

The complaint

Mr and Mrs H'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 a claim under section 75 of the CCA.

Background to this decision

I recently issued my provisional decision setting out the events leading up to this complaint and my intended conclusions on how I considered the dispute best resolved. I've reproduced that provisional decision here and it is incorporated as part of my overall findings. I invited both parties to let me have any further comments they wished to make in response, and I will address their responses later in this decision.

My provisional decision

Mr and Mrs H purchased membership of a timeshare (the "Fractional Club") from a timeshare provider (the "Supplier") on 23 April 2017 (the "Time of Sale"). They entered into agreements with the Supplier to purchase 3,080 fractional points at a cost of £20,249. This was split into two separate agreements as follows:

- 1,540 fractional points at a cost of £6,874, and
- 1,540 fractional points at a cost of £13,375.

Although these were separate agreements, for ease of reading I'll refer to them collectively as the "Purchase Agreement".

Mr and Mrs H traded in an existing timeshare arrangement, valued at £10,000. So, they ended up paying £10,249 for Fractional Club membership, which they funded by means of a loan in their joint names with First Holiday Finance Ltd ("the Lender").

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 their Purchase Agreement (the "Allocated Property") after their membership term ends.

Mr and Mrs H – using a professional representative (the "PR") – wrote to the Lender on 20 March 2023 (the "Letter of Complaint") to complain about:

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

Along with the Letter of Complaint, the PR submitted training materials it said were used by the Supplier in relation to the sale.

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

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

1. told them that Fractional Club membership was an “*investment*” when that was not true.
2. told them that they had purchased an investment – a share in a property – that would “*considerably appreciate in value*”, when this wasn’t true.
3. told them that they could sell the Fractional Club membership “*back to the resort*” or “*easily sell it at a profit*” when it wasn’t true.
4. told or led to believe that they would “*have access to the holiday’s apartment at any time all around the year*” when it wasn’t true.

Mr and Mrs H says 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 H.

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 H says that the credit relationship between them and the Lender was unfair to them under section 140A of the CCA. In summary, they include the following:

1. Fractional Club membership was marketed and sold to them as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the “Timeshare Regulations”).
2. The Supplier used an unauthorised credit intermediary in breach of the Financial Services and Markets Act 2000 (“FSMA”).
3. Unfair terms in the Purchase Agreement in the event of default.
4. The Supplier’s sales companies went into liquidation, affecting any claim that might be brought against them.

The Lender dealt with Mr and Mrs H’s concerns as a complaint and issued its final response letter on 31 March 2023, rejecting it on every ground. In summary, it said:

- Mr and Mrs H didn’t view the presentation referenced in the training material submitted by PR, as they purchased a different membership. This was in the Supplier’s Signature Collection and was their fourth Signature Membership.
- The Members Declaration confirms that the Supplier makes no representation as to the future price or value of the Fractions. This is also confirmed in the Information Statement given to Mr and Mrs H.
- The Members Declaration also makes clear that the Supplier does not and will not repurchase the fractions.
- Mr and Mrs H have access to resorts in their portfolio all year round, subject to availability and in line with the Supplier’s rules. Their membership gives them the guaranteed usage of their weeks on an annual basis.
- The Supplier was authorised and regulated by the Financial Conduct Authority (“FCA”). The staff that signed the loan were both employed and trained to do so.
- The Supplier didn’t sell the Fractional Club membership as an investment and the decision of a Spanish court has no bearing on the Loan Agreement or Purchase Agreement, which are governed by UK law.
- The claim relating to unfair terms was not supported by the way in which the Supplier operated, which took steps to ensure fair treatment in the event of default.

The PR, on behalf of Mr and Mrs H, referred the complaint to the Financial Ombudsman Service – the complaint form is dated 3 June 2023. It was assessed by an investigator who, having considered the information on file, rejected the complaint on its merits.

In a view dated 14 February 2024, the investigator said that in the absence of direct testimony from Mr and Mrs H, he was unable to determine (with any certainty) what they were told by the Supplier at the Time of Sale. Also, the 2011 Fractional Property Owners Club (FPOC) training manual supplied by the PR was unlikely to have been used in this sale.

In the circumstances the investigator couldn't say that the Supplier marketed and sold Fractional Club membership to Mr and Mrs H as an investment contrary to Regulation 14(3) of the Timeshare Regulations. He also couldn't say that this would've rendered the relationship between Mr and Mrs H, and the Lender, unfair under section 140A of the CCA.

Furthermore, he found the Lender did nothing wrong by entering into a loan agreement using the Supplier as a credit intermediary. The Supplier had the relevant authority to carry out credit brokering which was overseen by the FCA.

Mr and Mrs H had said little about why the lending was unaffordable for them, given their financial circumstances at the time. In any case, he couldn't say they lost out. And, despite what the PR said, it hadn't explained why the Supplier issuing liquidation proceedings in 2020 was relevant to this complaint about the Lender. The investigator said he couldn't see how this could've resulted in unfairness in the relationship between Mr and Mrs H and the Lender.

The PR, on behalf of 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.

In a response dated 11 March 2024 the PR said that the way the Fractional Club membership was sold created an unfair relationship between Mr and Mrs H and the Lender under section 140A of the CCA. It maintains that the Supplier marketed and sold the Fractional Club membership as an investment.

The PR said that the Fractional Club membership also included a share in the net sale proceeds of a property named on Mr and Mrs H's Purchase Agreement. In this instance, they were entitled to a percentage of the sale proceeds of the property when it was supposed to be sold at the end of their membership.

The PR also says that it was common knowledge that the sales presentation lasted for hours and all consumers were subject to "*high pressure selling*". They were manipulated into purchasing timeshare products that were unsuitable (and unaffordable).

The PR supplied an electronically signed statement (the "Witness Statement") from Mr and Mrs H dated 28 February 2024, in support of its points. The PR also provided a copy of a later edition of the Supplier's training manual. It said this supplanted the training manual from 2011 and must've been used at the Time of Sale, showing that the Fractional Club membership was sold as an investment.

The PR also said that Mr and Mrs H may not remember many details from the sales meeting, but they clearly remember that the product was presented to them as an investment.

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

The legal and regulatory context that I think is relevant to this complaint is set out in an appendix (the 'Appendix') at the end of my findings – which forms part of this decision.

What I've provisionally decided – and why

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

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. Having done that, I do not currently think this complaint should be upheld.

But before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

As a preliminary point the Lender has suggested we don't have jurisdiction to consider the complaint points. It argues that Mr and Mrs H have sought to bring complaint points that have been raised more than three years from when they ought reasonably to have been aware they had cause for complaint. So, it argues that Mr and Mrs H's complaint has been made too late under the Dispute Resolution (DISP) rules.

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 H 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 H were told that they were buying an interest in a specific piece of "real property" when that was not true. 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 H'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.

The above notwithstanding, I've found nothing within the evidence – other than what's suggested within the Witness Statement – that would suggest that the Supplier gave any assurances or guarantees about the future sales values of Mr and Mrs H's Fractional Club membership or the Allocated Property.

It is said in the Letter of Complaint that the Fractional Club membership had been misrepresented by the Supplier as an investment, through which Mr and Mrs H would have a share of a property and obtain a “*considerable return on investment*”.

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.

While I’ll cover the investment aspect in more detail later in this decision, I consider that Mr and Mrs H’s acquisition of a share in the Allocated Property did amount to an investment – as it offered them the prospect of a financial return. Presenting the timeshare as an investment would not, therefore, have amounted to a misrepresentation – albeit there are other considerations when it comes to the marketing and selling of a timeshare contract as an investment that I explore below.

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

The above notwithstanding, I note what Mr and Mrs H say in their Witness Statement is somewhat different from what is claimed by the PR. What Mr and Mrs H say is that they’d “*be entitled for a share in the property after sale and our own holiday home*” – which I don’t believe is the same as the claim in the Letter of Complaint in any event.

It is also said in the Letter of Complaint that Mr and Mrs H were told that they could sell the timeshare back to the resort. No such option was available. This was clearly set out in an Information Statement that Mr and Mrs H were given at the Time of Sale. The Purchase Agreement they signed included a declaration to the effect that they had received this Information Statement. I do not find it likely that the Supplier would’ve suggested something so starkly contradictory to not only its standard practice, but to the terms and conditions that were provided to Mr and Mrs H at the time.

Lastly it was said in the Letter of Complaint that Mr and Mrs H were “*made to believe that [they] would have access to the holiday’s apartment at any time all around the year*”. However, I am mindful that Mr and Mrs H make no such mention in their Witness Statement other than to say “*...we used the program and travelled to numerous (Supplier) resorts for over 10 years*”.

In any case, based on what the PR says in the Letter of Complaint, I understand this to mean that Mr and Mrs H thought they would be able to stay at the Allocated Property whenever they wanted, which was not the case. But it may also mean that they thought availability of accommodation more broadly was guaranteed, so I read this as Mr and Mrs H saying that they could not holiday where and when they wanted to – which, on my reading of the complaint, suggests that they consider that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement.

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 Mr and Mrs H would’ve been given states that the availability of holidays was subject to demand. And with regard to the usage of the Allocated Property, the Purchase Agreement that Mr and Mrs H signed clearly stated that their Fractional Points “*do not transfer or grant the right of use to any specific property*”. I find it unlikely that the Supplier would’ve made promises of the type suggested in the Letter of Complaint. And while I

accept that they may not have been able to take certain holidays, I have not seen enough to persuade me that the Supplier breached the terms of the Purchase Agreement or to say that this allegation is made out.

For these reasons, therefore, I do not think the Lender is liable to pay Mr and Mrs H any compensation for the alleged misrepresentations or any 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 H 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 H 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 H 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:

- 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;
- The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;
- Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; and
- 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 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 also made for several reasons, all of which I set out at the start of this decision. The PR says the right checks weren't carried out before the Lender lent to Mr and Mrs H. 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 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.

Again, from the information provided, I am not satisfied that the lending was unaffordable for Mr and Mrs H. I note that in Mr and Mrs H's Witness Statement they say that they asked the Supplier to suspend their membership in 2018, less than a year after taking it out owing to a "change in circumstances" – which is down to unforeseeable

circumstances. In other words, I think it's likely that the Lender couldn't have foreseen these changes, therefore it's not something I can blame it for. If there is any further information on this (or any other points raised in this provisional decision) that Mr and Mrs H wish to provide, I would invite them to do so in response to this provisional decision.

Connected to this is the suggestion by the PR that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that the Lender wasn't permitted to enforce the Credit Agreement.

I note the PR says that whilst the Supplier was authorised to carry out regulated activity such as credit brokering, the person that signed the loan on behalf of the Lender and acted as agent of the Lender was a self-employed credit intermediary and therefore not authorised to carry out the regulated activity against the general prohibition of FSMA.

I think the evidence points to the credit broking activity happening in Spain - and so outside of FSMA's territorial scope, that is the broker (the Supplier's branch in Spain) wasn't required to be authorised. But even if I'm wrong about that, the Supplier in the UK was authorised at the time of sale.

In any case it looks to me like Mr and Mrs H knew, amongst other things, how much they were borrowing and repaying each month, who they were borrowing from and that they were borrowing money to pay for Fractional Club membership. So, even if the Credit Agreement was arranged by a broker that didn't have the necessary permission to do so (which I make no formal finding on), I can't see why that led Mr and Mrs H to financial loss – such that I can say that the credit relationship in question was unfair on them as a result. And with that being the case, I'm not persuaded that it would be fair or reasonable to tell the Lender to compensate them, even if the loan wasn't arranged properly.

The PR also say that Mr and Mrs H were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. In their Witness Statement, Mr and Mrs H say:

“Although they said it would only last a few hours these discussions would turn quite lengthy whereby my daughter would be bored, tired and hungry as a few hours would turn into a full day of meeting different representatives exposing us to different projects and complexes.

...After much pressure and enforcement myself and my wife bought two properties in total from them on two different occasions. However, these purchases were enforced upon us as both myself and my wife were not interested.

...We felt pressure to sign the paperwork and were harassed by arrogant representatives to make the purchases.”

I acknowledge that they 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 or indeed why, according to their evidence they went on to buy another on a different occasion. 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'm not persuaded, therefore, 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.

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 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 membership of the Fractional Club as an investment. This is what the provision said at the Time of Sale:

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

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

As I've already noted, Mr and Mrs H'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 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.

I can't just take that to have been automatically proved just because of what the High Court said in *Shawbrook & BPF v FOS* at [77]. The judge did not say that all timeshares will have been sold in breach of regulation 14(3) just because they include an investment element.

Indeed, the judge specifically said at [71] that if the ombudsman whose decision was under consideration in that case had concluded that the timeshare had been mis-sold because of the intrinsic design of fractional ownership timeshares, then that would have indicated that he had made an error of law. So instead, I have to consider the available evidence to decide what happened in this particular instance.

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. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs H as an investment. So, it's *possible* that Fractional Club membership wasn't marketed or sold to Mr and Mrs H 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. I also note Mr and Mrs H's statement. 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 is not necessary to make a formal finding on that particular issue for the purposes of this decision.

In other words, even if I did conclude that the membership was sold in breach of Regulation 14(3), I'm not currently persuaded that would've made a difference to the outcome of this complaint anyway. I will explain in the next section.

Was the credit relationship between the Lender and Mr and Mrs H 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 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.

On 28 February 2024, the PR supplied an electronically signed and dated Witness Statement from Mr and Mrs H along with its response to the investigator's view. Several observations flow from what Mr and Mrs H (purportedly) say in their statement. To begin with it's not entirely clear why they took out the Fractional Club membership in the first place (because they don't provide an explanation) – however they don't express any dissatisfaction with it either, which on balance suggests that they weren't necessarily unhappy with what they had. Mr and Mrs H say that they travelled to many of the Supplier's resorts over 10 years.

In respect of acquiring additional points, I note Mr H says it's not what he and Mrs H wanted – in other words, both he and his wife weren't interested. But after much "pressure" – and being "*harassed by arrogant representatives to make the purchases*" the purchases were "*enforced*" on them.

But despite what they say, I don't think their motivation can be safely inferred. On the one hand they say that they were pressured into buying something that they didn't want, but on the other hand they say they were promised a share in the property upon sale which is

why they went ahead with the purchases. Their reasons therefore contradict and undermine each other.

Despite what they say, its arguable that their previous purchases were motivated by holidays, and that these purchases were also motivated by an opportunity to have access to new holidays in new resorts.

The above points notwithstanding, I'm conscious that the Witness Statement wasn't provided until after the investigator's view, about seven years after the Time of Sale and two years after the complaint was made to the Supplier. The timing of this is important as I would've expected to see this evidence presented to our service at the outset, but this didn't happen, and it's not clear why. This is the only account I have from Mr and Mrs H.

I'm conscious that it was only after the investigator issued his view, and after the judgment in *Shawbrook & BPF v FOS* was handed down, that Mr and Mrs H stated that the Supplier told them that they'd be entitled to a share of the property after sale – arguably suggesting that they'd make some money.

I'm aware that the more time that passes between a complaint and the event complained about, the more risk there is of recollections being vague, inaccurate and influenced by discussions with others.

In this case, especially in the absence of an earlier account, I simply can't rule out the latter. I find it difficult to understand why Mr and Mrs H didn't, at the outset, just say that they'd been told they would make more money than they put in and this is why they purchased Fractional Club membership if this is what had happened – but that's not what they say. In fact they don't mention the word investment, gain, or profit at all in their statement. In the circumstances, and on balance, I think there's a high risk that Mr and Mrs H were influenced by discussions they had with others.

In other words, in the circumstances I can't put the relevant weight on Mr and Mrs H's account that would enable me to uphold this complaint.

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).

Unfair contract terms

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

To conclude that a term in the Purchase Agreement rendered the credit relationship between Mr and Mrs H and the Lender unfair to them, I'd have to see that the term was

unfair under the CRA and operated against Mr and Mrs H in practice.

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

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

With that in mind, it seems unlikely to me that the contract term cited by the PR has led to any unfairness in the credit relationship between Mr and Mrs H and the Lender for the purposes of section 140A of the CCA. I say this because I cannot currently see that the term was actually operated against Mr and Mrs H, let alone unfairly. And I cannot ignore that the lender ceased to hold Mr and Mrs H liable for repayment of the loan balance after they could no longer sustain the management charges and the Supplier suspended their membership.

Moreover, as I haven't seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Mr and Mrs H was unfair to them because of an information failing by the Supplier, I'm not persuaded it was.

Liquidation

In my opinion, the point about liquidation, adds little (if anything) of value to the claim that was submitted.

Despite what the PR says, I don't think the Supplier going into liquidation means that Mr and Mrs G won't get what they're entitled to. In other words, this doesn't affect the Supplier fulfilling its contract, and/or the Lender fulfilling its obligations.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Mr and Mrs H 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.

Overall 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 claim, 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.

Appendix: The Legal and Regulatory Context

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

Section 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:

- The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') remains the leading case.
- 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.
- *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.
- 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*.
- *Deutsche Bank (Suisse) SA v Khan and others* [2013] EWHC 482 (Comm) – in which Hamblen J summarised – at paragraph 346 – some of the general principles that apply to the application of the unfair relationship test.
- *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
- *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
- *R (on the application of 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.”¹

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

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

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

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

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

The Law on Misrepresentation

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

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

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

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

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

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

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

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

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

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

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

The CPUT Regulations put in place a regulatory framework to prevent business practices that were and are unfair to consumers. They have been amended in places since they were first introduced. And it's only since 1 October 2014 that they imposed civil liability for certain breaches – though not misleading omissions. But, again, I'm not deciding – nor is it my role to decide – whether the Supplier is liable for any breaches of these regulations. Instead, they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair as they also signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

Below are the most relevant regulations as they were at the relevant time(s):

- Regulation 3: Prohibition of Unfair Commercial Practices
- Regulation 5: Misleading Actions
- Regulation 6: Misleading Omissions
- Regulation 7: Aggressive Commercial Practices

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

- Schedule 1: Paragraphs 7 and 24

The Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR')

The UTCCR protected consumers against unfair standard terms in standard term contracts. They applied and apply to contracts entered into until and including 30 September 2015 when they were replaced by the Consumer Rights Act 2015.

Below are the most relevant regulations as they were at the relevant time(s):

- Regulation 5: Unfair Terms
- Regulation 6: Assessment of Unfair Terms
- Regulation 7: Written Contracts
- Schedule 2: Indicative and Non-Exhaustive List of Possible Unfair Terms

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.

I've read the PR's submissions in response to my provisional decision. Having done so, I don't consider the PR has said anything that I didn't take into account or explain in my provisional decision.

My provisional findings were that Mr and Mrs H's Fractional Club membership did include an investment (a profit) element, that it was possible that it was marketed and sold to them in that way in breach of Regulation 14(3), but that there was no persuasive evidence that a profit motive had been a material factor in Mr and Mrs H's decision to purchase membership.

While the PR makes the point that no Witness Statement was taken either when the claim was filed or when it referred Mr and Mrs H's complaint to us, I can't see how that assists its client. It is inevitable that as a consequence, their recollection of events came after the Lender responded to their claim and following our initial assessment of the complaint. I appreciate the reasons the PR has given about why no earlier statement was taken, and I have not discounted entirely what Mr and Mrs H have said.

The PR's more recent submissions assert that "*people expect appreciation because of factors like location, infrastructure development or amenities, improvements and renovations*", as well as "*the point that the properties would increase in value was implied by*

the overall behaviour of [the Supplier's] sales people...that these properties were in high demand, and that this purchase was a once in a lifetime deal, so that[the] clients had to make a decision quickly there and then", and "[the] clients clearly stated the benefits that obviously convinced them to purchase, which include the potential gains from selling the apartment at the end."

This leads the PR to the conclusion that it means the investment element did play an important part during the sales process in convincing Mr and Mrs H to purchase Fractional Club membership.

But the fact remains that Mr and Mrs H say nothing in their Witness Statement about a belief that they were purchasing a capital-appreciating asset, or that any of the above was an important aspect informing their decision to purchase membership. So I'm afraid I can't properly accept the PR's assertions as compelling evidence of their purchase motivation.

The PR has highlighted what it considers conflicting information in the purchase documents about the sale date of the Allocated Property. The purchase documents include wording that refers to an automatic sale date in 19 years' time or later. However, they also say that the trustee will start the sales process on the Allocated Property on 31 December 2031, being a little over 17½ years after the Time of Sale.

I'm aware that this isn't something that the PR raised in the Letter of Complaint and that First Holiday Finance hasn't therefore commented upon it. It's possible that this apparent discrepancy simply allows for a period of time between the commencement of the sales process and its completion, rather than introduce any ambiguity.

But even if that were not the case, as the PR has pointed out, the usual remedy for ambiguity in terms in a consumer contract would be for that ambiguity to be interpreted in the consumer's favour. It does not mean the entire contract would be deemed unenforceable, or that the credit relationship between Mr and Mrs H and First Holiday Finance is unfair as a result. And given that neither date has yet been reached, it isn't by any measure clear what date the Supplier would seek to rely upon. With this in mind, I'm not going to make any award or direction in relation to this matter.

Overall, there is nothing that the PR has said in response to my provisional decision that points me towards reaching a different set of conclusions, or gives me good reason not to adopt my provisional findings in full as part of this final decision.

Accordingly, for the reasons I've set out here and in my provisional decision, I remain of the opinion that First Holiday Finance did not act unfairly or unreasonably when it dealt with Mr and Mrs H's section 75 claim, or that it was party to a credit relationship with them that was unfair for the purposes of section 140A of the CCA. It follows that I adopt in full my provisional findings in relation to the conclusion that First Holiday Finance has not acted unfairly or unreasonably in dealing with Mr and Mrs H's claims.

My final decision

My final decision is that I don't uphold this complaint.

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

Niall Taylor
Ombudsman

