DRN-6150337

The complaint

Mr and Mrs O'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 her 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 O purchased membership of a timeshare (the 'Fractional club membership - FCM') from a timeshare provider (the 'Supplier') on 10 August 2017 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1200 fractional points at a cost of £9,438 (the 'Purchase Agreement').

FCM was asset backed – which meant it gave Mr and Mrs O 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 O paid for their FCM by making an initial payment of £500 and taking out finance of £8,938 from the Lender in their names (the 'Credit Agreement').

Mr and Mrs O – using a professional representative (the 'PR') – wrote to the Lender on 10 April 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. A breach of contract by the Supplier giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.
4. The Credit Agreement being unenforceable because it was not arranged by a credit broker regulated by the Financial Conduct Authority (the 'FCA')] to carry out such an activity.

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

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

1. told them that they were buying an interest in a specific piece of "real property" when that was not true.
2. told them that FCM was an "investment" when that was not true.
3. told them they could sell their timeshare back to the resort or easily sell it at a profit.
4. led them to believe that they would have access to the holiday apartment all around the year.

Mr and Mrs O say that they have a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to

Mr and Mrs O.

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

Mr and Mrs O say that the Supplier breached the Purchase Agreement because it went into liquidation in December 2020. They also suggest that there is no guarantee what will happen to the Allocated Property after 19 years, apart from being told they will get the equivalent market price for it.

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

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

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

1. FCM 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 supply agreement contains a clause requiring any payment due under the agreement to be paid within 14 days, and in default of payments being made within that time, the supplier can rescind the agreement and all payments made by Mr and Mrs O would be forfeited. Mr and Mrs O say such a term was an unfair contract term under the Consumer Rights Act 2015 ('CRA'). And Mr and Mrs O say they weren't given information about the Maintenance fees.
3. The Lender failed to carry out an affordability assessment which amounted to irresponsible lending.
4. They felt pressured into purchasing FCM by the Supplier.

(4) The arrangement of credit by an unauthorised credit broker

Mr and Mrs O say that although the business that arranged their finance may have had the requisite permissions from the FCA to arrange the finance, the individual sales representatives were self-employed and did not have the necessary permissions. Consequently, they don't think the credit agreement is enforceable.

The Lender dealt with Mr and Mrs O's concerns as a complaint and issued its final response letter on 18 April 2023, rejecting it on every ground.

Mr and Mrs O then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

Mr and Mrs O disagreed with the Investigator's assessment and the PR on their behalf, provided further information which it asked to be considered. It explained why it disagreed with the assessment and asked for an Ombudsman's review and decision – which is why it was passed to me for review.

I issued a provisional decision explaining why I didn't think the complaint should be upheld. In its response, the PR explained why it disagreed with my findings. In summary it said:

- Mr and Mrs O hadn't been provided with the investigators' non-uphold assessment and it didn't agree with my findings in respect of their witness statement.
- The investment element did play an important part in Mr and Mrs O's decision to purchase FCM and it didn't agree with my findings in respect of their motivation to purchase FCM.
- It referred to substantial contradiction in the purchase documentation, which meant the sale date was in 14 years not the 19 years shown on the information statement.

The Lender accepted my provisional decision and said it had nothing else to add. 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:

<u>The Consumer Credit Sourcebook ('CONC') – Found in the Financial Conduct Authority's (the 'FCA') Handbook of Rules and Guidance</u>

Below are the most relevant provisions and/or guidance as they were at the relevant time:

- CONC 3.7.3 [R]
- CONC 4.5.3 [R]
- CONC 4.5.2 [G]

<u>The FCA's Principles</u>

The rules on consumer credit sit alongside the wider obligations of firms, such as the Principles for Businesses ('PRIN'). Set out below are those that are most relevant to this complaint:

- Principle 6
- Principle 7
- Principle 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.

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 O 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.

Mr and Mrs O have said that the FCM was misrepresented to them as an investment. I've also considered this allegation. In its letter of complaint to the Lender, the PR said the FCM was presented as an investment in a share of a property (i.e directly held property.)

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 O'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. And if Mr and Mrs O were told that membership of FCM was an investment, that wouldn't have been untrue either, because there was an investment element to the Fractional membership.
It was the marketing or selling of FCM as an investment that was prohibited, and I'll address this issue later on in the decision.

As for the rest of the Supplier's alleged pre-contractual misrepresentations, while I recognise that Mr and Mrs O have concerns about the way in which their FCM was sold, they have not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the other reasons they allege.

And I say that because I've also considered Mr and Mrs O's own evidence and thought about what I know about the Supplier's sales process to see if they could have been told something by the Supplier during the sale, that they could sell their timeshare back to the resort or easily sell it at a profit, or that they were led to believe that they would have access to the holiday apartment all around the year.

But I'm not aware of anything in the way that the Supplier normally sold FCM that makes me think they would have been told that. Further, Mr and Mrs O have provided a witness statement setting out their memories of the sale, and they have not said they were told they could sell their timeshare back to the resort or easily sell it at a profit, or that they were led to believe that they would have access to the holiday apartment all around the year. Also point 5 of the Members declaration, signed by Mr and Mrs O says:

"We understand that (the Supplier), the Trustee or the Manager does not and will not run any resale or rental programmes and will not repurchase Fractions (or Vacation Club Points) or act as an agent in the sale other than as a trade in against future property purchases (see Paragraph 11 below.)"

So, I think this would have made Mr and Mrs O aware that the Supplier would not purchase their fraction or facilitate a sale of it. And I've not seen anything that suggests that Mr and Mrs O couldn't sell their FCM if they found a purchaser for it.

Mr and Mrs O have also said they weren't given any details, confirmation or guarantee about what would happen to their share in the property at the end of 19 years. But after the

membership term expired, Mr and Mrs O's allocated property would be placed for sale and their membership ended when the Allocated Property was sold, subject to market conditions. That was made clear in the paperwork they signed at the Time of Sale.

Mr and Mrs O have also said they were led to believe that they would have access to the holiday apartment all around the year. But I've not seen anything in the contemporaneous documents that supports that allegation. I think the documentation makes clear that Mr and Mrs O could use the points they purchased under the FCM to book accommodation.

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

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

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

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

Mr and Mrs O say that the Supplier breached the Purchase Agreement because it went into liquidation in December 2020. I can see that certain parts of the Supplier's business did go insolvent. And I can understand why the PR is alleging that there was a breach of the Purchase Agreement as a result. However, neither Mr and Mrs O nor the PR have said, suggested or provided evidence to demonstrate that Mr and Mrs O are no longer:

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

Mr and Mrs O also seem to be suggesting that the Supplier breached the Purchase Agreement because there is no guarantee that they will receive their share of the net sale proceeds of the Allocated Property. I understand that they are saying that they fear that, when the time comes for the Allocated Property to be sold, they will not receive their share of the sale proceeds. However, it would seem that any breach of contract (if that occurs) lies in the future and is currently uncertain.

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

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

I'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 O 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 in relation to Fractional Club membership, including the contractual documentation and disclaimers made by the Supplier;
3. The commission arrangements between the Lender and the Supplier at the Time of Sale and the disclosure of those arrangements;
4. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;
5. The inherent probabilities of the sale given its circumstances; and, when relevant
6. 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 O and the Lender.

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

Mr and Mrs O's complaint about the Lender being party to an unfair credit relationship was also made for several reasons, all of which I set out at the start of this decision. They include the allegation that Mr and Mrs O felt pressured by the Supplier to agree to purchase the FCM.

I've also considered what the PR has said on this issue in its response to my provisional decision. And I acknowledge that Mr and Mrs O may have felt weary after a sales process that went on for a long time. But as I said in my provisional decision, they say little about what was said and/or done by the Supplier during the sales presentation that made them feel as if they had no choice but to purchase FCM 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 O made the decision to purchase FCM, because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

The PR also says that the right checks weren't carried out before the Lender lent to Mr and Mrs O. 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 O 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 O.
I'm not persuaded, therefore, that Mr and Mrs O's credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why they say their credit relationship with the Lender was unfair to them. And that's the suggestion that FCM was marketed and sold to them as an investment in breach of the prohibition against selling timeshares in that way.

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs O's FCM 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 the PR says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

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

Mr and Mrs O'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 FCM 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 its response to the provisional decision, the PR also referred to the fact that in the judgment handed down in *Shawbrook & BPF v FOS*, it was not challenged that the product in question was marketed and sold as an investment. But, as I explained in my provisional decision, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold. And the judgment referred to did not make a blanket finding that all such products were mis-sold in the way the PR appears to be suggesting. Any complaint needs to be considered in the light of its specific circumstances, which is what I've done in this case.

As I also said in my provisional decision, to conclude, therefore, that FCM was marketed or sold to Mr and Mrs O 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 FCM 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 FCM was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations.

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs O, 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 FCM was not sold to Mr and Mrs O as an investment. So, it's *possible* that FCM wasn't marketed or sold to them as an investment in breach of Regulation 14(3).

On the other hand, I acknowledge that the Supplier's training material relevant to the version of the FCM sold to Mr and Mrs O, left open the possibility that the sales representative may have positioned FCM as an investment. So, I accept that it's equally possible that FCM was marketed and sold to Mr and Mrs O as an investment in breach of Regulation 14(3).

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

Was the credit relationship between the Lender and Mr and Mrs O 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 O and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) lead them to enter into the Purchase Agreement and the Credit Agreement is an important consideration. And in the context of Mr and Mrs O's motivations, I think their own recollections/testimony of the sale will be important evidence for me to consider in this regard.

Mr and Mrs O have provided a statement of their recollections of the sale. But I have a number of concerns regarding it. Firstly, I've noted it was provided in response to the investigator's assessment that didn't uphold the complaint. Also, it was received more than six years after the sale complained about, and after the case of Shawbrook v FOS, a case which highlighted the potential significance of breaches of Regulation 14(3). So, as a result, I think this all limits the weight I can reasonably apply to Mr and Mrs O's statement.

The PR explained in their response to my provisional decision, that they hadn't shared the Investigator's view on this complaint with Mr and Mrs O saying, "*this was done in order not to influence their recollections*". The PR also said Mr and Mrs O weren't aware of the judgement handed down in *Shawbrook and BPF v FOS*[1], which meant their recollections have not been influenced by either the Investigator's view or the aforementioned judgment.

Part of my assessment of the testimony was to consider *when* it was written, and whether it may have been affected by external factors such as the widespread publication of the outcome of *Shawbrook and BPF v FOS*.

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[1] *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*').

I have thought about what the PR has said, but on balance, I don't find it a credible explanation of the contents of Mr and Mrs O's evidence. Here, the PR responded to our Investigator's view to say that Mr and Mrs O alleged that Fractional Club membership had been sold to them as an investment and it provided evidence from Mr and Mrs O to that effect. I fail to understand how they disagreed with the view on the basis that the timeshare was sold as an investment if they didn't know our Investigator's conclusions. It follows, I think it more likely than not, that Mr and Mrs O did know about our Investigator's view before their evidence was provided.

So, I maintain that there is a risk that Mr and Mrs O's testimony was coloured by the Investigator's view and/or the outcome in *Shawbrook & BPF v FOS*. And, on balance, the way in which the evidence has been provided makes me conclude that I can place little weight on it. So, ultimately, for the above reasons, along with those I already explained in my provisional decision, I remain unpersuaded that any breach of Regulation 14(3) was material to Mr and Mrs O purchasing decision.

Before our Investigator issued their assessment, we had no real understanding of what Mr and Mrs O's motivations were for purchasing the FCM. The letter of complaint and the summary on this service's complaint form were in my opinion, somewhat generic. And I haven't found it very helpful in understanding Mr and Mrs O's reasons for purchasing the FCM.

Notwithstanding what I've said above, I've considered the statement provided by Mr and Mrs O after the Investigator's assessment. I've noted that they do mention being told they would recoup their investment with a huge profit. However, my impression from what they have said is that their concerns appear to be focussed on the pressure they say they felt during the presentation day to join up. And as I've already explained, I think there is insufficient evidence to demonstrate that Mr and Mrs O made the decision to purchase FCM, because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

In addition, even if the Supplier had breached Regulation 14(3), the witness statement and supporting documentation doesn't help me to understand what Mr and Mrs O's primary motivations were for purchasing the FCM. And taking into account the information provided to me, and the concerns I have explained about the weight I can apply to Mr and Mrs O's statement, I simply can't safely conclude that any breaches the Supplier may have made, were material factors in Mr and Mrs O's decision to purchase the FCM. From what I can ascertain from the witness statement, Mr and Mrs O might have been influenced by the opportunity to enjoy frequent holiday vacations.

So, as I said before, even if the Supplier had marketed or sold the membership as an investment in breach of Regulation 14(3) (which I still make no finding on here), I'm not persuaded Mr and Mrs O's decision to make the purchase was motivated by the prospect of a financial gain (i.e., a profit). So, I still don't think the credit relationship between Mr and Mrs O and the Lender was unfair to them for this reason.

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

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mr and Mrs O when they purchased membership of the Fractional Club at the Time of Sale. But they and the PR say that the Supplier failed to provide them with all of the information they needed to make an informed decision.

The PR also says that the contractual terms governing the ongoing costs of FCM and the consequences of not meeting those costs, were unfair contract terms under the CRA.

As I've said above, the Supreme Court made it clear in Plevin that it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A of the CCA. The extent to which any unfair contract terms can make a credit relationship unfair, also need to be decided according to their impact on the complainant.

Consequently, it's not enough for a party to an agreement to allege that some of the terms were unfair under the relevant law or regulations or could potentially operate in an unfair way. So, in this case, Mr and Mrs O needs to be able to show that significant harm has been, or will be, caused to them by the inclusion of the allegedly unfair terms.

The PR's main concern appears to be that the Supplier has wide-ranging powers to rescind the agreement if payments under the agreement are made outside the 14 days stated for payment. But as I can't see that any such terms were operated unfairly against Mr and Mrs O in practice, nor that any such terms led them to behave in a certain way to their detriment, I'm not persuaded that any of the terms governing FCM are likely to have led to an unfairness that warrants a remedy.

I acknowledge that the PR has referred to the case of (Link Financial v Wilson), which involved a different product sold by the Supplier. But my understanding is that the Supplier in that case had exercised its right to cancel the membership, and the court concluded that the term in question had operated in an unfair way. That hasn't happened in Mr and Mrs O's case, so I don't think the legal authority referred to by the PR is helpful in this case where the facts and circumstances are different.

Mr and Mrs O have said that they weren't told about maintenance fees but point 3 in the members declaration made clear that they were told that maintenance fees would be payable. And further information regarding fees and charges for maintaining the property, and the amount of the first year's charge were provided at point 4 of the members declaration and in section 4 of the Information statement. So, on balance, I think they were made aware that maintenance charges would be payable. Also, I can't see that they were misled about this or that they have suffered any detriment as a result of paying maintenance charges.

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 O was unfair to them because of an information failing by the Supplier, I'm not persuaded it was.

I will also address the PR's point regarding the apparent ambiguity in the proposed sale date of the Allocated Property. The PR suggests that a delayed sale date could lead to an unfairness to Mr and Mrs O in the future, as any delay could mean a delay in the realisation of their share in the Allocated Property.

It does appear that the proposed date for the commencement of the sales process, as set out on the owners' certificate, is 31 December 2032. This same date is set out under point 1 of the Members Declaration, which has been initialled and signed as being read by Mr and Mrs O. This date indicates that the membership has a term of 14 years. The ambiguity identified by the PR is that in the Information Statement provided as part of the purchase documentation it says the following:

> "*The Owning Company will retain such Allocated Property until the automatic sale date in **19 years time** or such later date as is specified in the Rules or the Fractional Rights Certificate.*" (bold my emphasis).

It seems clear to me that the commencement date for the start of the sales process is 31

December 2032. This actual date is repeated in the sales documentation as I've set out above. So, I can't see that this is a reason to find the credit relationship unfair and uphold this complaint.

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 O 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.

The complaint about the Credit Agreement being unenforceable because it was arranged by a credit broker that was not regulated by the FCA to carry out that activity

Mr and Mrs O say that the Credit Agreement was arranged by an individual who wasn't an authorised credit broker, the upshot of which is to suggest that the Lender wasn't and isn't permitted to enforce the Credit Agreement as a result.

However, having looked at [the Financial Ombudsman Service's internal records I can see that the Lender named on the Credit Agreement as the credit intermediary was, at the Time of Sale, authorised by the FCA for credit broking. This also seems to have been acknowledged by the PR.

Also, it looks to me like Mr and Mrs O 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 FCM. 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 to Mr and Mrs O's financial loss – such that I can say that the credit relationship in question was unfair on her 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 Supplier's alleged breach of Spanish Law and its implications on the Credit Agreement

The PR appears to be arguing that the Purchase Agreement was unlawful under Spanish law, which it says has been confirmed by a number of judgements issued by Spanish Courts.

However, as I can't see that the Supplier (i.e., company that entered into the Purchase Agreement) is itself the subject of a Spanish court judgment in favour of Mr and Mrs O, it seems to me that there is an argument for saying that the Purchase Agreement is valid under English law.

I also note that the Purchase Agreement is governed by English law. So, it isn't at all clear that Spanish law would be held relevant if the validity of the Purchase Agreement were litigated between its parties and the Lender in an English court. For example, in *Diamond Resorts Europe and Others* (Case C-632/21), the European Court of Justice ruled that, because the claimant lived in England and the timeshare contract governed by English law, it was English law that applied, not Spanish, even though the latter was more favourable to the claimant in ways that resemble the matters seemingly relied upon by the PR.

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 O's Section 75 claims. I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement and related Purchase 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 reasons set out above, my decision is not to uphold this complaint. Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs O and Mr O to accept or reject my decision before 12 March 2026.

Simon Dibble
Ombudsman