DRN-4747498

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'), (2) deciding against paying a claim under section 75 of the CCA, (3) lending to them irresponsibly by failing to carry out proper checks, and (4) deciding against refunding their loan payments.

Background to the complaint

Mr and Mrs H purchased membership of timeshares from two timeshare providers on four occasions. The timeshare providers were both part of the same group of companies. Their first purchase was of a trial membership in 2009, which is not the subject of this complaint. The three other purchases were upgrades of their membership on 8 September 2010, 2 May 2011, and 15 April 2012 (collectively the 'Time of Sale'). On the third upgrade, they entered into an agreement with the second timeshare provider (the 'Supplier') to buy 1,932 fractional points (the 'Fractional Club') at a cost of £23,613 (the 'Purchase Agreement'); this was their first purchase of fractional points.

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 Agreements (the 'Allocated Property') after their membership term ends.

Mr and Mrs H paid for their Fractional Club membership by paying a £500 deposit and jointly taking finance of £23,113 from another lender (the 'Credit Agreement'). This loan consolidated another loan which they had used to fund their previous upgrade, which in turn had consolidated an earlier loan which had financed their first upgrade. In August 2015 the Credit Agreement was assigned to the Lender.

In June 2015, Mr and Mrs H told the original lender that they had entered into an individual voluntary arrangement ('IVA') with their creditors. As a result, their loan was put on hold, and in 2020 the outstanding balance was written off.

On 15 February 2022, Mr and Mrs H – using a professional representative (the 'PR') – wrote to the Lender (the 'Letter of Complaint') to complain about the three upgrades and the related loans – specifically:

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 three credit agreements and the related Purchase Agreement for the purposes of section 140A of the CCA.
3. The decisions to lend being irresponsible because the Lender did not carry out the right creditworthiness assessments.
4. The Credit Agreement being unenforceable because it was not arranged by a credit broker regulated by the Office of Fair Trading ('the 'OFT') to carry out such an activity, and the Lender's decision to deny their claim for a refund of their loan payments on that ground.

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

Mr and Mrs H say 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 which would appreciate in value, giving them a considerable return on their investment, when that was not true;
2. told them that they could sell their club membership at any time, when that was not true;
3. told them that they would have access to their holiday apartment at all times of the year, when that was not true.

Mr and Mrs H 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 H.

(2) 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 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. 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 contractual terms setting out the consequences of defaulting on their payments of annual management charges were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').

(3) Irresponsible lending

Mr and Mrs H complain that the decisions to lend were irresponsible because the Lender didn't carry out the right creditworthiness assessments. That was raised as a free-standing complaint issue, but it can also be considered as another ground of unfairness under section 140A.

(4) Unenforceability

Mr and Mrs H say that under section 27 of the Financial Services and Markets Act 2000 ('FSMA'), the Credit Agreement was unenforceable from its inception because the credit intermediary which brokered it (which was the Supplier) was not authorised by the Office of Fair Trading and was therefore acting in breach of section 19 of FSMA. They say that under section 27(2), they are therefore entitled to claim a refund of all of their loan payments.

The Lender dealt with Mr and Mrs H's concerns as a complaint and issued its final response letter on 21 February 2022, rejecting it on every ground.

Mr and Mrs H then referred the complaint to the Financial Ombudsman Service. It was assessed by an investigator who, having considered the information on file, decided that the 2010 and 2011 loans did not fall within the jurisdiction of our service (because the complaint had been brought too late under our time limits). He also thought that the complaint about irresponsible lending in 2012 had been brought too late as well. He decided that he could consider the rest of the complaint about the 2012 loan, but he rejected that part of the complaint on its merits.

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.

I wrote a provisional decision which read as follows.

The legal and regulatory context

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

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

Jurisdiction

I have not been invited to reconsider the investigator's conclusions about our service's jurisdiction in this matter. But I have still considered our jurisdiction, and I have reached broadly the same conclusions as the investigator and for the same reasons; additionally, the original lender was not subject to our jurisdiction, since it was neither based in nor operating from the UK. The one point where I differ is that I think the allegation of irresponsible lending in 2012 can also be considered in the context of the section 140A claim, which is in jurisdiction.

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.

And having done that, I do not currently think this complaint should be upheld.

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

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

As both sides may already know, a claim against the Lender under section 75 essentially mirrors the claim Mr 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. However, I'm not satisfied that they are.

I say this because it's my understanding that when Mr and Mrs H entered into the Credit Agreement in 2012, they did so with another lender – First Holiday Finance Ltd based in the British Virgin Islands ('FHFBVI') and operating from the Isle of Man, rather than the UK entity of the same name. The UK entity has provided us with evidence that shows it wasn't engaged in regulated lending activity until it applied for permission from the Financial Conduct Authority ('FCA') in 2014. On 1 August 2015, FHFBVI assigned its loan book (including Mr and Mrs H's loan) to the UK entity First Holiday Finance.

Section 75 enables a claim to be brought against the creditor. At the time the Credit Agreement was made, the creditor was FHFBVI. While FHFBVI assigned its loan book to

First Holiday Finance, it didn't necessarily follow that its duties or other obligations – such as any potential liability for a section 75 claim – were similarly assigned. Although the definition of creditor in section 189(1) of the CCA includes an assignee, *Goode* indicates that this shouldn't be interpreted as creating a positive liability on the assignee for a monetary claim under (among other things) section 75.[1]

That's not to say that a claim can't be made along the lines outlined by Mr and Mrs H. Rather, it highlights the inherent difficulty they might face in succeeding with that claim. And with this in mind, I can't say that First Holiday Finance Ltd acted unfairly or unreasonably towards Mr and Mrs H when it declined to pay them compensation for the claim they said it was liable for under section 75.

However, I can still consider allegations of misrepresentation in the context of assessing whether Mr and Mrs H's relationship with the Lender was unfair under section 140A of the CCA.

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

Mr and Mrs H also make arguments that either say or infer that the credit relationship between them and First Holiday Finance was unfair under section 140A of the CCA, when looking at all the circumstances of the case, including the Supplier's representations and parts of its sales process at the Time of Sale.

Mr and Mrs H's loan from FHFBVI was executed under English law and regulated under the CCA. First Holiday Finance Ltd acquired and continued to administer the loan when Mr and Mrs H made their complaint, so section 140A of the CCA is relevant law. It is not subject to the same difficulty as their section 75 claim. So determining what is fair and reasonable in all the circumstances of the complaint includes considering whether the credit relationship between Mr and Mrs H and First Holiday Finance was unfair.

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:

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

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

The Supplier's alleged misrepresentations at the Time of Sale

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 Fractional Club membership was an investment which would appreciate in value, giving them a considerable

[1] *Goode: Consumer Credit Law and Practice,* paragraph 45A.62.

return. The Lender disputes that they were told this, but for the purposes of the next paragraph I will assume that it was said. (I will come back to whether it was said later on.)

I think that as real property usually appreciates in value, it is certainly too soon to say that the Allocated Property will fail to, given that the intended sale date is still a few years away. But even if Mr and Mrs H do not make a profit when the Allocated Property is eventually sold, that does not mean that telling them in 2012 that it was likely to make a profit was a false statement, because that was the genuine likelihood at the time. So I don't think that amounts to an actionable misrepresentation. After all, the very nature of an investment is that its value may go up or down.

Mr and Mrs H say that they could not holiday whenever they wanted to, and that the Supplier had misled them about the availability of holidays. But I think that like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. The sales paperwork states that the availability of holidays is subject to demand. I accept that they may not have been able to take certain holidays when they wanted. But I have not seen anything to persuade me on this ground that the Supplier had misrepresented the Fractional Club membership.

Mr and Mrs H say that the Supplier told them that they could sell their club membership at any time. But this was true, and the right to sell is set out in the terms and conditions of their purchase agreement (on page 2 at paragraph G). That was only a right to sell to a third party. The Supplier did not buy back memberships; this was set out in the Member's Declaration, which read (in paragraph 4):

"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 act as an agent in the sale other than as a trade in against future property purchases…"

I haven't seen a copy of Mr and Mrs H's Members' Declaration in this case, but from my experience of dealing with other complaints against the Supplier I know that this was a routine part of the sale. So on the balance of probabilities, I think it is more likely than not that they were told this at the Time of Sale.

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 H 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.

The Supplier's sales and 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 that 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. 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 at the Time of Sale. The fact that it became unaffordable for them a couple of years later appears to have been because of a subsequent change of circumstances. 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. But for now, I am not satisfied that their credit relationship was unfair due to the reason alleged.

The PR says that the contractual terms setting out the Supplier's ability to terminate Mr and Mrs H's membership in the event of non-payment of management fees or other fees were unfair contract terms under the UTCCR, which prohibit *"requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation"*. In support of this argument, the PR relies on the case of *Wilson.* In that case, the judge held that it was disproportionate to have a contractual term saying that fractional membership can be ended by the Supplier for non-payment of fees – however small the amount outstanding may be – without refunding any of what he paid for his purchase, because then the Supplier would not only receive a windfall (the purchase price paid for the timeshare) but can also re-sell the same allocated property to another consumer. The judge described this as *"wholly disproportionate and penal."*

I agree with that, but before I can accept that this means that the relationship between the creditor and the debtor thereby became unfair, as the judge went on to find in *Wilson,* I think I have to take into account how the clause has actually operated in practice in relation to Mr and Mrs H's agreements, not just how it could potentially operate hypothetically. I do not think that the clause's mere existence, by itself, amounts to grounds to find that an unfair credit relationship exists. The judge in *Wilson* said as much at paragraph [46] of his judgement:

"The fact that clause D can be regarded in the abstract as an unfair term is not however the end of the enquiry for the purposes of s.140A of the Act. In considering the fairness of the relationship, it is necessary to consider all other relevant matters, and (amongst other things) these necessarily include how the clause has been operated in practice."

In *Wilson* the clause had been used to terminate the defendant's timeshare. Mr and Mrs H's membership was not terminated, but it was suspended after they stopped paying their fees. In an email sent in June 2017, the Supplier told them that they could restart or sell their membership once they cleared their arrears. The arrears at the time of the IVA were £1,500.

I think that is a proportionate response to the non-payment of the fees. It wouldn't be reasonable to expect a business to carry on providing a service which its customer is no longer paying for. Suspending membership for non-payment seems to me to be a proportionate incentive to get a customer to resume paying and clear their arrears.

So I'm not persuaded that Mr and Mrs H's credit relationship with the Lender was rendered unfair to them under section 140A for any of the reasons above. But there is another reason why they say their credit relationship with the Lender was unfair to them. And that's the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of 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 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.

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 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.

There is competing evidence in this complaint as to whether Fractional Club membership was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations.

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs 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 them as an investment in breach of regulation 14(3).

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

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, then an important consideration is whether the Supplier's breach of regulation 14(3) lead them to enter into the Purchase Agreement and the Credit Agreement.

On balance, I think it did not. This is partly because their purchases in 2009, 2010, and 2011 were not purchases of fractional timeshares, meaning that they must have been motivated by the desire to go on holidays on those occasions. So it is likely that this was also the driving force behind their 2012 purchase too (they acquired an extra 431 points with this upgrade). But I have also read Mr and Mrs H's witness statement to see what they had to say about their 2012 purchase. And there is only a brief mention that the Supplier led them to believe that the Fractional Club membership was an investment from which they would make a financial gain. Nor is there much indication that they were induced into the purchase on that basis. They also mention the fact that they had not been able to book the holiday that they had wanted nine months earlier, so they wanted to upgrade to improve their holiday options. They wanted to go on holiday for two weeks (they previously had only one week). They also said they wanted to get out of their existing, indefinite timeshare agreement and replace it with a fractional timeshare because it had a limited duration of 19 years. So although they also mention that with Fractional Club membership they would *"get our money back,"* the overall impression I'm left with is that this factor did not figure greatly in their thinking.

On balance, therefore, even if the Supplier did market or sell 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 in 2012 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).

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.

Section 27 of FSMA: Was the Credit Agreement unenforceable because it was arranged by a credit broker that was not regulated by the OFT to carry out that activity?

Mr and Mrs H say that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that (i) the Lender wasn't permitted to enforce the Credit Agreement as a result and (ii) the Lender should have refunded all of the loan repayments. However, credit-broking did not become a regulated activity until April 2014, two years after the Time of Sale. So I am satisfied that section 27 of FSMA did not apply to the Credit

Agreement. Furthermore, the credit broker operated in Spain, and the original lender was based in the British Virgin Islands with its administration outsourced to a company operating from the Isle of Man, so the lending wasn't subject to UK supervision.

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 claims under section 75 of the CCA and section 27 of FSMA, 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.

Responses to my provisional decision

The PR did not accept my provisional findings. In a detailed reply, the PR argued that: (1) I had not given enough weight to a passage in Mr and Mrs H's statement where they alleged that the timeshare had been sold to them as an investment; (2) profit does not have to be the main motivation for buying the timeshare; (3) I had not taken into account that the benefit of free or cheaper holidays (together with the return of the money invested) was itself a form of profit; and (4) the suspension of Mr and Mrs H's membership was sufficient to result in unfairness in their credit relationship with the Lender.

The Lender accepted my provisional findings and had nothing to add.

My findings

(1) In addition to the remarks in Mr and Mrs H's witness statement which I had summarised in my provisional findings (see the previous page), the PR drew my attention to the fact that they had also said that they were told to take two weeks *"to get the best return."* I want to reassure the parties that I didn't miss that bit when I first read that statement, because it is in the same sentence as the parts about getting money back and the timeshare being of a fixed duration of 19 years, which I mentioned in my summary. Also in that sentence, Mr and Mrs H say that they normally went away for two weeks anyway, and so I still think it is likely that even without the investment element of the product, they would still have bought a second week of fractional points anyway, for holiday purposes.

(2) I accept that a purchaser can be motivated by two (or more) different reasons for buying something. In the case of buying a fractional timeshare, that can be both holidays and an investment opportunity (and sometimes by other things too). And I accept that in proceedings for breaching regulation 14(3), it is not a defence to show that a consumer was motivated by something other than the investment element. However, in the context of deciding whether there has been unfairness for the purposes of section 140A of the CCA, my approach in this case (and in similar cases) has been to decide whether a breach of the regulation (assuming that there was one) made a difference to Mr and Mrs H's decision to buy, because if it didn't, then that means they would still have entered into the Credit Agreement. And in that case, it will not have resulted in unfairness in the credit relationship between them and the Lender.

I find support for following that approach, with its focus on causation, in the judgement of the High Court in *Shawbrook & BPF v FOS* at paragraph 143:

"The starting point here is the statutory function conferred on a court by s.140A(1) of determining whether a relevant debtor/creditor relationship is 'unfair'. That function arises only if the relationship is potentially 'unfair' because of one of the elements listed in the subsection; these elements are a limitation on the scope of the statutory function, by reference to potential identified and prescribed causes *of unfairness. One such causal component is provided by the reference in s.140A(1)(c) to 'any other thing done (or not done) by, or on behalf of, the creditor'."* [Emphasis in original.]

(3) I appreciate that the prospect of potentially selling a share in the Allocated Property for more than was paid for it is not the only benefit of owning a fractional timeshare – clearly the ability to take cheaper holidays is another benefit. But I do not agree that this means that the holidays themselves (or their cost, or the savings made by taking them instead of other holidays with third parties) fall to be reckoned as part of the profit to be made at the end of the duration of the Fractional Club membership. And such an interpretation of profit or investment appears to be at odds with what was said in *Shawbrook & BPF v FOS*, in particular at paragraph 78 in which it was said to be *"a prospect of getting more back from the ultimate proceeds of sale than the fractional ownership cost in the first place"* [original emphasis omitted].

(4) I still remain of the view that suspending (rather than terminating) membership of the Fractional Club was a proportionate way of dealing with the non-payment of fees. Suspension is a temporary state of affairs, since membership can be restored once the arrears have been cleared. As I've said, Mr and Mrs H's arrears when their membership was suspended was £1,500, which is not so large a sum that it could not potentially be paid at some point, so that restoring their membership was not out of the question. In other words, suspension was not yet equivalent to termination in all but name. So having regard to the *Wilson* case, I do not think the suspension was unfair.

So in conclusion, I still do not think that the credit relationship between Mr and Mrs H and the Lender was unfair.

My decision

For the reasons set out above, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr and Mrs H to accept or reject my decision by 20 November 2025.

Richard Wood
Ombudsman

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
Sections 140A: Unfair relationships between creditors and debtors
Section 140B: Powers of court in relation to unfair relationships
Section 140C: Interpretation of sections 140A and 140B

Case law on section 140A

Of particular relevance to the complaint in question are:

1. The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*'), which remains the leading case.
2. The judgment of the Court of Appeal in the case of *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland')* sets out a helpful interpretation of the deemed agency and unfair relationship provisions of the CCA.
3. *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*') – in which the High Court held that determining whether or not the relationship complained of was unfair had to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"*, which was the date of the trial in the case of an existing relationship, or otherwise the date the relationship ended.
4. The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*') – which approved the High Court's judgment in *Patel*.
5. *Deutsche Bank (Suisse) SA v Khan and others* [2013] EWHC 482 (Comm) – in which Hamblen J summarised (at paragraph 346) some of the general principles that apply to the application of the unfair relationship test.
6. *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
7. *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
8. *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').
9. *Link Financial v Wilson* [2014] EWHC 252 (Ch) ('*Wilson'*).

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) 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).

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*, the Court of Appeal said, at paragraph 56, that the effect of section 56(2) 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."[2]

So, the Supplier is deemed to be the 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.

Related agreements

Under section 140A(1) of the CCA, a debtor-creditor relationship can be found to have been or to be unfair to the debtor because of one or more of the following: (a) the terms of the credit agreement or of any related agreement; (b) how the creditor exercised or enforced its rights under the agreement or under any related agreement; and (c) *"any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or of any related agreement)."*

The meaning of "related agreement" is given in section 140C(4), which (so far as relevant here) reads:

"(4) References in sections 140A and 140B to an agreement related to a credit agreement (the 'main agreement') are references to—

> *(a) a credit agreement consolidated by the main agreement;*
>
> *(b) a linked transaction in relation to the main agreement or to a credit agreement within paragraph (a); …"*

A "linked transaction" is defined in section 19. In the context of this case, it means a purchase agreement financed by a regulated credit agreement. So the definition of a "related agreement" in section 140C(4) (that is, one related to the 2012 Credit Agreement) includes the 2012 Purchase Agreement. But it does not include the 2010 and 2011 credit agreements following the assignment of the 2012 Credit Agreement to the Lender in August 2015.

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

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.

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 7: Timeshare contracts
- 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.[3]

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
- Schedule 1: Paragraphs 7 and 24

Paragraph 7 prohibits *"Falsely stating that a product will only be available for a very limited time, or that it will only be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed choice."*

And paragraph 24 prohibits *"Creating the impression that the consumer cannot leave the premises until a contract is formed."*

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, after which 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

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

Unregulated credit-broking

The relevant provisions that relate to this issue are in FSMA. In short, section 19 of FSMA states that "*[n]o person may carry on a regulated activity in the United Kingdom"* unless they are *"an authorised person*". This prohibition is called the "general prohibition".

Section 27 of FSMA states that an agreement that was "*made in consequence of something said or done by another person ("the third party") in the course of…a regulated activity carried on by the third party in contravention of the general prohibition*" is unenforceable against the borrower. Further, borrowers under such an agreement would be entitled to recover any money paid under the loan agreement and to compensation for any loss suffered as a result of making such payments.

Credit-broking became a regulated activity on 1 April 2014, under article 36A of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, which was inserted by article 4 of the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013.

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').

Richard Wood
Ombudsman