DRN-4795082

The complaint

Mr D and Mrs W's complaint is, in essence, that First Holiday Finance Limited (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 the complaint

Mr D and Mrs W purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 22 May 2012 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,252 fractional points at a cost of £21,653 (the 'Purchase Agreement'). But after trading in their existing Trial Membership, which they purchased in 2011, they ended up paying £17,658 for membership of the Fractional Club.

Fractional Club membership was asset backed – which meant it gave Mr D and Mrs W 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 D and Mrs W paid for their Fractional Club membership by paying £500 by other means and taking finance of £17,158 from the Lender in joint names (the 'Credit Agreement').

Mr D and Mrs W – using a professional representative (the 'PR') – wrote to the Lender on 30 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. A breach of fiduciary duty, in that the payment of commission as a result of the Credit Agreement, had not been disclosed to Mr D and Mrs W.
4. The decision to lend being irresponsible because (1) the Lender did not carry out the right creditworthiness assessment and (2) the money lent to them under the Credit Agreement was unaffordable for them.

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

Mr D and Mrs W 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 gave them the opportunity to make savings on holiday accommodation.
2. Told them that the Supplier's holiday resorts were exclusive to its members when that was not true.

Mr D and Mrs W 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 D and Mrs W.

(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 D and Mrs W 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. The documentation presented to them at the Time of Sale was unclear, and this was in breach of regulation 12(4) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. They were pressured into purchasing Fractional Club membership by the Supplier.
3. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
4. The Supplier received commission from the Lender, and this was not disclosed to them.
5. The Supplier did not provide information about the management charges applicable to the membership, in breach of the Consumer Protection from Unfair Trading Regulations 2008 (the CPUT Regulations).[1]

The Lender dealt with Mr D and Mrs W's concerns as a complaint and issued its final response letter on 11 April 2023, rejecting it on every ground.

Mr D and Mrs W then referred the complaint to the Financial Ombudsman Service ('the Service'). The PR provided a copy of further testimony from Mrs W on 4 January 2024. The complaint was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

Mr D and Mrs W's PR disagreed with the Investigator's assessment and raised another allegation of unfairness for the first time – that being that the timeshare was sold as an investment in breach of Regulation 14(3) of the Timeshare Regulations. The PR asked for an Ombudsman's decision – which is why it was passed to me.

And having considered the complaint, I agreed with the outcome reached by the Investigator. I didn't think Mr D and Mrs W's complaint ought to be upheld, but in reaching that conclusion I expanded on the reasons why. So, I set out my initial thoughts in a Provisional Decision ('PD'). I invited both Mr D and Mrs W and the Lender to respond with any new evidence or arguments if they wished to.

In my PD, I began by setting out the legal and regulatory context:

"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.

I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:

- *The CCA (including Section 75 and Sections 140A-140C).*

[1] On pages 9 and 10 of the Letter of Complaint, the PR set out 17 other brief reasons why there may have been an unfair relationship. I have read and considered each of them in addition to the more substantive reasons for complaint that I have set out in more detail

- *The law on misrepresentation.*
- *The Timeshare Regulations.*
- *The Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').*
- *The CPUT Regulations.*
- *Case law on Section 140A of the CCA – including, in particular:*

    - *The Supreme Court's judgment in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 ('Plevin') (which remains the leading case in this area).*
    - *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
    - *Patel v Patel [2009] EWHC 3264 (QB) ('Patel').*
    - *The Supreme Court's judgment in Smith v Royal Bank of Scotland Plc [2023] UKSC 34 ('Smith').*
    - *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').*

Good industry practice – the RDO Code

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')."

I then set out my initial thoughts on the merits of Mr D and Mrs W's complaint:

"I have considered all the available evidence and arguments to decide what is 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.

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

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

The CCA introduced a regime of connected lender liability under s.75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.

In short, a claim against the Lender under s.75 CCA essentially mirrors the claim Mr D and Mrs W could make against the Supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. However, unless claims are made within the time limits set out in the Limitation Act 1980, the lender will have a complete defence to any claim. With respect to claims for misrepresentations, that is normally within six years of the date of the misrepresentation. Here, Mr D and Mrs W's claim was made outside of that time, so the Lender has a defence to their misrepresentation claim under s.75 CCA. However, those matters can be considered when deciding if there was an unfair credit relationship under s.140A CCA (see Scotland and Reast), so I will consider the alleged misrepresentations later in this decision.

With that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the s.75 CCA 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 Mr D and Mrs W have a successful claim under Section 75 of the CCA and what I think is a fair outcome to that part of their complaint. But Mr D and Mrs W 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.

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between Mr D and Mrs W and the Lender was unfair.

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."

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of

Mr D and Mrs W's membership of the Fractional Club 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.140(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."[2]

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.

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

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.

I have considered the entirety of the credit relationship between Mr D and Mrs W 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 D and Mrs W and the Lender.

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

Mr D and Mrs W'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 D and Mrs W. 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 D and Mrs W 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 ought to have been deemed unaffordable for Mr D and Mrs W at the Time of Sale. I have seen a copy of a letter sent to the Lender by Mr D and Mrs W about their loan on 24 November 2017. They say:

"When we attended the presentation we were in extreme debt which we made clear to the [Supplier] sales office but they were determined to get our names on the dotted lines by extreme pressure after a 9 hrs presentation".

…

"This was irresponsible lending on your part as we were already in debt, and were trying our hardest to get out of debt".

I have also seen a suggestion by Mr D and Mrs W that they were turned down by two lenders before the Lender decided to grant them a loan.

I have seen from the loan statements provide to me that Mr D and Mrs W stopped repaying the loan in September 2017, some five years after the Lender made the decision to lend the money. I've not been given any details about why they stopped repaying the loan at that time, but I can see that they had made the monthly loan repayments every month until then, barring one late payment in December 2016. It seems that the Lender did not receive any further payment after September 2017, and it cancelled the loan with a balance of £15,166.64 outstanding.

Based on the evidence I have seen to date, I am not persuaded that the lending ought not to have taken place because they were in debt as this would not necessarily indicate the lending was unaffordable for them. And I have not been given any other details about their financial circumstances at the Time of Sale, so I am not persuaded that the lending was irresponsible. It follows that I don't agree Mr D and Mrs W have lost out because of the Lender's actions. If there is any further information on this (or any other points raised in this provisional decision) that Mr D and Mrs W wish to provide, I would invite them to do so in response to this provisional decision.

Mr D and Mrs W say that they were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. 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. And with all of that being the case, there is insufficient evidence to demonstrate that Mr D and Mrs W made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

The PR also says that the Supplier did not give Mr D and Mrs W a choice of products or finance providers and this rendered the credit relationship between them and the Lender unfair. But their own testimony says that they applied, but were refused, by two other finance providers, and there is nothing in their testimony to suggest they were not willing to proceed with the purchase, or the credit agreement.

Mr D and Mrs W say the Lender paid the Supplier commission and this was not disclosed to them. As well as contributing to an unfair relationship, the PR says this was a breach of fiduciary duty. The Lender says it did not pay the Supplier any commission. Given the Lender is, in essence, the Supplier's in-house finance provider, I think it's unlikely there was any payment of commission involved in this transaction.

The misrepresentations I have covered above could also be something that might lead to an unfair debtor-creditor relationship, as in Scotland and Reast, so I have considered what Mr D and Mrs W say about this.

In their letter of complaint, Mr D and Mrs W say they were told the membership would give them the opportunity to save money on holiday accommodation and this would be exclusive to members. I've not seen any evidence to show that they could not have saved money on holiday accommodation, or that this was not exclusive to members, nor have I been given any details of the conversation that took place at the Time of Sale, such as exactly what they were told, by whom, and in what context. Based on the evidence I've seen, I am not satisfied that Mr D and Mrs W were told something by the Supplier that turned out not to be true.

I'm not persuaded, therefore, that Mr D and Mrs W's credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons the PR provided in its claim letter. But in its response to the Investigator's assessment, the PR says their credit relationship with the Lender was unfair to them because the Fractional Club membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way. So, I will consider this below.

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 D and Mrs W'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 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 D and Mrs W'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 D and Mrs W 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 evidence in this complaint 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 D and Mrs W, 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 D and Mrs W as an investment.

With that said, 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. And while that was not alleged by either Mr D and Mrs W nor their PR when they first complained about a credit relationship with the Lender that was unfair to them, I accept that it's possible that Fractional Club membership was marketed and sold to them as an investment in breach of Regulation 14(3) given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Club membership without breaching the relevant prohibition.

However, I don't think it is necessary to make a finding on this point because, as I'll go on to explain, I am not currently persuaded that would make a difference to the outcome in this complaint anyway.

Was the credit relationship between the Lender and Mr D and Mrs W rendered unfair?

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.

I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in Carney and Kerrigan (respectively) on causation.

In Carney, HHJ Waksman QC said the following in paragraph 51:

"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"

And in Kerrigan, HHJ Worster said this in paragraphs 213 and 214:

*"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court **may** make an order **if** it determines that the relationship is unfair to the debtor. […]*

[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr D and Mrs W and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) which, having taken place during its antecedent negotiations with Mr D and Mrs W, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the

Lender) lead them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

But I am not currently persuaded that it did. I will explain why.

Mr D and Mrs W wrote to the Lender on 24 November 2017 to explain that they would no longer repay the loan and wished to cancel the timeshare agreement. They gave several reasons for wanting to do this. They said the Fractional Club membership was "not fit for purpose". They later explained what they meant by this:

"When we say membership unfit for purpose, we mean the membership does not work or fits our needs, as we were led to believe the points membership would get us a 2 week holiday any time of year, this is totally an untrue statement as to date we have not used the membership as it won't even give us a weeks [sic] accommodation so total false misrepresentation at point of sale."

Mr D and Mrs W were silent on what they were told, if anything, about the Allocated Property. So, at least by this time, the potential to realise a profit on the sale of the Allocated Property did not seem to be of concern to them. Rather, they were unhappy with the lending decision, availability of holiday accommodation, and with having to repay the loan and annual management fees. And they were prepared to give up their membership without asking or expecting to get back any of what they had paid to date, which does not fit with them buying it with an expectation or hope of financial gain. This, in my view, is strengthened by the fact that the PR's letter of complaint and its referral to our service are also silent on any potential investment element to the Fractional Club membership relating to the sale of the Allocated Property. Again, the letter of complaint makes clear that Mr D and Mrs W were unhappy about the lending, availability of holiday accommodation, and the other issues I've set out above. And they first purchased a Trial membership with the Supplier and were attending a promotional holiday at the Time of Sale. So, I think it's reasonable for me to conclude that they were interested in buying holidays and that they bought the Fractional Club membership to gain holiday accommodation – and are unhappy with the way this has worked in practice.

Mrs W gave some further recollections of the Time of Sale in a separate letter, which the PR sent to the Service and the Lender on 4 January 2024. The PR points out that the statement is unsigned and undated but that it provided the bundle of documents sent to it, some of which are dated. It does not say when the statement was written, but given that the complaint was first made in March 2023, I think it is likely to have been around that time. In this statement, Mrs W says:

"During this presentation, the line fed to us was that - Taking holidays alone is dead money. But taking holidays with a fractional ownership, allows for not only enjoyable holidays, but for a return on your investment at the end of a specified period. The property would hold its value, and then the individual members would each receive a lump sum".

Looking closely at what Mrs W says, I don't think it's clear that she was told to expect a profit. Rather, she recalls being told that the Allocated Property would hold its value and that she and Mr D would receive some money after it is sold. There is no indication that the Supplier suggested that the Allocated Property would increase in value, or that the potential to make money was something that enticed her and Mr D to agree to the purchase – in other words that they bought it in the hope or expectation of making a profit or financial gain. As I've said above, I think they did so because they were interested in gaining holiday accommodation.

I have also thought about Mrs W's statement in relation to the letter of complaint and find it surprising that the allegation that the timeshare was sold as an investment did not appear in the earlier letters. Yet, this is something I would have expected to see if it was of significance to the decision Mr D and Mrs W made to purchase the membership and enter the Credit Agreement. But this allegation only came to light after the complaint had been made, and there was no suggestion in Mr D and Mrs W's earlier letters to the Lender, that the Supplier led them to believe that the Fractional Club membership was an investment from which they would make a financial gain nor was there any indication that they were induced into the purchase on that basis.

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 D and Mrs W'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 D and Mrs W and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

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

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 D and Mrs W 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 says that the contractual terms governing the ongoing costs of Mr D and Mrs W's Fractional Club membership were unfair because the Supplier did not explain that the management fees would "rise significantly". It says this point amounts to a misleading omission as defined within Article 6 of the CPUT Regulations. The PR also says the Supplier charged Mr D and Mrs W "legal and admin fees" that were for the Supplier's own benefit, when they could have used legal advice themselves – and were not given clear or intelligible information about the fees – meaning there was a breach of Regulation 12(4) of the Timeshare Regulations.

One of the main aims of the Timeshare Regulations, the CPUT Regulations, and the UTCCR was to enable consumers to understand the financial implications of their purchase so that they were put in the position to make an informed decision. And if a supplier's disclosure and/or the terms of a contract did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, that may lead to the Timeshare Regulations, CPUT Regulations, and the UTCCR being breached, and, potentially the credit agreement being found to be unfair under Section 140A of the CCA.

However, as I've said before, 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 such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mr D and Mrs W, have flowed from such a term, because those consequences are relevant to an assessment of unfairness under Section 140A. For example, the judge in Link Financial v Wilson [2014] EWHC 252 (Ch) attached importance to the question of how

an unfair term had been operated in practice: see [46].

As a result, I don't think the mere presence of a contractual term that was/is potentially unfair is likely to lead to an unfair credit relationship unless it had been applied or operated unfairly in practice. And I've not seen any evidence which would persuade me that any of the fees mentioned by the PR are actually unfair to Mr D and Mrs W, nor even that they have been enforced in a way that would render their credit relationship with the Lender unfair to them.

Given the facts and circumstances of this complaint, I am not persuaded that the Supplier's alleged breaches of Regulation 12 of the Timeshare Regulations or the CPUT Regulations and the UTCCR are likely to have prejudiced Mr D and Mrs W's purchasing decision at the Time of Sale and rendered their credit relationship with the Lender unfair to them for the purposes of section 140A of the CCA.

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

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 D and Mrs W 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 responses to the PD and my findings

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

The Lender responded by saying it had nothing further it wanted to add. The PR, on behalf of Mr D and Mrs W, provided a comprehensive reply. I have summarised what I think are the key points it raised and my findings on the new arguments. The PR says:

"The PD errs in failing to find a breach of Regulation 14(3) and is inconsistent with [*Shawbrook & BPF v FOS] and Other [Ombudsman] Decisions"* and "*the evidence suggests [there was] a breach [of the Regulation]."*

But I think this ignores what I said in my PD about the sale:

"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. And while that was not alleged by either Mr D and Mrs W nor their PR when they first complained about a credit relationship with the Lender that was unfair to them, I accept that it's possible that Fractional Club membership was marketed and sold to them as an investment in breach of Regulation 14(3) given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Club membership without breaching the relevant prohibition.

However, I don't think it is necessary to make a finding on this point because, as I'll go on to explain, I am not currently persuaded that would make a difference to the outcome in this complaint anyway."

So, I have accepted that it was possible the Supplier did breach Regulation 14(3) during the course of the sale of Fractional Club membership to Mr D and Mrs W. But I did not think that this would have made a difference to the outcome of their complaint, and I didn't think that

any breach led to an unfairness that needed a remedy. So, I have not found it necessary to make a finding on whether there was a breach of Regulation 14(3).

In its response, the PR says:

"The PD acknowledges the possibility of the product being presented as an investment. Mr. D and Mrs. W's statements, particularly in their Letter of Complaint and Mrs W's further statement, indicate they were led to believe the FPOC membership was an "investment" and that they would "get something back" making it "extremely useful" when they were older, and that it was "attractive" as it had a "fixed duration of 19 years...coming to an end in December 2030, beyond which time they would have no further liability, in respect of [the Supplier]'s annual management charges." They also said that the membership was "an investment in luxury holidays every year, but it was also a financial investment, as it was a vehicle to get some money back in the future".

But these statements, as written here by the PR, do not appear anywhere within Mrs W's testimony. And as I said in my PD, the allegation that the Fractional Club membership was sold to Mr D and Mrs W as an investment does not appear in the PR's Letter of Complaint at all. I would have expected to see this allegation in the Letter of Complaint had it been an important factor in their decision to purchase the membership and enter the Credit Agreement, or to have been something set out by Mr D and Mrs W when then first contacted the Lender in 2017.

Throughout its response, the PR says my PD is inconsistent with the decisions on four complaints decided before, and that I have not considered the inherent probabilities of a breach of the Timeshare Regulations during the sale. I am aware of the decisions to which the PR refers. Each complaint must turn on the specific facts as presented, and I don't agree that the facts of those complaints are the same as those of Mr D and Mrs W's complaint. Nor could they be as each individual complaint necessarily has its own individual facts, so just because an Ombudsman has decided one complaint ought to be up upheld, it doesn't follow that Mr D and Mrs W's complaint should be upheld too. So, I will not comment on why other Ombudsmen felt the factual matrix in other complaints led to those complaints being upheld.

I would also draw the PR's attention to what I said I had considered in my PD, which included:

"The inherent probabilities of the sale given its circumstances".

So, for the avoidance of doubt, I have taken into consideration that it is more likely that a product with an investment element was sold as an investment than a product without that element. But, for the reasons I explained in my PD, even if this specific sale did breach Regulation 14(3), I did not think that meant this complaint should be upheld.

The PR says I should have considered whether the alleged misrepresentations rendered the credit relationship unfair. But that is exactly what I did in my PD when I said:

"The misrepresentations I have covered above could also be something that might lead to an unfair debtor-creditor relationship, as in Scotland and Reast, so I have considered what Mr D and Mrs W say about this.

In their letter of complaint, Mr D and Mrs W say they were told the membership would give them the opportunity to save money on holiday accommodation and this would be exclusive to members. I've not seen any evidence to show that they could not have saved money on holiday accommodation, or that this was not exclusive to members, nor have I been given any details of the conversation that took place at the Time of Sale, such as exactly what they

were told, by whom, and in what context. Based on the evidence I've seen, I am not satisfied that Mr D and Mrs W were told something by the Supplier that turned out not to be true."

The PR suggests I dismissed the breach of contract claims relating to holiday availability, accommodation quality, and exclusivity of resorts, citing insufficient evidence, but that a more thorough investigation of these points may have been warranted. The PR has not set out any of these alleged breaches of contract in its letter of complaint. It has instead raised these points as misrepresentations, so my findings are set out with this in mind. And for the same reason that I did not find such an allegation made out that the resorts were exclusive to members as misrepresentations, I also do not find them made out had there been contractual terms that the resorts were exclusive (and I have seen no such term). Further, I have not seen enough evidence that Mr D and Mrs W were not able to book holidays, nor that the holidays were not of the agreed quality.

The PR says I did not make any reference to the RDO Code in my PD, that I have not explained why I did not consider the RDO Code, and this is an error of law. However, this is not correct. I refer the PR to the section of my PD where I set out the legal and regulatory context, and confirmed this included the RDO Code.

The PR says I have not explained why I found it unlikely there was any payment of commission involved in the transaction. And it says I have not investigated whether there was a breach of fiduciary duty arising from the relationship between the relationship between the Lender and the Supplier.

I have explained why I think it's unlikely there was any payment of commission in this transaction – and the PR has not provided anything further for me to consider – so I remain satisfied that it's unlikely there was any payment of commission, nor that there was any associated breach of a fiduciary duty. The PR has now raised a further question of whether, due to the close relationship between the Lender and the Supplier, there was any other fiduciary duty that was breached. However, it has not explained what duty it alleged that there was or how such a duty was breached. So, without any specific allegation, I see no need to consider this point further.

Further, I explained why I did not think the Lender lent irresponsibly to Mr D and Mrs W, and I invited them to provide any further evidence to me on this point. But as nothing further has been provided, I see no reason to revisit my findings on this point.

As I set out in my PD, the Supreme Court's judgement in *Plevin* makes clear that regulatory breaches do not automatically 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 as I also set out in my PD, and being mindful of *Carney and Kerrigan*, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr D and Mrs W 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. The PR has not explained why it disagrees with my reading of those two judgments. Further, the judgment in *Shawbrook & BPF v FOS* (at [185]) appreciated, for there to be an unfairness that warranted compensation, there needed to be a link between any breach of Regulation 14(3) with a consumer's purchasing decision:

"Challenges are made in these proceedings to the adequacy of the evaluation by which the ombudsmen reached their final conclusions of unfairness –in particular to whether they had

regard to all relevant matters within the terms of s.140A(2). But the ombudsmen had the full facts and circumstances, as they had found them, firmly in mind. Breaching Reg.14(3) by selling a timeshare as an investment – whether doing so explicitly or implicitly, whether in a slideshow or in a to-and-fro conversation with individual consumers – is conduct that knocks away the central consumer protection safeguard the law provides for consumers buying timeshares. The ombudsmen held the breach in each case to be serious/substantial ***and the constituent conduct causative of the legal relations entered into: timeshare and loan****. As such, it is hard to fault, or discern error of law in, a conclusion that the relationship could scarcely have been more unfair.* ***It was constituted by the acts/omissions of the timeshare companies in the antecedent negotiations leading up to the contractual commitments.*** *Those are acts/omissions for which the banks are 'responsible' by operation of law. The timeshare companies and lenders clearly benefited overall thereby and the consumers, as the ombudsmen found as a matter of fact, were disproportionately burdened. No error of law appears from the ombudsmen's conclusions in any of these respects. I am satisfied their findings of unfairness were properly open to them on this basis alone."*
(emphasis my own)

For the reasons set out in my PD, I do not think Mr D and Mrs W have said that they purchased Fractional Club membership with the hope or expectation of financial profit or gain. That was based on the plain reading of their own words, and I've not seen anything to make me change my mind about that. It follows that, I can't say that any breach of Regulation 14(3) was causative of them taking out that membership and, therefore, that there was an unfairness that warrants any remedy.

And having considered everything submitted by the PR in response to my PD, I remain satisfied that any possible breach of Regulation 14(3) by the Supplier at the Time of Sale was immaterial to Mr D and Mrs W's decision to purchase membership of the Fractional Club.

My final decision

Given the facts and circumstances of this complaint, and for the reasons I set out above, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr D and Mrs W's Section 75 claim. And I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement and related Fractional Club 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. So, I do not uphold their complaint against First Holiday Finance Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D and Mrs W to accept or reject my decision before 4 March 2025.

Andrew Anderson
Ombudsman