DRN-5088831

The complaint

Mr and Mrs S's complaint is, in essence, that Shawbrook Bank 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 claims under Section 75 of the CCA.

What happened

I issued a provisional decision in Mr and Mrs S's case on 3 October 2024, in which I set out the background to, and my provisional findings on, their complaint. A copy of my provisional decision is appended to, and forms a part of, this final decision. For that reason, it's not been necessary for me to go over the details again here, but in very brief summary:

- Mr and Mrs S purchased memberships of a timeshare (the 'Fractional Club') in February 2014 and October 2015, from a specific timeshare provider ('the Supplier'). These purchases were financed by point of sale loans with the Lender.

- Mr and Mrs S complained to the Lender, firstly in March 2018, making a number of allegations relating to the sale of the Fractional Club memberships and related loans. These included:

    - That the Supplier had been in breach of contract or had made misrepresentations to them, giving rise to a valid claim against the Lender under Section 75 of the CCA.

    - That the Lender had been a party to an unfair credit relationship with them, in relation to the loans and related agreements to purchase the Fractional Club memberships, for the purposes of Section 140A of the CCA.

The specifics of each of these heads of complaint can be found in the appended provisional decision.

In my provisional decision, I said I was not minded to conclude that Mr and Mrs S's complaint should be upheld. The full reasons for this are again set out in full in the appended provisional decision.

I asked the parties to the complaint to let me have any further submissions they'd like me to consider, by 17 October 2024. The Lender provided nothing further in response to the provisional decision. Mr and Mrs S, via their current representatives ('PR2'), supplied a witness statement outlining their recollections of their purchases with the Supplier. The case has now been returned to me to review again.

What I've decided – and why

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

I've read carefully the witness statement supplied by PR2 on behalf of Mr and Mrs S. In my provisional decision, one of the things I had noted was the lack of direct testimony from Mr and Mrs S relating to their experiences with the Supplier. This, coupled with inconsistent and vague accounts of what had happened from PR2 and Mr and Mrs S's previous representatives ('PR'), had meant I'd found it difficult to attach much weight to their evidence.

I've not been supplied with any other submissions, such as argument or further points, to accompany the witness statement. So it's not clear to me what parts of my provisional decision Mr and Mrs S disagree with. I've summarised the salient parts of their witness statement below:

- The February 2014 sale had taken place at a time when they'd recently had a bereavement, and they'd been subjected to a lengthy and high-pressure sales presentation by the Supplier where they weren't given an opportunity to read things properly before signing. Mrs S had still been vulnerable due to the bereavement at the time of the October 2015 sale.

- They'd been told they'd be able to holiday wherever they wanted, whenever they wanted, but they found this not to be the case.

- They'd been told they were buying into property and that it was a good investment, as the way the property market was going would ensure a good return. They were shown paper illustrations showing the investment potential, and were told the Supplier would buy the property back from them if they wanted to sell it. They'd only found out recently that the investment aspect of the purchase did not work as had been described.

- It hadn't been explained to them that all owners in the Fractional Club needed to agree to a sale, and that the Supplier was an owner and could therefore block any sale.

- They were told management fees would rise only with inflation, and they'd get the first year free. They were told paying management fees was cheaper than buying holidays.

- No financial checks were carried out other than to ask their income, what their jobs were, and whether they owned their own home. For the second purchase, they were additionally told they could easily refinance their loan back in the UK.

- During the second purchase, they'd complained of the lack of holiday availability and been told buying more points would help them get the holidays they wanted. They were also given the same sales pitch as previously regarding the product being an investment and being able to sell it back to the Supplier. This sale was also high-pressure and they found it difficult to say no despite having doubts.

- Despite their purchases, and spending many thousands of pounds, they'd never been able to book a holiday with the Supplier, and management fees had risen from around £800 per year to £1,200 to £1,400.

- They would not have gone ahead with the purchases if they'd known it was impossible to take a holiday or had they known they weren't investments.

I thank Mr and Mrs S for providing their recollections of the 2014 and 2015 purchases. I think a large proportion of the concerns they've outlined in their witness statement were covered

in my provisional decision, and the statement doesn't introduce anything new which would change my conclusions on those matters. I think it's also important to note that this statement has come about ten years after the events in question, which to my mind limits to some degree the amount of weight I can place on it where it conflicts with more contemporaneous evidence such as the documents dating to the Time of Sale, or complaints made nearer to that time.

Regarding the question of the sales being of a high-pressure nature, I don't doubt that either Mrs or Mr S were vulnerable at the time of at least the first sale due to a family bereavement. But they still had the option, if they did not want to purchase either of the Fractional Club memberships, of cancelling within the 14-day cooling off period. They did not do so, and haven't explained why they didn't. So it's difficult for me to conclude that their ability to choose to buy either of the memberships was significantly impaired by the Supplier's conduct.

On the question of the availability of holidays, I don't think there's much I can add to what I said in the provisional decision. The 2015 purchase came with what appeared to be a guarantee of availability in a specific luxury suite at a specific time of year, and I think it's likely (given this was a key feature of the product) that the Supplier would have made representations to this effect. However, Mr and Mrs S haven't said they ever tried to book this specific week in this specific suite, and the rest of the paperwork does say in several places that all (other) bookings were subject to availability. Ultimately, I'm unable to conclude the Supplier was in breach of contract in relation to this point, or made misrepresentations to Mr and Mrs S in relation to the availability of holidays.

Regarding the management fees, Mr and Mrs S have given some further detail of what they recall from the Time of Sale, and they've also said the fees rose from about £800 to between £1,200 and £1,400. It's unclear over what period this rise took place – no other details or evidence have been given. I found in my provisional decision that it was possible the Supplier had not explained the costs associated with the Fractional Club memberships – such as the management fees – as it should have under the Timeshare Regulations, albeit I made no formal findings on that point. However, I also found that information had not been submitted to show that any information failings by the Supplier had led to unfairness in practice, and which could have led to an unfair credit relationship between Mr and Mrs S, and the Lender.

I still don't think Mr and Mrs S have shown that the Supplier's potential breach of the information requirements in the Timeshare Regulations surrounding the management fees, led to unfairness arising in practice. All they've said is that the fees increased, but they've not explained why such increases led to unfairness in their case. So it's difficult, given the limited evidence, for me to see how a potential failing by the Supplier here led to an unfair credit relationship arising between Mr and Mrs S and the Lender. It follows that my views on this remain unchanged.

I note Mr and Mrs S have said in their witness statement that only very limited checks were carried out into their ability to afford the loans given to them by the Lender. Whether or not that's the case, in my provisional decision I said this would not necessarily lead to an unfair credit relationship between Mr and Mrs S, and the Lender, unless the loans were actually unaffordable. Mr and Mrs S have not supplied information which would suggest the loans were unaffordable, and have in fact indicated the opposite, saying the loans have not caused 'severe hardship', so I don't think this helps to progress their complaint further on this ground.

The final main point from Mr and Mrs S's witness statement relates to the sale of the Fractional Club memberships as an investment. I found in my provisional decision that it was

possible the Supplier may have marketed the products to Mr and Mrs S as investments, in contravention of the Timeshare Regulations. On balance though, I thought it less likely, as Mr and Mrs S had never mentioned this had happened, PR had not mentioned it when formulating their claim against the Lender, and indeed the first time it had been mentioned was by PR2 in February 2023.

As I said in the provisional decision – Fractional Club membership was asset backed and it did have an investment element to it, in the sense that the Allocated Property would be sold at a defined point in the future and Mr and Mrs S would be entitled to a share of the proceeds. This wasn't wrong in itself, but it was prohibited under the Timeshare Regulations to sell or market the products as investments.

Based on what they've said in their witness statement, Mr and Mrs S are concerned that the investment aspect of the product will not come to fruition because all owners would need to agree for a sale of the Allocated Property to take place, and the Supplier would be in a position to block any sale. Having read the relevant documents relating to the membership, I don't think that is how the sale of the Allocated Property is designed to work. And in any event, this is a concern about something that hasn't happened and may never happen. Any breach of contract (which is uncertain), would be in the future, and not something Mr and Mrs S would be able to make a valid claim for at this point against the Lender.

Mr and Mrs S have also said in their witness statement that they would not have gone ahead with either purchase, had they been aware they were not investments. In other words, they say the Supplier's alleged marketing of the products as investments was material to their purchasing decisions.

The difficulty I have with this is along the lines of what I outlined above: the statement that the investment potential of the Fractional Club memberships was material to Mr and Mrs S's purchasing decisions was not made on their behalf until 2023, and there has been no direct testimony from them to this effect until 2024. The handwritten notes on PR's initial complaint in 2018, which was made much closer to the Time of Sale, make no mention of any investment-related motivation for the purchases. Indeed, the notes focus on Mr and Mrs S's dissatisfaction with the availability of holidays and rising management fees.

I think it's possible that, with the benefit of hindsight, Mr and Mrs S feel now that they would not have proceeded with their 2014 and 2015 purchases from the Supplier, had it not been for the idea that the products they were buying were investments which could make them a return in the future. But I don't think the evidence points in that direction. Even if the Supplier did, as I think is possible, market the Fractional Club memberships in 2014 and 2015 as investments, I remain unconvinced that this had a material impact on Mr and Mrs S's purchasing decisions at that time.

In light of the above, I remain of the views expressed in the appended provisional decision, which, to summarise, were:

- In relation to section 140A of the CCA, that given all of the facts and circumstances of the complaint, I don't think the credit relationship between the Lender and Mr and Mrs S 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.

- In relation to section 75 of the CCA, that I don't think the Lender dealt unfairly or unreasonably with the claim brought on Mr and Mrs S's behalf.

My final decision

For the reasons explained above, and in my appended provisional decision, I do not uphold Mr and Mrs S's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S and Mrs S to accept or reject my decision before 26 November 2024.

Will Culley
Ombudsman

COPY OF PROVISIONAL DECISION

I've considered the relevant information about this complaint.

Having done so, I broadly agree with the outcome reached by the most recent of our investigators to assess the complaint, but I've explained my decision in considerably more detail, so in the interests of fairness I'm issuing this provisional decision to give the parties a further opportunity to provide further comment before I make my decision final.

I'll look at any more comments and evidence that I get by **17 October 2024**. But unless the information changes my mind, my final decision is likely to be along the following lines.

The complaint

Mr and Mrs S's complaint is, in essence, that Shawbrook Bank 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 claims under Section 75 of the CCA.

Background to the complaint

Mr and Mrs S purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') in February 2014. They subsequently traded in this purchase against another fractional timeshare with the Supplier in October 2015. I will refer to the points at which these purchases took place as the 'Time of Sale'.

In their first purchase, Mr and Mrs S entered into an agreement with the Supplier to buy 610 fractional points at a cost of £10,219 (the 'Purchase Agreement'). Mr and Mrs S had an existing 'Trial' membership with the Supplier. They had outstanding finance (with another lender) on this Trial membership. They paid for their first purchase, and consolidated their outstanding finance, with a loan from the Lender of £13,505. Mr and Mrs S settled this loan early, in the summer of 2015.

Mr and Mrs S's second purchase was of a membership to a different Fractional Club with the same Supplier, which gave them the exclusive right to use a specific luxury suite in week 48 of the calendar year. This was the equivalent of 900 fractional points within the Club. An unknown amount of credit was given to Mr and Mrs S for trading in their first purchase against the second purchase, after which the amount that was left to pay was £11,507. This was financed with a loan from the Lender of the same amount.

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

Mr and Mrs S – using a professional representative ('PR') – first wrote to the Lender on 28 March 2018, complaining of the following:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.

2. A breach of contract by the Supplier giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.

3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

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

Mr and Mrs S said 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 the only way for them to exit their existing timeshare membership, when this wasn't true.

2. told them that they'd be able to book the holidays they wanted with their membership, when this wasn't true because there was limited availability and flexibility.

3. told them that they were guaranteed to exit the Fractional Club membership after a set number of years, when this wasn't true because a purchaser needed to be found for the fractional asset.

Mr and Mrs S 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 them.

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

Mr and Mrs S also say that the fact they found it difficult to book the holidays they wanted, when they wanted, amounts to a breach of contract as well as a misrepresentation.

Additionally, Mr and Mrs S say that the Supplier breached the Purchase Agreement because there is no guarantee that they will receive their share of the net sale proceeds of the Allocated Property.

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

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

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

1. That terms within the relevant contracts causing Mr and Mrs S's rights to be forfeited in the event of their non-payment of management fees, were unfair terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR') and Consumer Rights Act 2015 ("CRA").

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.

The Lender dealt with Mr and Mrs S's concerns as a complaint and issued its final response letter on 12 November 2018 rejecting it on every ground.

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

Then, in February 2023, PR stopped representing Mr and Mrs S and a new representative, ('PR2'), took over. PR2 reformulated Mr and Mrs S's complaint and made a number of points on their behalf. I've outlined these below:

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'). This caused an unfair relationship between Mr and Mrs S and the Lender, and made the contract illegal and therefore void from the beginning.

2. The Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs, such as future management charges, which appeared to be set at the Supplier's discretion.

PR2 also expanded on PR's point relating to the lack of availability of holidays, stating that Mr and Mrs S had been told they would have no problems booking holidays wherever they wanted, but that in reality holidays could only be booked in Tenerife and mainland Spain, and even there only with limited availability.

Following PR2's involvement, a new Investigator reassessed the complaint, but also rejected it on its merits.

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

PR2, on Mr and Mrs S's behalf, made further submissions prior to the complaint being passed to me. I've summarised these below:

1. Mr and Mrs S had been subjected, in relation to the 'Trial' membership purchase, to a sale lasting 4-5 hours which had been of a pressurised nature. They'd been given various assurances regarding the availability of holidays and of timeshare being a good investment. When they had subsequently gone on to buy the Fractional Club memberships, they had been told they could sell the membership at a huge profit in the future. Mr and Mrs S had been the victim of systematic mis-selling by the Supplier.

2. Mr and Mrs S had not used the holiday-related benefits of the upgraded Fractional Club membership, which underscored the fact that they'd bought it primarily for investment purposes. PR2 noted that Mr and Mrs S had stayed at a hotel in Leeds for one night using the membership, and had unsuccessfully attempted to book days in Wales and Scotland, but gave up trying due to lack of availability.

3. The judge in the case of *Shawbrook & BPF v FOS* (see below), had concluded that it would be almost impossible for the Supplier to have sold Fractional Club memberships in any other way but as an investment, and this was consistent with Mr and Mrs S's experience.

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).
- The law on misrepresentation.
- The Timeshare Regulations.
- The UTCCR/CRA.
- The Consumer Protection from Unfair Trading Regulations 2008 (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').

My provisional findings

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.

What's 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.

Finally, I need to make it clear that I am not considering the sale of the 'Trial' membership in this decision. That is because the Lender did not finance that purchase.

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

The CCA introduced a regime of connected lender liability under section 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 Section 75 essentially mirrors the claim Mr and Mrs S 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. The Lender does not dispute that the relevant conditions are met in this complaint. And as I'm satisfied that Section 75 applies, if I find that the Supplier is liable for having misrepresented something to Mr and Mrs S at the Time of Sale, the Lender is also liable.

This part of the complaint was made for several reasons that I set out at the start of this decision.

I recognise that Mr and Mrs S have concerns about the way in which their Fractional Club membership was sold, but they have not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the reasons they allege.

I think it's worth mentioning at this point that we have never received any testimony[1] from Mr and Mrs S as to what was said or not said, or done or not done, by the Supplier, when the two Fractional Club memberships were sold to them. We have received some limited direct comments from Mr and Mrs S, in the form of some handwritten notes on a complaint form sent to us by PR. However, these focused on the lack of availability of holidays and rising management charges. The only accounts of what happened at the Time of Sale come from PR and PR2. And unfortunately, PR and PR2's submissions have also not been entirely consistent with one another, and at times have been rather vague. It has sometimes been challenging to determine if they are referring to the sale of the Trial membership, or either of the two Fractional Club memberships.

I have found it difficult as a result to attach much weight to PR and PR2's accounts of what happened at the Time of Sale, except for where these are supported by the contemporaneous documentary evidence.

This evidence does not support an allegation that Mr and Mrs S were told that either of the purchases were the only way they could leave a previous membership. Indeed, such an allegation doesn't make much sense in the context of Mr and Mrs S's purchase history.

I understand the Trial membership was set to run for a short period of time, and the terms of the two Fractional Club memberships were broadly similar to one another in terms of their length and how they would be brought to an end. The main difference appears to have been the exclusive use Mr and Mrs S had of a luxury suite, under the second membership. I find it difficult to see how the second membership could have been marketed as a means of exiting the first one, rather it seems to have been the exchange of a lower value product for a higher value one.

[1] For example, a witness statement or a telephone call.

The contemporaneous documents also do not support any allegation that Mr and Mrs S were told they could holiday anywhere they wanted, whenever they wanted. The documents said that holidays would be subject to availability. I think it's probably the case that the Supplier told Mr and Mrs S they were guaranteed availability in a specific week in a luxury suite for their second Fractional Club membership purchase, but that wouldn't have been untrue, as that was a specific feature of the second membership.

Finally, there's nothing in the documents dating to the Time of Sale which would lead me to believe that unequivocal guarantees would have been given that the membership would come to an end on a specific date. The documents explain that the property would be marketed for sale after a set time, and I can't see that Mr and Mrs S were told anything different to that.

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

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

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

I've already summarised how Section 75 of the CCA works and why it gives Mr and Mrs S a right of recourse against the Lender. So, it isn't necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, the Lender is also liable.

Mr and Mrs S say that they could not holiday where and when they wanted to – which, on my reading of the complaint, suggests that they consider that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement. Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. And, as I've referenced above, some of the sales paperwork signed by Mr and Mrs S states that the availability of holidays was subject to demand.

For the second Fractional Club membership, Mr and Mrs S were entitled to a guaranteed week in a specific luxury apartment on the Costa del Sol, but I've not been told by any of the parties to the complaint that they ever tried to book this week. It follows that I've not been able to establish that the Supplier failed to honour this part of the agreement. I accept that Mr and Mrs S may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

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

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

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

I have already explained why I am not persuaded that the contract entered into by Mr and Mrs S was misrepresented (or breached) by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Mr and Mrs S also says 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 the Mr and Mrs S 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 and Mrs S's memberships 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.

What's more, the scope of that responsibility extends to both acts and omissions by the Supplier as the Supreme Court in *Plevin* made clear when it referred to 'acts or omissions' when discussing Section 56. And as Section 56(3)(b) says that an applicable agreement can't try to relieve a person from liability for 'acts or omissions' of any person acting as, or on behalf of, a negotiator, it must follow that the reference to 'omissions' would only be necessary because they can be attributed to the creditor under Section 56.

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."

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

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 and Mrs S 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 (1) and/or (2) on the fairness of the credit relationship between Mr and Mrs S and the Lender.

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

Mr and Mrs S's complaint about the Lender being party to an unfair credit relationship was made for several reasons, all of which I set out at the start of this decision.

PR says that the right checks weren't carried out before the Lender lent to Mr and Mrs S. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mr and Mrs S 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 S. Nor, I should add, am I sure that PR2 is in fact maintaining PR's position that the Lender made an irresponsible lending decision. If there is any further information on this (or any other points raised in this provisional decision) that Mr and Mrs S wish to provide, I would invite them to do so in response to this provisional decision.

Mr and Mrs S say that they were pressured by the Supplier into purchasing Fractional Club memberships at the Time of Sale. I acknowledge that they may have felt tired after a sales process that went on for a long time. But, as I've already said, we have no direct testimony from Mr and Mrs S. I have no testimony as to what was said and/or done by the Supplier during their sales presentations that made them feel as if they had no choice but to purchase Fractional Club memberships 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 memberships during that time. Additionally, their purchase history – first buying a Trial membership, then a Fractional Club membership, then upgrading that membership – is not consistent with them having gone ahead with these purchases because they were pressured into them. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs S made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

I'm not persuaded, therefore, that Mr and Mrs S credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why they say their credit relationship with the Lender was unfair to them. And that's the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of 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 S'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 PR2 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 S's share in the Allocated Property clearly, in my view, constituted an investment as it gave 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. I know PR2 takes the view that the nature of products such as the Fractional Club means it would be 'almost impossible' for it to be sold as anything other than an investment. It has cited the judge in *Shawbrook & BPF v FOS* in support of this argument. However, having read the judgment myself, I don't think it's open to me to draw such a broad conclusion. I note the judge in fact appeared not to favour this view, suggesting in paragraph 71 of her judgment that to conclude the intrinsic design of fractional ownership timeshares would lead inevitably to a breach of Regulation 14(3), could be indicative of an error of law.

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr and Mrs S 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 Clubs as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs S, the financial value of their share in the net sales proceeds of the Allocated Properties 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 memberships were not sold to Mr and Mrs S as an investment.

With that said, I acknowledge that the Supplier's training material left open the possibility that the sales representatives may have positioned Fractional Club memberships as an investment. And while that was not alleged by either Mr and Mrs S or 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.

So, I have taken all of that into account. On my reading of the evidence however, I don't think this is what happened here. I return once again to the lack of any testimony from Mr and Mrs S as to their recollections of the sales process at the Time of Sale for either purchase. They don't refer in their handwritten notes to having been sold the memberships as an investment, or that this was an important reason why they bought their Fractional Club memberships. I also note that PR made no allegation on their behalf, that the Fractional Club memberships had been marketed or sold as an investment or that this was the reason Mr and Mrs S had made their purchases. This allegation has only been made by PR2, and has only surfaced following the outcome of *Shawbrook & BPF v FOS*, some five years after the complaint was initially made.

PR's initial Letter of Complaint was put together much closer to the Time of Sale and is, in my view, better evidence of what Mr and Mrs S were likely to have been unhappy with, rather than the more recent set of unevidenced submissions from PR2. After all, if Fractional Club membership had been marketed and sold as an investment by the Supplier at the Time of Sale, it is difficult to understand why this was not mentioned in their initial recollections and, in turn, why PR made no mention of it in the Letter of Complaint either. And with that being the case, in the absence of persuasive evidence to suggest otherwise, I find that it is unlikely that the Supplier led them to believe that membership offered them the prospect of a financial gain (i.e., a profit), given the evolving version of events.

But even if I am wrong to conclude that, on this occasion, membership was unlikely to have been sold in that way given what I have already said about Mr and Mrs S's recollections of the sales process at the Time of Sale, 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 and Mrs S 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 and Mrs S 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 and Mrs S, 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 as I've already said, there was no suggestion in Mr and Mrs S's initial complaint 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 and Mrs S's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr and Mrs S and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

PR2 has suggested the Fractional Club membership contracts would have been void due to illegality, had the Supplier breached Regulation 14(3). I don't think this can be correct, as it doesn't follow that a contravention by the Supplier of the Regulations makes the contracts it entered into with Mr and Mrs S illegal or voidable in themselves.

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

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mr and Mrs S when they purchased memberships of the Fractional Clubs at the Time of Sale. But they and PR2 say that the

Supplier failed to provide them with all of the information they needed to make an informed decision. Specifically, they refer to having received inadequate information about the ongoing management fees relating to the memberships, and how these would be set from year to year.

PR also said that the contractual terms governing the ongoing costs of Fractional Club membership and the consequences of not meeting those costs were unfair contract terms under the UTCCR for the first sale, and the CRA for the second. PR2 makes similar points regarding an alleged lack of the provision of clear information by the Supplier to Mr and Mrs S regarding the ongoing costs of being members of the Clubs.

One of the main aims of the Timeshare Regulations and the UTCCR and CRA was to enable consumers to understand the financial implications of their purchase so that they were/are 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 and the UTCCR or CRA 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.

I've considered firstly the information provided by the Supplier relating to the annual management fees to be paid in respect of the memberships. Regulation 12 of the Timeshare Regulations required the Supplier to provide this information in a way that was *'clear, comprehensible and accurate, and sufficient to enable the consumer to make an informed decision about whether or not to enter into the contract'.*

The specific information the Supplier was required to provide is outlined in schedule 1, part 3 of the Timeshare Regulations. The relevant section states the required information is:

'an accurate and appropriate description of all costs associated with the timeshare contract; how these costs will be allocated to the consumer and how and when such costs may be increased; the method for the calculation of the amount of charges relating to occupation of the property, the mandatory statutory charges (for example, taxes and fees) and the administrative overheads (for example, management, maintenance and repairs).'

The documents the Supplier provided and Mr and Mrs S signed at the Time of Sale in February 2014 and October 2015, set out some information about the ongoing costs that would be associated with the contracts. Broadly speaking, this information included the fact that there would be ongoing management charges to pay and what these charges would be for the first year of membership. There was also an indication that the charges would increase over time, but there was not much information about how the charges would be calculated, or what exactly they covered. Mr and Mrs S were directed to other, rather lengthy, documents, to find out more, but the Supplier did not say where in these documents the relevant information could be found. In these other documents there were details of additional costs which were not mentioned in the documents signed at the Time of Sale.

It follows that it's possible the Supplier didn't meet the requirements of regulation 12 of the Timeshare Regulations to provide, in the prescribed way, an accurate and appropriate description of *all* costs. And while I've not analysed in detail the position regarding whether

any of the terms relating to the management charges were *unfair* under the UTCCR or CRA, I think it's possible that some of the terms had the potential to operate in an unfair way, taking into account the lack of transparency and the level of discretion given to the Supplier as to the setting of various charges. I think it's also possible that terms which could lead to Mr and Mrs S forfeiting their membership and Fractional Club rights for non-payment of management fees, had the potential to operate in an unfair way.[3]

But 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 and the UTCCR and CRA are likely to have prejudiced Mr and Mrs S'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. And I say this for two reasons:

Firstly, my understanding is that the Supplier has not invoked the relevant terms regarding the forfeiture of the memberships in Mr and Mrs S's case, and that it does not, in practice, use these terms in this way. So, I don't think the presence of these terms alone in Mr and Mrs S's agreements with the Supplier means the credit relationship between them and the Lender was unfair to them.

Secondly, Mr and Mrs S have not provided any information or evidence which would lead me to believe that any potential breaches of regulation 12 of the Timeshare Regulations by the Supplier, or the inclusion by the Supplier of unfair terms in their Purchase Agreements, has led to any significant harm or unfairness to them arising *in practice*.

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

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 S 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.

My provisional decision

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 S's Section 75 claims, and I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

If there is any further information on this complaint that Mr and Mrs S wish to provide, I would invite them to do so in response to this provisional decision. They should ensure that this reaches me by **17 October 2024**. I will then review the case again.

Will Culley

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[3] For the avoidance of doubt, I make no firm finding on whether any of these provisions have been breached as, for the reasons I'll explain, it doesn't make a difference to the outcome of this complaint.

Ombudsman