DRN-5279162

## The complaint

Mr and Mrs L's complaint is, in essence, that First Holiday Finance Ltd (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

## What happened

Mr and Mrs L purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 20 December 2011 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,050 fractional points at a cost of £21,629 (the 'Purchase Agreement'). But after trading in their existing trial membership, they ended up paying £15,629 for membership of the Fractional Club.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs L 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 L paid for their Fractional Club membership by taking finance of £15,129 from the Lender in their joint names (the 'Credit Agreement').

Mr and Mrs L – using a professional representative (the 'PR') – wrote to the Lender on 22 November 2017 (the 'Letter of Complaint') to complain about:

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

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

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

- Told them that Fractional Club membership had a guaranteed end date, specifically 2030, after which they would have no liability to the Supplier, when that was not true.
- Told them that they were buying an interest in a specific piece of "real property" when that was not true.
- Told them that Fractional Club membership was an "investment" when that was not true.

Mr and Mrs L 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 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 L 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:

- They were not given a copy of the sales documentation prior to agreeing to purchase, or if they were, they weren't given sufficient time to review it prior to signing.
- The contractual terms setting out (i) the duration of their Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of their membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
- The annual management charges have risen by more than the rate of inflation.
- The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.
- The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mr and Mrs L's concerns as a complaint and asked the Supplier to respond on its behalf. It did so and rejected Mr and Mrs L's complaint on every ground.

Mr and Mrs L then referred the complaint to the Financial Ombudsman Service, and submitted a statement setting out their recollections of the Time of Sale.

Their complaint was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

Mr and Mrs L disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. Mr L also submitted a further statement.

On 10 January 2025 I issued a provisional decision (the 'PD') in which I set out my initial thoughts on the merits of Mr and Mrs L's complaint against the Lender, which I didn't think ought to be upheld.

In my PD I first set out the legal and regulatory context. I said:

*"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.*
- *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 proceeded to consider the merits of Mr and Mrs L's complaint:

*"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 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 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 L 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 L at the Time of Sale, the Lender is also liable.*

*This part of the complaint was made for several reasons which I set out at the start of this decision. They include the suggestion that Fractional Club membership had been misrepresented by the Supplier because Mr and Mrs L were told that the Fractional Club membership had a guaranteed end date. But I can't see that what Mr and Mrs L have told us that the Supplier said here was actually untrue. I've not seen anything which makes me think that the Allocated Property would not be able to be sold at the conclusion of the contract period. The Terms and Conditions set out that the title to the property is held by independent trustees, the sale of the Allocated Property can only be carried out by the Trustees on or after the proposed sale date, and the Allocated Property cannot be removed from the trust before that sale date. What's more, the sale date can only be delayed for up to two years by the unanimous written consent of all fractional owners, in which Mr and Mrs L are included.*

*Mr and Mrs L say that their Fractional Club membership had been misrepresented by the Supplier because they were told by the Supplier that they were buying an interest in a specific piece of "real property" when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr and Mrs L's share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.*

*Mr and Mrs L also make an allegation that the product was sold as an investment, which I address further below. For the reasons I'll explain, had they been told their Fractional Club membership was an investment (and I make no finding on that point here), that would not have been untrue.*

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

*For these reasons, therefore, I do not think the Lender is liable to pay Mr and Mrs L 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 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 L was misrepresented 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 L 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 and Mrs L 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 L'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."*[1]

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

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

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

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

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

*I have considered the entirety of the credit relationship between Mr and Mrs L 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;*
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; and*
4. *The inherent probabilities of the sale given its circumstances.*

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

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

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

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

*They include the allegation that the Supplier misled Mr and Mrs L and carried on unfair commercial practices which were prohibited under the CPUT Regulations for the same reasons they gave for their Section 75 claim for misrepresentation. But given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.*

*The PR says that the right checks weren't carried out before the Lender lent to Mr and Mrs L. 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 L 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. I understand that Mr and Mrs L's circumstances may have changed since the Time of Sale, and this may have had an impact on their personal finances, but again, from the information provided, I am not satisfied that the lending was unaffordable for Mr and Mrs L at the Time of Sale. And the changes to their circumstances were not necessarily foreseeable the time. If there is any further information on this (or any other points raised in this provisional decision) that Mr and Mrs L wish to provide, I would invite them to do so in response to this provisional decision.*

*I'm not persuaded, therefore, that Mr and Mrs L'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. If so this would have been a breach of the prohibition against selling timeshares in that way.*

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

*The Lender does not dispute, and I am satisfied, that Mr and Mrs L's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.*

*Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling membership of the Fractional Club as an investment. This is what the provision said at the Time of Sale:*

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

*But PR, in the Letter of Complaint, says that the Supplier did exactly that at the Time of Sale. And during the course of this complaint Mr and Mrs L submitted a statement dated 13 March 2017 setting out their recollection of the Time of Sale. It said:*

*"…We were told that by purchasing [Fractional Club], we would be buying a 26th share in a studio apartment. It was mentioned as an investment which we could pass on to our family."*

*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 L's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.*

*In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.*

*To conclude, therefore, that Fractional Club membership was marketed or sold to Mr and Mrs L 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 and Mrs L, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs L 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 there has been no suggestion in either the Letter of Complaint nor in the submitted statements that the Supplier suggested or implied that Mr and Mrs L may make a profit once the Allocated Property was sold, 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.*

*But even if the Supplier did breach Regulation 14(3) of the Timeshare Regulations when it sold the Fractional Club memberships to Mr and Mrs L, I do not think it necessary to make a finding on this point. That is because, given Mr and Mrs L'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 L 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 L and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3)[2] led 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 L's initial recollections of the sales process at the Time of Sale 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. The only mention of the 'investment' element in their first statement was the following sentence:*

> *"…We were told that by purchasing [Fractional Club], we would be buying a 26th share in a studio apartment. It was mentioned as an investment which we could pass on to our family. They also said it was different from their other memberships insofar as it had a finite date. The term was 19 years after which we could sell it back to them, sell it on or keep it. We were also told that we could resell it before the end of the term, provided we gave [the Supplier] first refusal."*

*And in Mr L's second statement he said:*

> *"We were told that the membership would not only get us luxury holidays, every year, but also be a financial investment for us, because it was an investment in part of a property, which we could pass on to the family.*

---

[2] which, having taken place during its antecedent negotiations with Mr and Mrs L, 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

*The term was 19 years, after which the property would be sold, and the proceeds split between the Fractional owners. They could sell it back to [the Supplier] or keep it.*

*[The sales person] also said that, if we ever decided at a later date, that we no longer wanted the fractional membership, we could sell our interest, before the end of the term, provided we gave [the Supplier] first refusal."*

*But both of these statements seem to set out how the Supplier had described how the Fractional Club and the eventual sale of the Allocated Property worked (albeit, it is not entirely accurate as the Supplier did not apparently operate a buy-back scheme) rather than a reason for why Mr and Mrs L bought it.*

*As regards their motivation to make the purchase of their Fractional Club membership, they said in their statement that they were attracted by the possibility of taking a holiday with their children to Animal Kingdom:*

*"This was a great selling point for us and we were advised that the cost of our stay would be at a fraction of the cost of going directly through a travel agent."*

*And then further:*

*"The main selling points for the fractional was the guarantee of quality and the opportunity to exchange for holidays anywhere in the world. It was also said that [the Supplier] is much cheaper when compared to the purchase of one's own property."*

*On my reading of this, Mr and Mrs L's motivation for making the purchase was for the quality of the world-wide holidays they could get with their children. And I have seen that they did book the accommodation for Animal Kingdom but cancelled it when they found the cost of the flights to be prohibitive.*

*And my thoughts on this are strengthened when I see what Mr and Mrs L have said about their concerns about how their membership was working in practice. They have mentioned that the annual management fees had risen by more than they had thought they would, and that they had bought their own property in Spain so had no wish to spend holiday weeks elsewhere. They also found the cost of the flights to go on holiday often far exceeded the actual costs of the accommodation. There was again simply no mention of the investment element of the Fractional Club.*

*Having considered everything that has been submitted, I am not currently persuaded that Mr and Mrs L's decision to purchase the Fractional Club was motivated by the investment element. 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 L'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 L 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 and Mrs L when they purchased membership of the Fractional Club at the Time of Sale. But the PR says that the Supplier failed to provide them with all of the information they needed to make an informed decision,*

*or if it did, they did not have adequate time to review it.*

*But I'm not persuaded by this. Mr and Mrs L were provided copies of the Purchase Agreement, and the Right of Withdrawal document, which gave them a 14-day window to cancel the agreement without penalty if there was anything they were unhappy with. And Mr and Mrs L have not given any credible explanation as to why they did not do this, if, as they are now saying, they were not given sufficient time to consider everything prior to signing.*

*PR also says 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.*

*One of the main aims of the Timeshare Regulations and the UTCCR 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 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.*

*Regarding the duration of the membership, the Information Statement made clear to Mr and Mrs L that the membership lasted for 19 years. I acknowledge that the sale of the Allocated Property could be postponed at the Supplier's discretion, but it could only be postponed for up to two years in limited circumstances which don't seem unusual or unreasonable. So, I don't think the term in relation to the mere duration of the membership is likely to be unfair for the purposes of the UTCCR.*

*Similarly, I don't think the term relating to the mere obligation to pay an annual management charge is likely to be unfair for the purpose of the UTCCR. The Information Statement explains that the charges are budgeted annually and are subject to increase or decrease as determined by the costs of managing the scheme, which doesn't seem unreasonable. And, while I acknowledge that such an increase could be greater than what had been set out, this would be in exceptional circumstances, where there had been an extraordinary increase in costs directly related to the Resort which could not previously have been foreseen.*

*But in any event, to conclude that a term in the Purchase Agreement rendered the credit relationship between Mr and Mrs L and the Lender unfair to them, I'd have to see that the term was unfair under the UTCCR, and that the term was actually operated against Mr and Mrs L in practice.*

*In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mr and Mrs L 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 in practice.*

*Having considered everything that has been submitted, it seems unlikely to me that the contract term(s) cited by Mr and Mrs L in the Letter of Complaint have led to any unfairness in the credit relationship between them and the Lender for the purposes of Section 140A of the CCA. I say this because I cannot currently see that the relevant terms in the Purchase Agreement were actually operated against Mr and Mrs L, let alone unfairly. The PR hasn't explained why exactly they feel these term(s) cause an unfairness and as I've said, I can't see that these term(s) have been operated in an unfair way against Mr and Mrs L in any event.*

*So, given the facts and circumstances of this complaint, I am not persuaded that the Supplier's alleged breaches of the CPUT Regulations and the UTCCR are likely to have prejudiced Mr and Mrs L'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 and Mrs L 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 L 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.*

***Conclusion***

*In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs L's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.*

*If there is any further information on this complaint that Mr and Mrs L wish to provide, I would invite them to do so in response to this provisional decision."*

**The responses to the PD**

The Lender responded, agreeing with the outcome and had nothing further to submit. The PR, on Mr and Mrs L's behalf, did not agree and submitted a comprehensive response. In summary, it said:

The PD's reasoning is flawed and inconsistent with both *Shawbrook & BPF v FOS* and other decisions published.

- Concluding that it is unnecessary to make a finding on whether Fractional Club was sold in breach of Regulation 14(3) is a significant error and inconsistent with *Shawbrook & BPF v FOS* and other decisions, as a finding of a breach can, in and of itself, render the associated credit agreement unfair.
- The training materials, and Mr and Mrs L's statements support that there was a breach of Regulation 14(3).
- The PD fails to adequately consider: the key aspects of *Shawbrook & BPF v FOS* when it comes to a detailed analysis of the sales pitch; why Mr and Mrs L would

purchase additional holiday rights if it was not for the investment aspect; and the inherent risks of fractional ownership and the potential for customers to perceive them as investments.

The PD errs in its assessment of causation and unfairness and is inconsistent with other decisions:

- The PD has misinterpreted Mr and Mrs L's statement. It should have been seen as presenting Fractional Club membership as having a financial value beyond holiday use. It is again inconsistent with other decisions in this regard.
- The PD ignores the context and inherent probabilities of the sale. Had it done so it would have found the Fractional Club had been sold as an investment.
- The PD's focus on Mr and Mrs L's motivation to purchase is too narrow and inconsistent. While the quality of holidays was relevant, the investment aspect could also have been material, and the PD fails to adequately explore this possibility.
- Mr and Mrs L's witness statements are largely dismissed in the PD.

The PD's treatment of other issues is insufficient and inconsistent.

- The alleged misrepresentations: Further investigation into the precise wording used and the overall impression created at the Time of Sale ought to have occurred.
- The creditworthiness assessment: A more thorough examination of the assessment conducted by the Lender was necessary.

The PR concluded that the PD was flawed in its failure to find a breach of Regulation 14(3); its misinterpretation of evidence; its inadequate assessment of causation; and in its cursory treatment of other relevant issues. It was inconsistent with *Shawbrook & BPF v FOS* and other final decisions, despite the evidence being similar.

As all parties have now responded, the complaint has been returned to me for further consideration.

**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.

Having considered everything again, I still do not think Mr and Mrs L's complaint ought to be upheld for the reasons set out above in my PD. But in this final decision I will also deal with the matters the PR raised in response.

In doing so, I note again that my role as an Ombudsman is not to address every single point that has been made in response. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I have read the PR's response in full, I will confine my findings to what I find are the salient points.

The PR has said that the findings of the PD were inconsistent with *Shawbrook & BPF v FOS* and other final decisions published by this Service. But whilst being cognisant of those cases, I have made this decision on the specific circumstances of this case.

The response to the PD also said that concluding that it is unnecessary to make a finding on whether Fractional Club was sold in breach of Regulation 14(3) is a significant error and inconsistent with *Shawbrook & BPF v FOS* and other decisions, as a finding of a breach can,

in and of itself, render the associated credit agreement unfair. But I don't agree. As I said in the PD, 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.

So to be clear, I accept that it is possible that the Supplier breached Regulation 14(3) when it sold Fractional Club membership to Mr and Mrs L. But in the particular circumstances of this case, even if there had been a breach of Regulation 14(3), I do not find it necessary to make a finding on that point, because I am not persuaded that a breach, if it had occurred, would have caused an unfairness in the credit relationship between Mr and Mrs L and the Lender.

This is because I am not persuaded that Mr and Mrs L's motivation to make their purchase of the Fractional Club membership was the prospect of a financial gain. Having considered what the PR has said in response to the PD, I remain persuaded that Mr and Mrs L decided to purchase Fractional Club membership because of the holidays they could take. Mr and Mrs L's statement says the following regarding the prospect of holidays:

> *"This was a great selling point for us and we were advised that the cost of our stay would be at a fraction of the cost of going directly through a travel agent."*

And then further:

> *"The main selling points for the fractional was the guarantee of quality and the opportunity to exchange for holidays anywhere in the world. It was also said that [the Supplier] is much cheaper when compared to the purchase of one's own property."*

This, in my view, shows Mr and Mrs L's motivation for making the purchase was for the quality of the world-wide holidays they could get with their children. I am simply not persuaded that a financial gain was a motivation for Mr and Mrs L here. I remain satisfied that the evidence suggests they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3).

As regards the alleged misrepresentations, no further evidence, other than that which was supplied originally, has been presented. And as I said in the PD, I cannot see that the alleged misrepresentations were actually untrue.

Telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr and Mrs L's share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort.

As regards Mr and Mrs L being told the Allocated Property would be sold at the end of the membership term when this was untrue, the Terms and Conditions set out that the title to the property is held by independent trustees, the sale of the Allocated Property can only be carried out by the Trustees on or after the proposed sale date, and the Allocated Property cannot be removed from the trust before that sale date. What's more, the sale date can only be delayed for up to two years by the unanimous written consent of all fractional owners, in which Mr and Mrs L are included. So I am not persuaded that this was untrue.

And telling prospective members that Fractional Club membership was an investment, as I've set out above, is not factually incorrect. Mr and Mrs L'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.

So I am not persuaded that there were any actionable misrepresentations made by the Supplier at the Time of Sale. For these reasons, therefore, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

As regards the allegation that the lender was irresponsible when it agreed to lend to Mr and Mrs L, the PR has said that a more thorough examination of the assessment conducted by the Lender was necessary. But I do not agree. As I said in the PD, even if I were to find that the Lender failed to do everything it should have when it agreed to lend, I would have to be satisfied that the money lent to Mr and Mrs L 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. I invited Mr and Mrs L to provide evidence that the Credit Agreement was actually unaffordable for them in response to my PD, but nothing was submitted. So, even if the Lender did not carry out the right checks at the time of the lending decision, (and as I did in my PD I make no finding on this point) I am not persuaded that the loan was unaffordable for Mr and Mrs L. So I am not persuaded that an unfairness to the credit relationship was caused here.

In conclusion, given the facts and circumstances of this complaint, and having considered everything afresh, including the PR's submissions following my PD, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs L's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

**My final decision**

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L and Mrs L to accept or reject my decision before 19 February 2025.

Chris Riggs
**Ombudsman**