DRN-5492087

The complaint

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

What happened

Mrs N was an existing member of a points-based timeshare arrangement, the Vacation Club ('VC') from a timeshare provider (the 'Supplier'). As a member, every year she could use her points in exchange for holidays at the Supplier's holiday resorts. Different accommodation had different points values, depending on factors such as location, size, and time of year. So, for example, a larger apartment in peak season would cost more to a member in their points than a smaller apartment outside of school holiday periods.

On 19 June 2018 (the 'Time of Sale') Mrs N purchased membership of a different type of timeshare (the 'Signature Suites') from the Supplier. She entered into an agreement with the Supplier to buy 2,910 fractional points (the 'Purchase Agreement'), but after trading in her existing timeshare, she ended up paying £11,689 for membership of the Signature Suites.

Unlike her existing VC membership, Signature Suites membership was asset backed – which meant it gave Mrs N more than just holiday rights. It also included a share in the net sale proceeds of a property named on her Purchase Agreement (the 'Allocated Property') after her membership term ends. It also offered guaranteed availability of her Allocated Property in a set week each year, or she could use her points to stay at another property from the Supplier's portfolio of resorts.

Mrs N paid for her Signature Suites membership by making a card payment of £1,689 and taking finance of £10,000 from the Lender in her sole name (the 'Credit Agreement') for the remaining balance.

Mrs N – using a professional representative (the 'PR') – wrote to the Lender on 29 January 2021 (the 'Letter of Complaint') to complain about:

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

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

Mrs N says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. Told her that she would own part of a resort asset which would grow in value like normal property and which she could sell and recoup some of her total investment.

2. She had found it difficult to find accommodation due to poor availability*.
3. The Interest rate on the finance was exorbitantly high*.
4. She was not told that her beneficiaries would inherit the management fee liability should she die during the course of the membership*.

* Although set out by the PR in the Letter of Complaint as misrepresentations, this appears to be an error. I shall deal with these individual points later as appropriate.

Mrs N says that she has a claim against the Supplier in respect of the misrepresentation set out above, and therefore, under Section 75 of the CCA, she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mrs N.

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

Although set out as a misrepresentation, Mrs N says that that she found it difficult to book the holidays she wanted, when she wanted. It seems that Mrs N is saying here that the Supplier did not live up to its obligations under the Purchase Agreement.

As a result of the above, Mrs N suggests she has a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mrs N.

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

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

1. Signature Suites membership was an Unregulated Collective Investment Scheme ('UCIS') the selling and/or marketing of which was illegal.
2. There were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999[1] (the 'UTCCR') in the Purchase Agreement and Credit Agreement, namely:
    a. There had been no choice of lender given to Mrs N;
    b. The interest rate applied to the Credit Agreement (13.8%) was extortionately high; and
    c. Commission was paid to the Supplier by the Lender which had not been disclosed to Mrs N.
3. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
4. The Supplier had pressured Mrs N into purchasing Signature Suites membership and had taken advantage of her medical vulnerability.

The Lender dealt with Mrs N's concerns as a complaint and asked the Supplier to respond to the elements relating to the Time of Sale. It issued its final response letter on 25 February 2021, rejecting it on every ground.

[1] Although set out by the PR as a breach of the UTCCR, this appears to be an error. The applicable regulation at the Time of Sale was the Consumer Rights Act 2015 (the 'CRA'), and I will deal with it as such.

The PR, on Mrs N's behalf, 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.

Mrs N disagreed with the Investigator's assessment and the PR said, amongst other things, that the Signature Suites membership was sold and/or marketed to Mrs N as an investment in breach of Regulation 14(3) of The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'). So, Mrs N asked for an Ombudsman's decision – which is why it was passed to me.

The Provisional Decision

Having considered everything that had been submitted, I agreed with the outcome reached by the Investigator, in that I didn't think Mrs N's complaint ought to be upheld, but I had expanded somewhat on the reasons given by the Investigator. So, I set out my initial thoughts in a provisional decision (the 'PD') and invited all parties to submit any new evidence or arguments that they wished me to consider before coming to my final decision.

I began by setting out the legal and regulatory context that I considered relevant to the complaint:

"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 CRA.*
- *The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT').*
- *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 went on to set out my thoughts as to the merits of Mrs N's complaint. I said:

"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 Mrs N 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 Mrs N 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. Some of the alleged misrepresentations clearly cannot not be described as such, as they do not relate to something that the Supplier is alleged to have said which was false.

However, the Letter of Complaint does set out that the Supplier allegedly told Mrs N that the purchase of the Signature Suites membership meant she would own part of a resort asset which would grow in value like normal property, and which she could sell and recoup some of her total investment, when this 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. Mrs N'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 her that interest, it did not change the fact that she acquired such an interest.

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

For these reasons, therefore, I do not think the Lender is liable to pay Mrs N 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

Although set out as a misrepresentation, Mrs N has said she found it difficult to book the holidays she wanted, when she wanted. This seems to be an allegation that the Supplier breached the terms of the Purchase Agreement.

I've already summarised how Section 75 of the CCA works and why it gives Mrs N 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.

Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork signed by Mrs N states that the availability of holidays was/is subject to demand. However, the terms of the Signature Suite membership mean that Mrs N had guaranteed availability of the accommodation on a set week each year, and Mrs N has not shown that she was unable to use this accommodation due to it not being available, and she hasn't provided any evidence of when she tried to book alternative accommodation but was unable to do so. So, I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mrs N 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 Mrs N 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 Mrs N also says that the credit relationship between her 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 she has 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 Mrs N 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 Mrs N's membership of the Signature Suites were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

Antecedent negotiations under Section 56 cover both the acts and omissions of the Supplier, as Lord Sumption made clear in Plevin, at paragraph 31:

"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.' […] Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."

And this was recognised by Mrs Justice Collins Rice in Shawbrook & BPF v FOS at paragraph 135:

"By virtue of the deemed agency provision of s.56, therefore, acts or omissions 'by or on behalf of' the bank within s.140A(1)(c) may include acts or omissions of the timeshare company in 'antecedent negotiations' with the consumer".

In the case of Scotland & Reast, the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that "negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law" before going on to say the following in paragraph 74:

"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing

done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[2]

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

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

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 Mrs N and the Lender, along with all of the circumstances of the complaint. When coming to my 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;*
4. *The inherent probabilities of the sale given its circumstances.*

I have then considered the impact of these on the fairness of the credit relationship between Mrs N and the Lender. And having done so, I do not think the credit relationship between them was likely to have been rendered unfair to Mrs N for the purposes of Section 140A.

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

Mrs N'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.

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

Mrs N says that she was pressured by the Supplier into purchasing Signature Suites membership at the Time of Sale, and that the Supplier took advantage of her vulnerability due to medication she had taken.

I thank Mrs N for her candour on this point, and how open she has been regarding a very serious injury she suffered in the months before the sale, and her personal circumstances, before, during and after the sale. But I'm not persuaded, on the evidence I've seen, that the Supplier treated her unfairly for this reason, and I'm not persuaded that the Supplier was aware, or ought to have been aware, that Mrs N was vulnerable for any reason. Mrs N has said that she may have still been under the effect of a general anaesthetic that had been administered a few weeks before, but again, I can't see how the Supplier would have known this, if that was the case.

But I do acknowledge that Mrs N may have felt weary after a sales process that went on for a long time. But she says little about what was said and/or done by the Supplier during her sales presentation that made her feel as if she had no choice but to purchase the Signature Suites membership when she simply did not want to. It also seems that she didn't actually agree to make the purchase until the day after the presentation, so she had a significant time away from the pressure of the sales process to consider whether it was something she actually wanted. She was also given a 14-day cooling off period and she has not provided a credible explanation for why she did not cancel her membership during that time if, as is now attested, she only purchased it due to the pressure placed on her by the Supplier.

And with all of that being the case, there is insufficient evidence to demonstrate that Mrs N made the decision to purchase Signature Suites membership because her ability to exercise that choice was significantly impaired by pressure from the Supplier.

The PR says that the right checks weren't carried out before the Lender lent to Mrs N. 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 Mrs N was actually unaffordable, before also concluding that she lost out as a result, and then consider whether the credit relationship with the Lender was unfair to her for this reason.

The PR has said that because of Mrs N's age, and because she is retired, it is clear that a loan with a term of 12 years was likely to be unaffordable later in the term. But I don't agree with this. I say this because I can see from the finance application that Mrs N has said she was already retired, with an income of £30,000 per year. And retirement income, be it from a private pension, the state pension, or a combination of both when it becomes available, generally means that the income will not reduce. So given Mrs N declared her retirement income as being £30,000 per year, and from the information provided, I am not satisfied that the lending was unaffordable for Mrs N. And whilst her personal circumstances and subsequently her financial circumstances may have changed since the lending was agreed, I can't see how those changes would have been reasonably foreseeable at the time.

If there is any further information on this (or any other points raised in this provisional decision) that the Mrs N wishes to provide, I would invite her to do so in response to this provisional decision.

The PR says that Mrs N wasn't offered a choice of credit providers by the Supplier. But it wasn't acting as an agent of Mrs N but as the supplier of contractual rights she obtained under the relevant purchase agreements. And, in relation to the loan, it doesn't look like it was the Supplier's role to make impartial or disinterested recommendations or to give Mrs N advice or information on that basis. So, I'm not persuaded that her credit relationship with

the Lender was rendered unfair for this reason given the facts and circumstances of this complaint.

In addition, the PR says in the Letter of Complaint that the Supplier was paid commission by the Lender as a result of it arranging the Credit Agreement, and that this commission payment was not disclosed to Mrs N thereby rendering her credit relationship with the Lender unfair. But the Lender has told both this Service and the PR that no commission was paid by it to the Supplier in this case, and this would seem likely to be the case given the Lender was the Supplier's in-house credit provider. So, I am not persuaded that any commission was paid in this case.

I'm not persuaded, therefore, that Mrs N credit relationship with the Lender was rendered unfair to her under Section 140A for the reasons above. But there is another reason, perhaps the main reason in the Letter of Complaint why she says that her credit relationship with the Lender was unfair to her. And that's the suggestion that Signature Suites membership was a UCIS, the marketing and selling of which was prohibited.

But I don't agree the Signature Suites membership was a UCIS. The Lender does not dispute, and I am satisfied that Mrs N's Signature Suites membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations, because Mrs N acquired holiday rights when purchasing the membership. And as such, the Signature Suites membership was exempt from giving rise to a Collective Investment Scheme (see paragraphs 39-54 in Shawbrook & BPF v FOS).

However, I have gone on to consider if the Signature Suites membership was marketed and sold to her as an investment in breach of prohibition under the Timeshare Regulations against selling timeshares in that way.

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

As I've said, I am satisfied that Mrs N's Signature Suites 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 Signature Suites as an investment. This is what the provision said at the Time of Sale:

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

But the PR, in saying that it was sold as an UCIS, says that the Supplier did exactly that at the Time of Sale. And although there has been no witness testimony submitted from Mrs N, in an email she sent to the PR on 9 January 2021 she says:

> *"I went out to Spain with the intention of finishing with [the Supplier], but as I enquired, they worked on me to change the perimeters [sic] & successfully sold me a product saying it was better & an investment replacing what I'd got. They made me believe it was a No- Brainer."*

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.

Mrs N's share in the Allocated Property clearly, in my view, constituted an investment as it offered her the prospect of a financial return – whether or not, like all investments, that was more than what she first put into it. But the fact that Signature Suites 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 Signature Suites. They just regulated how such products were marketed and sold.

To conclude, therefore, that Signature Suites membership was marketed or sold to Mrs N 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 her as an investment, i.e. told her or led her to believe that Signature Suites membership offered her 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 Signature Suites as an 'investment' or quantifying to prospective purchasers, such as Mrs N, the financial value of her 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 Signature Suites membership was not sold to Mrs N 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 Signature Suites membership as an investment, so I accept that it's possible that Signature Suites membership was marketed and sold to her 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 Signature Suites membership without breaching the relevant prohibition.

So, I have taken all of that into account. However, on my reading of the evidence provided and Mrs N's initial recollections of the sales process at the Time of Sale, as set out in her 9 January 2021 email, that is not what appears to have happened at that time. She did describe being told by the Supplier that the Signature Suites was "better & an investment replacing what I'd got", but at no point did she say or suggest that the Supplier led her to believe that her Signature Suites membership would lead to a financial gain (i.e., a profit).

And indeed, in setting out Mrs N's concerns in the Letter of Complaint, the PR has said the following in relation to the 'investment element':

> *"Our client was introduced to fractions for which The Resort claimed they would own a part of the resort asset which would grow in value like normal property and which they could sell and recoup some of their total investment."*

Although this is clearly not a record of Mrs N's actual words, I think that as it's a letter of complaint written on her behalf by a professional representative, it is fair to assume that it is an accurate reflection of what Mrs N told the PR when setting out her concerns and recollections of the Time of Sale. And like her email, it does not set out that the Supplier told her, or led her to believe, that purchasing Signature Suites membership would lead to a

profit. In fact, the Letter of Complaint says that Mrs N was told by the Supplier she could recoup some of her total investment.

So, while PR now argues that the Supplier marketed and sold Signature Suites membership to Mrs N as an investment (i.e. with the hope or expectation of a financial gain/profit), I don't recognise that assertion in her initial recollections of the sale in the email she sent to the PR, nor is it set out as such in the Letter of Complaint.

Mrs N's initial recollections and the Letter of Complaint were put together much closer to the Time of Sale and are, in my view, better evidence of what she remembers of the sales process at that time and why she was unhappy with it, than the PR's very recent assertions following the Investigator's opinion. After all, if Signature Suites membership had been marketed and sold by the Supplier at the Time of Sale as something that would likely provide Mrs N with a profit, it is difficult to understand why she did not say that in her initial recollections and, in turn, why PR only said in the Letter of Complaint that the Supplier had told her she could recoup some of her total investment – this is not suggesting that she expected or hoped to receive a profit.

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 her to believe that membership offered her 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 Mrs N'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 Mrs N 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)[3] led to a credit relationship between Mrs N and the Lender that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led her 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 Mrs N's initial recollections of the sales process at the Time of Sale that the Supplier led her to believe that the Signature Suites membership was an investment from which she would make a financial gain, nor was there any indication that she was induced into the purchase on that basis. And I think it is important to reiterate here that Mrs N was moving from a timeshare membership which provided access to the Suppliers standard pool of accommodation, but with no guaranteed reservation rights. With her Signature Suites membership, she had a guaranteed week's accommodation in her Allocated Property, and the Signature Suites themselves were marketed as being more luxurious and better equipped than the standard accommodation available to VC members. So, as it is apparent that Mrs N was dissatisfied with her existing membership, I think she was likely motivated to purchase the Signature Suites membership because of the improved access and facilities it offered.

On balance, therefore, even if the Supplier had marketed or sold the Signature Suites membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations (and as I've said, I don't think that was the case here), in any event I am not persuaded that Mrs N's decision to purchase Signature Suites 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 she would have pressed ahead with her 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 Mrs N and the Lender was unfair to her 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 Mrs N when she purchased membership of the Signature Suites at the Time of Sale.

The PR says that there are contractual terms in both the Purchase Agreement and Credit Agreement which are unfair, namely that the interest rate attached to the loan was extortionate (13.8%) and the term that means her beneficiaries could become liable for the Signature Suites annual management charges should she die before her membership term ends. The PR set out that these terms were contrary to the UTCCR, but given the date of sale, the regulatory framework in place was the CRA, so I will assess the terms with the CRA and the Timeshare Regulations in mind.

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

[3] which, having taken place during its antecedent negotiations with Mrs N, 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

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 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.

To conclude that a term (and in particular the term cited by the PR relating to forced inheritance) in the Purchase Agreement rendered the credit relationship between Mrs N and the Lender unfair to her, I'd have to see that the term was unfair under the CRA, and that the term was actually operated against Mrs N in practice. In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mrs N, 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.

But in any case, the PR has not shown how there would be a forced inheritance of Mrs N's membership and has not pointed to any terms which set this out. And the Lender has said this is not the case and there is no forced inheritance of any of the Supplier's products or their liabilities.

Having considered everything that has been submitted so far, it seems unlikely to me that the contract term(s) cited by the PR has led to any unfairness in the credit relationship between Mrs N and the Lender for the purposes of Section 140A of the CCA. I say this because I cannot currently see that there is such a relevant term, and even if there is, that term hasn't actually been operated against Mrs N. And the PR hasn't explained why exactly they feel this term causes an unfairness in her credit relationship with the Lender in any event.

In the Letter of Complaint to the Lender, the PR says that the loan's high interest rate made the agreement unfair to Mrs N. But I can see in the signed Credit Agreement that it clearly states the applicable interest rate and the duration of the agreement. It also explains the total amount Mrs N would be repaying after interest and charges. There are also further explanatory notes beside and below this which are noted as important and to be read carefully.

Being charged interest when borrowing money is normal, and I do not see that charging interest would have led to an unfairness in this case. I note that Mrs N says she feels the interest rate was high and it is described as 'exorbitant' but again, the interest rate was set out on the face of the loan agreement, so it would have been clear to Mrs N. Further, I've not been provided with any reason why such a rate was unfair given Mrs N's circumstances. After all it appears that this Signature Suites membership was something that Mrs N wanted, and she doesn't appear to have had alternative means to pay for it at the Time of Sale. So, I can't say the level of interest led to an unfairness that requires a remedy in this case.

Given the facts and circumstances of this complaint, I am not persuaded that the Supplier's

alleged breaches of the CRA are likely to have prejudiced Mrs N's purchasing decision at the Time of Sale and rendered her credit relationship with the Lender unfair to her 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 Mrs N was unfair to her 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 Mrs N was unfair to her 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 Mrs N's Section 75 claim(s), and I am not persuaded that the Lender was party to a credit relationship with her under the Credit Agreement that was unfair to her 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 her."

The responses to the Provisional Decision

The Lender responded to say that it agreed with the findings and had nothing further to add. The PR also responded, disagreeing, and sent a comprehensive response. In summary, it said:

Mrs N had a valid claim under Section 75 of the CCA for misrepresentation because:

- The Supplier told her the membership represented ownership of a resort asset that would grow in value like conventional property, and that she would be able to recoup some or all of her investment upon exit. This goes beyond the legal structure of her fractional interest, which only entitled her to a share in the net sales proceeds, without guaranteed liquidity, valuation clarity, or potential profit.

The Lender was party to an unfair credit relationship under Section 140A of the CCA because:

- Mrs N was elderly, vulnerable and under physical and cognitive impairment at the Time of Sale. She was in a wheelchair and under the influence of strong pain killers and sedatives.
- Mrs N was retired and only in receipt of pension income.
- Mrs N was abroad, with unfamiliar surroundings, support and advisers.
- The sales staff were pushing for same-day completion. No steps were taken to slow the process or to assess capacity. The prolonged sales pitch and the 'day-after' agreement did not remove the lasting effects of pressure, particularly given Mrs N's circumstances.

The lending was unsuitable because of:

- Mrs N's age; her fixed income; the absence of employment or other earnings; and her

vulnerability due to medication. Mrs N provided bank statements from an account in her name from around the Time of Sale and the following five months.

Signature Suites was sold/marketed as an investment.

- The suggestion that Mrs N would 'recoup some or all of her investment' and the framing of the product as a property-based structure is investment language, which likely breached Regulation 14(3) of the Timeshare Regulations.

Finally, the PR addressed causation and the material impact on Mrs N. It said:

- Mrs N would not have agreed to the transaction has she understood the true value (or lack thereof) of her interest; the unaffordability of the finance over 12 years; the lack of a resale market; and her rights under the CCA and Timeshare Regulations. Without the investment-based misrepresentation, Mrs N would not have concluded the sale.

As the deadline for responses has now passed the complaint has returned to me for a decision.

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.

And when doing that, the Financial Conduct Authority's (FCA) Handbook of Rules and Guidance requires that I take into account the following under Rule 3.6.4 of the Dispute Resolution Rules ('DISP'): relevant law and regulations; the regulator's rules, guidance and standards; codes of practice; and where appropriate, what I consider to have been good industry practice at the relevant time.

PR, on Mrs N's behalf, has made a number of detailed points, both in its earlier submissions to our Service and in response to my PD, and I have considered everything that has been submitted. We're an informal dispute resolution service, set up as a free alternative to the courts. In deciding this complaint I've focussed on what I consider to be the heart of the matter, rather than commenting on every issue in turn. This isn't intended as a discourtesy to anyone, rather it reflects the informal nature of our Service, its remit, and my role in it.

In its response to the PD, the PR has drawn my attention to a previous Ombudsman's decision where it has been found that the Supplier sold Signature Suites membership to a consumer as an investment in breach of Regulation 14(3). When assessing any complaint, the role of an Ombudsman is to assess the evidence to come to a fair and reasonable outcome on the merits of the specifics of that complaint. Whilst trying to be consistent with previous decisions, the outcome will always be specific to the individual complaint, as all circumstances are different. And the outcome I have reached in this case is specific to the circumstances of the sale of the Signature Suites membership to Mrs N.

And having considered everything afresh, I remain satisfied that this complaint ought not to be upheld, for the same reasons as set out in the extract of my PD above. I will, however, respond to the points made by the PR.

<u>Mrs N's claim for misrepresentation under Section 75 of the CCA</u>

The PR has said that Mrs N's claim under Section 75 ought to have been accepted by the Lender as the Supplier misrepresented Signature Suites membership. It says the Supplier told Mrs N that the purchase meant she would own part of a resort asset which would grow

in value like normal property, and which she could sell and recoup some of her total investment, when this was not true.

What I am considering here, is whether the Lender was fair and reasonable when it declined to accept Mrs N's claim under Section 75 for the alleged misrepresentation(s) by the Supplier at the Time of Sale.

As I said in my PD, and I maintain now, telling Mrs N that she was purchasing a share in a property was not, in itself, untrue. However, it is the allegation that the Supplier told Mrs N that this share would grow in value that is being highlighted by the PR here. So, in order to consider if the Lender acted fairly, I need to consider if the evidence presented persuades me that there was an actionable misrepresentation made.

The only document which sets out, in Mrs N's own words what happened, is the email she sent to the PR. It is this which I have referred to in the PD. I appreciate that the Letter of Complaint was probably prepared by the PR following a conversation or conversations with Mrs N – after all, it contains personal information that only Mrs N would know. However, a letter of complaint (or claim) is not evidence – especially when, as here, it contains bare allegations or a mere summary of the consumer's allegations. So, the only direct evidence I can rely on here is what is contained in Mrs N's email.

And this email provides little in respect of what was said, by whom, and in what context, to support the allegation of misrepresentation. Indeed, the only reference to what Mrs N says she was told at the Time of Sale is the following:

> *"I went out to Spain with the intention of finishing with [the Supplier], but as I enquired, they worked on me to change the perimeters [sic] & successfully sold me a product saying it was better & an investment replacing what I'd got. They made me believe it was a No- Brainer."*

This does not persuade me that the Supplier told her that the value of the property would grow. So, I remain satisfied that the Lender is not liable to pay Mrs N 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.

Mrs N's complaint of unfairness under Section 140A of the CCA

I have considered everything the PR has said here. But I remain unpersuaded that the Supplier treated Mrs N unfairly given the medication she says she was on at the time, and because of her physical frailty. The PR also says she was unsupported and in unfamiliar surroundings. But this is not what Mrs N says in her email. She says:

> *"I was in plaster in May & travelled with my sister & niece & family to Spain to* [the Supplier] *with medical assistance in June as it was booked & considered good for me. Which it was as I was able to swim & relax."*

So, it seems that Mrs N was on holiday with her extended family, so I think it unlikely that she was unsupported, even if she was alone during the sales process. After all, as I've said, she didn't complete the sales process until the following day, so it is likely she would have had familial support in the meantime.

So, as I've said, Mrs N had a significant time away from the pressure of the sales process to consider whether the Signature Suites membership was something she actually wanted. She also had the 14-day cooling off period and she has not provided a credible explanation for

why she did not cancel her membership during that time if, as the PR continues to attest, she only purchased it due to the pressure placed on her by the Supplier.

I remain unpersuaded that Mrs N made the decision to purchase Signature Suites membership because her ability to exercise that choice was significantly impaired by pressure or unfair treatment from the Supplier.

I also remain unpersuaded that the decision by the Lender to provide finance for the purchase of Signature Suites was irresponsible. I say this having considered everything the PR has said in this regard about Mrs N's status as a retired person and her pension income. I have also looked closely at Mrs N's bank statements that have been submitted.

As I said in the PD, Mrs N was already retired when she applied for the finance, so it is a fair assumption that the income she declared (£30,000 per year) was from her pension, so was unlikely to decrease. And having seen the income/expenditure from the bank account statements that have been submitted, I can't see that it was unaffordable at the Time of Sale. So, it follows that I am not persuaded that the credit relationship between Mrs N and the Lender was unfair in this regard.

Lastly, the PR repeated that Signature Suites membership was sold to Mrs N as an investment, in breach of Regulation 14(3). But as I said in the PD, I am using the definition of the term *"investment"* as agreed in *Shawbrook & BPF v FOS - "an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit".* So, clearly, the Signature Suites membership had an investment element to it.

But again, as I said in the PD, I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to her as an investment, i.e. told her or led her to believe that Signature Suites membership offered her the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint. And the evidence simply doesn't support that assertion. Indeed, the initial Letter of Complaint set out the following:

> *"Our client was introduced to fractions for which The Resort claimed they would own a part of the resort asset which would grow in value like normal property and which they could sell and recoup some of their total investment."*

This, like Mrs N's email, does not set out that the Supplier told her, or led her to believe, that purchasing Signature Suites membership would lead to a profit. In fact, the Letter of Complaint says that Mrs N was told by the Supplier she could recoup **some** of her total investment (bold my emphasis).

But this assertion from the PR has changed somewhat since the PD. The PR now says:

> *"[Mrs N] was told that the Signature Suites membership represented ownership of a resort asset that would grow in value like conventional property, and that she would be able to recoup some **or all** of her investment upon exit."* (bold my emphasis).

This is an important difference and shows an evolving argument. And I do not recognise this assertion in either Mrs N's email or the Letter of Complaint. And as I've said, Mrs N's initial recollections and the Letter of Complaint were put together much closer to the Time of Sale and are, in my view, better evidence of what she remembers of the sales process at that time and why she was unhappy with it, than the PR's very recent assertions following the Investigator's opinion and then the PD. After all, if Signature Suites membership had been marketed and sold by the Supplier at the Time of Sale as something that would likely provide Mrs N with a profit, it is difficult to understand why she did not say that in her initial

recollections and, in turn, why the PR said in the Letter of Complaint only that the Supplier had told her she could recoup some of her total investment – this is not suggestive of Mrs N expecting or hoping to receive a profit.

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 her to believe that membership offered her the prospect of a financial gain (i.e., a profit), given the evolving version of events.

But, as I said in the PD, even if I am wrong to conclude that, and Mrs N's Signature Suites membership *was* sold to her in a way that breached Regulation 14(3) of the Timeshare Regulations, I don't think that would make a difference to the outcome to this complaint anyway. I think Mrs N would likely have pressed ahead with the purchase in any event.

I say this because it is apparent that Mrs N was unhappy with her existing membership, and the purchase of Signature Suites provided her with a guaranteed week's accommodation in her Allocated Property, which was apparently marketed as more luxurious and better equipped than what was available to her under her existing membership. So, as I said in the PD, I think it likely that Mrs N was motivated to purchase the Signature Suites membership because of the improved access and facilities it offered.

So having considered everything afresh, along with the PR's submissions following the PD, I remain satisfied that the Lender did not act unfairly or unreasonably when it dealt with Mrs N's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with her under the Credit Agreement that was unfair to her 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 her.

My final decision

I do not uphold Mrs N's complaint against First Holiday Finance Ltd.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs N to accept or reject my decision before 22 May 2025.

Chris Riggs
Ombudsman