DRN-5493639

The complaint

Mrs T'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 claims under Section 75 of the CCA.

What happened

Mrs T purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 29 December 2016 (the 'Time of Sale'). She entered into an agreement with the Supplier to buy 900 fractional points at a cost of £13,498 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mrs T 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.

Mrs T paid for her Fractional Club membership by paying a £500 deposit in cash and taking finance for the remaining amount of £12,998 from the Lender in her sole name (the 'Credit Agreement').

Mrs T – using a professional representative (the 'PR') – wrote to the Lender on 3 November 2020 (the 'Letter of Complaint') to complain about:

1. A misrepresentation 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.
2. A breach of contract by the Supplier giving her a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

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

Mrs T says that the Supplier made a pre-contractual misrepresentation at the Time of Sale – namely that the Supplier:

- Told her that Fractional Club membership was an "investment" when that was not true because it is worthless.

Mrs T 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 T.

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

Mrs T says that the Supplier breached the Purchase Agreement because it has ceased trading. And, that she found it difficult to book the holidays she wanted, when she wanted.

As a result of the above, Mrs T says that 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 T.

(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 T 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. Commission was paid by the Lender to the Supplier and this was not disclosed to Mrs T.
2. She was pressured into purchasing Fractional Club membership by the Supplier.
3. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender forwarded Mrs T's concerns to the Supplier, who responded to the complaint on 14 December 2020, rejecting it on every ground.

Mrs T, via the PR, then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, upheld the complaint on its merits.

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

I considered the matter and issued a provisional decision (the 'PD') dated 3 April 2025. In that decision, I said:

"***The legal and regulatory context***

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

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

- *The CCA (including Section 75 and Sections 140A-140C).*
- *The law on misrepresentation.*
- *The Timeshare Regulations.*
- *The Consumer Rights Act 2015 (the 'CRA').*
- *The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations').*
- *Case law on Section 140A of the CCA – including, in particular:*

- *The Supreme Court's judgment in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 ('Plevin') (which remains the leading case in this area).*
- *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
- *Patel v Patel [2009] EWHC 3264 (QB) ('Patel').*
- *The Supreme Court's judgment in Smith v Royal Bank of Scotland Plc [2023] UKSC 34 ('Smith').*
- *Carney v NM Rothschild & Sons Ltd [2018] EWHC 958 ('Carney').*
- *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm) ('Kerrigan').*
- *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service [2023] EWHC 1069 (Admin) ('Shawbrook & BPF v FOS').*

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time – which, in this complaint, includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code').

My provisional findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

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

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

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

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

The CCA introduced a regime of connected lender liability under 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 T 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 T at the Time of Sale, the Lender is also liable.

Mrs T says at the Time of Sale the Supplier told her the membership would be an investment but this wasn't true because the product is worthless. But, for reasons I'll go on to explain in more detail, Mrs T's membership clearly had an investment element to it. So, such a statement, if it was said (which I make no finding on here) would not have been untrue. Mrs T'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.

So, while I recognise that Mrs T has concerns about the way in which her Fractional Club membership was sold, she has not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the reason she's alleged.

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

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

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

I've already summarised how Section 75 of the CCA works and why it gives Mrs T 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.

Mrs T suggests that she could not holiday where and when she wanted to – which, on my reading of the complaint, suggests that she considers that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement. Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork generally provided to consumers like Mrs T states that the availability of holidays was/is subject to demand. From the information provided by the Supplier, it also looks like Mrs T was offered holidays but chose not to go ahead with those bookings for other reasons such as there being no direct flights, for example. I accept that she may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

Mrs T also says that the Supplier breached the Purchase Agreement because it ceased trading. I can see that certain parts of the Supplier's business were put into administration. And I can understand why the PR is alleging that there was a breach of the Purchase Agreement as a result. However, neither Mrs T nor the PR have said, suggested or provided evidence to demonstrate that she is no longer:

1. *a member of the Fractional Club;*

2. *able to use her Fractional Club membership to holiday in the same way she could initially; and*
3. *entitled to a share in the net sales proceeds of the Allocated Property when her Fractional Club membership ends.*

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mrs T 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 T 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 T 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 Mrs T 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 T'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.140A(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):

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

"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 T and the Lender, along with all of the circumstances of the complaint, and I do not think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

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

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

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

Mrs T's complaint about the Lender being party to an unfair credit relationship was also made for several reasons, all of which I set out at the start of this decision.

The PR says that the right checks weren't carried out before the Lender lent to Mrs T. 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 T 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. Again, from the information provided, I am not satisfied that the lending was unaffordable for Mrs T. If there is any further information on this (or any other points raised in this provisional decision) that Mrs T wishes to provide, I would invite them to do so in response to this provisional decision.

Mrs T says that she was pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledge that she 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 Fractional Club membership when she simply did not want to. 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. Moreover, from the Supplier's records made at the Time of Sale, by the time Mrs T's presentation had finished, it was too late to complete the purchase that day. So, she was able to consider the purchase overnight and it was then completed the next day. And with all of that being the case, there is insufficient evidence to demonstrate that Mrs T made the decision to purchase Fractional Club membership because her ability to exercise that choice was significantly impaired by pressure from the Supplier.

The PR also said that commission was paid to the Supplier by the Lender at the Time of Sale and because this was not disclosed to Mrs T, this made the credit relationship unfair.

But the PR has not provided any evidence that this was the case, and the Lender has confirmed to this Service that they did not pay any commission to the Supplier.

I'm not persuaded, therefore, that Mrs T's credit relationship with the Lender was rendered unfair to her under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why she says her credit relationship with the Lender was unfair to her. And that's the suggestion that Fractional Club membership was marketed and sold to her as an investment in breach of prohibition against selling timeshares in that way. This is also the reason the Investigator in this case originally upheld the complaint.

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 Mrs T's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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

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

But PR says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In Shawbrook & BPF v FOS, the parties agreed that, by reference to the decided authorities, "an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit" at [56]. I will use the same definition.

Mrs T'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 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 Mrs T 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 Fractional Club 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 Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mrs T, 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 Fractional Club membership was not sold to Mrs T 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. So, I accept that it's possible that Fractional Club 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 Fractional Club 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 T's initial recollections of the sales process at the Time of Sale, I'm not persuaded that is what happened at that time.

When the complaint was originally submitted to the Lender and this Service, no witness statement was provided by either Mrs T or the PR. A witness statement was subsequently provided in January 2024, but this was not signed or dated. The PR has provided the bundle of documents which they say was sent to them, some of which are dated and the witness statement is included in this. But, only one of these documents has a 'received' stamp on it (the copy of the purchase agreement), which was not included on the copy originally provided to the Lender and this Service. So, I don't think this is evidence of when the witness statement itself was actually drafted. And, it's ultimately difficult to explain why the witness statement wasn't included in the original submissions to either the Lender or this Service. So, I have to be mindful that there is a possibility this witness statement has been influenced by the judgement in Shawbrook & BPF v FOS given when it was submitted.

That said, I have still considered what Mrs T has said in this statement.

There firstly appear to be, in my view, some inconsistencies here. For example, for the first half of the statement, Mrs T says 'we' as if there was another person with her during the sales presentation, before switching to 'I' later on. And, according to the Supplier's contemporaneous sales notes, while her husband was on holiday with her, he did not attend the sales process with her. And, it's difficult to explain why Mrs T would have said things like "we were then led to the seminar room…" when she attended the sales process on her own.

Mrs T also fails to mention in her testimony that the purchase wasn't completed that same day but was actually completed the next morning due to it being too late by the time the presentation had finished. Instead, she suggests she signed the agreement on the same day, which from the contemporaneous notes made by the Supplier doesn't appear to be the case.

Mrs T also says she wasn't able to book a holiday with the Supplier and after several failed attempts, she was told she had to book three years in advance. But, the Supplier has said the membership only had a two year booking window and there is no record of the conversation Mrs T has referred to here. And, that holidays were offered to Mrs T on several occasions, but she chose not to book them for other reasons such as there being no direct flights or the check-in days not matching up with flights that were the cheapest.

Given the significance of some of these points it does, in my view, call into question how accurately Mrs T has been able to remember what occurred. And, how much weight I'm able to place on the statement.

Turning to what Mrs T has said regarding the sale of the product as an investment, I can see she has said:

"The representative then explained that to become a member of [the Supplier], I had to purchase a fraction of a property for a number of years as an investment.

[…]

And that at the end of the ownership period the property would be sold and I would get all my money back + accumulated value of the property making this a great investment. The representative further explained that the property would be rented to generate an income which would then benefit from once sold. I was never given a value for the property".

I acknowledge what Mrs T has said here. But, this particular Supplier did not offer a rental scheme, so I don't think it's likely such a statement was made at the Time of Sale. And, it's also unclear from what's been said what exactly was meant by an 'accumulated value' or how exactly this was explained at the Time of Sale.

I note for example that Mrs T has said she was never given a value for the Allocated Property at the Time of Sale. So again, it's unclear how this was explained to her if she was also never given a value for the property at the time.

So, for all of the above reasons, I'm not able to place much, if any, weight on the statement provided. And, in the absence of any other corroborating evidence, I'm therefore not persuaded that the Supplier likely led Mrs T to believe that membership offered her the prospect of a financial gain (i.e., a profit).

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 T'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.

<u>Was the credit relationship between the Lender and Mrs T rendered unfair?</u>

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 Mrs T and the Lender that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) which, having taken place during its antecedent negotiations with Mrs T, 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) led her to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On my reading of Mrs T's testimony, her unhappiness with the membership appears to solely relate to how it functions as a holiday product rather than any unhappiness with it as an investment. For example, she ends her testimony by saying:

> *"The representative also explained that the other benefits included accumulation of points every year that would contribute towards any future holiday accommodation all over the world at any time. This turned out not to be the case as the points could not always be used during the summer holidays. And I found it impossible to book any apartments in majority [sic] of the resorts as [the Supplier] only had access to a handful of places. After several failed attempts at booking a holiday with [the Supplier], I was advised by a booking co-ordinator that I had to book three years in advance to secure any accommodation."*

Further, this aligns with the Supplier's contemporaneous sales notes from the Time of Sale which say Mrs T was purchasing because she wanted to take her daughter on holiday.

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 Mrs T'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 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 T and the Lender was unfair to her even if the Supplier had breached Regulation 14(3).

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Mrs T 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."

Overall, given the facts and circumstances of this complaint, I did not think that the Lender acted unfairly or unreasonably when it dealt with Mrs T's Section 75 claims, and I was 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 could see no other reason why it would be fair or reasonable to direct the Lender to compensate her.

The Lender agreed with the provisional decision and confirmed they had nothing further to add. The PR did not agree and provided some further comments they wished to be considered.

Having received the responses from both parties, I'm now finalising my 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.

Following the responses from both parties, I've considered the case afresh and having done so, I've reached the same decision as that which I outlined in my provisional findings, for broadly the same reasons.

Again, my role as an Ombudsman isn't to address every single point which has been made to date, but to decide what is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, this doesn't mean I haven't considered it.

Rather, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision.

I firstly note that on 7 February 2025, the PR submitted a further complaint to the Lender about the same sale and loan being considered here. Our Service was not made aware of this until 3 April 2025 i.e. the date I issued my PD. But in any event, the Lender did not consider this to be a new complaint and responded to the PR's letter accordingly. And, having reviewed this, this simply appears to be an attempt by the PR to refine the complaint somewhat, at a late stage. Mrs T's complaint ultimately remains the same - that the Lender was party to an unfair credit relationship with her under Section 140A of the CCA and the Lender deciding against paying claims under Section 75 of the CCA.

In their response to the PD, the PR also questioned whether they'd seen certain documentation from the Lender relating to the complaint. But, to remind the PR, the Lender's further submissions following the Investigator's view were shared with them on 26 March 2025 and they were provided with an opportunity to comment on these prior to my PD being issued. And, they had already been provided with a copy of the Supplier's response to the complaint on 14 December 2020 as, from the information available, this was sent to them by email by the Supplier at that time.

Having read the PR's response to the PD in full, they haven't said much that's new here nor have they provided any new evidence to support the allegations they've made. In my view, they are simply repeating the arguments they've made previously. So, I will now address the points they've raised with that in mind.

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

As explained in my PD, the PR says the Supplier misrepresented the Fractional Club membership to Mrs T at the Time of Sale because they told her it was an "investment" when that was not true because it is worthless.

In their response to the PD, the PR said they acknowledge the existence of an investment element in the membership. But, they said the Supplier's representation here wasn't just false but also misleading and created a false impression, as well as being fraudulent. And, that I hadn't considered whether the Supplier's overall representation about the financial outcome of the investment was misleading. They also explained that their original allegation of the membership being 'worthless' also related to the value of the product in relation to holidays and how the Supplier had overstated this. And, overall, that I should consider whether Mrs T was induced to enter into the Purchase Agreement based on these misrepresentations.

As I've explained above, I don't consider that the PR has said much new here, nor have they provided any new evidence to support what they've said. And, in my view, their comments here are simply an attempt to try and refine the complaint point made.

They seem to now accept that the membership did have an investment element to it, as I explained in my PD. But, in summary, have said the Supplier misled Mrs T by overstating the value of the membership as an investment and as a holiday product.

I think it's useful here to again set out what a misrepresentation is. A material and actionable misrepresentation is an untrue statement of existing fact or law made by one party (or his agent for the purposes of passing on the representation, acting within the scope of his authority) to another party that induced that party to enter into a contract.

The misrepresentation doesn't need to be the only matter that induced the representee to enter into the contract. But the representee must have been materially influenced by the misrepresentation and (unless the misrepresentation was fraudulent or was known to be likely to influence the person to whom it was made) the misrepresentation must be such that it would affect the judgement of a reasonable person when deciding whether to enter into the contract and on what terms.

However, a mere statement of opinion, rather than fact or law, which proves to be unfounded, isn't a misrepresentation unless the opinion amounts to a statement of fact and it can be proved that the person who gave it, did not hold it, or could not reasonably have held it. It also needs to be shown that the other party understood and relied on the implied factual misrepresentation.

Given the above, and my concerns about the evidence in this case regarding what Mrs T says she was told at the Time of Sale (and what I think her motivations were for entering into the purchase), all of which I'll come on to further below, I'm still not persuaded there was an actionable misrepresentation here for the reason(s) Mrs T has alleged. I note, for example, the PR has only said the overall value proposition at the point of sale '*may*' have been misrepresented '*if*' the benefits (both holiday and financial) were significantly overstated compared to the reality and the cost. Even if I agreed that there was a misrepresentation here, in any event the PR hasn't provided any evidence which shows that Mrs T relied on these representations when making her purchase.

Further, whether such memberships were of value to consumers in a general sense, either as an investment or as a holiday product seems, in my view, to be a matter of opinion which isn't relevant to whether there was an untrue statement of fact made to Mrs T by the Supplier at the Time of Sale.

So, ultimately, I haven't seen anything which persuades me that this is now a reason to uphold the complaint.

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

Regarding this part of the complaint, the PR has said they feel I've underestimated the significance of the issues they've raised and their impact on the contract.

Regarding availability of holidays, they've said the inability for Mrs T to use the core benefit

of the product fundamentally undermines the contract. And, dismissing this based on the fact that Mrs T declined some bookings offered, for example, fails to address the issue.

But again, the PR has not said much new here, nor provided any new evidence. Rather, it's simply repeating it's stance.

I already acknowledged in my PD that Mrs T may not have been able to take certain holidays. But, I can't see that she wasn't able to take *any* holidays. Again, Mrs T was offered bookings that she declined for other reasons. And importantly here, I can't see that the contract entitled Mrs T to take any holiday, anywhere, at any time. As I explained in the PD, like any holiday accommodation, availability was not unlimited, and this was explained in some of the sales paperwork provided to consumers like Mrs T. So, I'm still not persuaded the Supplier breached the terms of the Purchase Agreement in this regard.

In relation to the Supplier going into administration, the PR said I'd set too high a bar and ignored the material impact on Mrs T. They said this had introduced significant uncertainty as well as potential disruption to services and questionable viability of the agreement in the long term. And, that this was therefore a breach of terms implicitly agreed upon regarding the secure and reliable provision of the benefits over the duration of the contract.

But, the key question here is whether the services the Supplier agreed to provide to Mrs T under the contract continued to be provided. And again, as I explained in my PD, neither Mrs T nor the PR have said, suggested or provided evidence to demonstrate that she is no longer a member of the Fractional Club, no longer able to use her membership to holiday in the same way she could initially or no longer entitled to a share in the net sales proceeds of the Allocated Property when her membership ends. So, while I appreciate the PR's concerns, I still can't see that there has been a breach of contract here for this reason either.

Overall, therefore, I still do not think the Lender acted unfairly or unreasonable when it dealt with the Section 75 claim in question.

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

The Supplier's alleged breach of Regulation 14(3)

Here, the PR reiterated its stance that the Supplier did breach Regulation 14(3) at the Time of Sale by selling membership to Mrs T as an investment. They said they felt I had put too much weight on the relevant disclaimers in the sales paperwork. And it said that due to the nature of the product, it would be difficult for the Supplier to have sold it without breaching the relevant provision.

But again, the PR hasn't said much new here nor has it provided any new evidence. I already acknowledged in my PD that it's possible Fractional Club membership was sold to Mrs T as an investment (despite the aforementioned disclaimers), given both the Supplier's training materials and the difficulty they were likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature without breaching Regulation 14(3). But, while possible, I explained in my PD I didn't think it was *probable* based on the evidence I had seen – and I haven't been provided with anything new that changes my view on that.

And in any event, I explained in my PD that even if I was wrong about that, and the Supplier *did* sell membership to Mrs T as an investment, I didn't think that made a difference to the outcome of the complaint anyway. I'll now address the PR's further comments on that point.

Was the credit relationship between the Lender and Mrs T rendered unfair?

Here, the PR correctly suggests in their response that what needs to be considered here is whether any breach by the Supplier of Regulation 14(3) at the Time of Sale had a material impact on Mrs T's decision to purchase. But, that is what I did in my PD and having considered everything afresh, I still don't think the credit relationship between Mrs T and the Lender was rendered unfair to her for this reason. I'll explain.

Here, the PR has highlighted the following part of Mrs T's witness statement:

> "*And at the end of the ownership period the property would be sold and I would get all my money back + accumulated value of the property making this a great investment.*"

They've said this shows that a financial return was presented as a significant benefit and reason to purchase. And, that it was therefore illogical of me to dismiss this based on Mrs T's other comments about holidays and the sales notes from the time.

But, I think here the PR is confusing the issue of whether there was a breach of Regulation 14(3) at the Time of Sale, and whether any such alleged breach had a material impact on the consumer's purchasing decision. These are two separate issues which it's important not to conflate.

I agree that Mrs T's testimony may potentially indicate the Supplier may have sold membership to her as an investment (notwithstanding the other issues I identified with this evidence in my PD). But, for the same reasons I explained in my PD, I don't consider this alone to be sufficient evidence that any such breach had a material impact on her purchasing decision. Instead, it seems to simply be a description of what potentially she was told during the sale.

The PR went on to provide some further comments regarding the weight they feel I should put on Mrs T's testimony, which I'll now address.

The PR acknowledged what I had said in my PD regarding the timing of the statement and inconsistencies I had identified within it. But, they said that completely dismissing its content was, in summary, unfair. They also said it's well established that inconsistencies are a normal part of recalling memories and shouldn't automatically invalidate the core of the evidence provided.

It's not correct to say that I completely dismissed the evidence Mrs T had provided in her statement. I've still considered it, along with all of the other evidence available, as I'm required to do. But, it's also my role to weigh the relevant evidence and it's up to me to decide how much weight to place on that evidence.

I agree with the PR that inconsistencies are a normal part of providing recollections, and that a consumer's testimony shouldn't be dismissed automatically simply because inconsistencies are present.

But, I do still have to take into account any inconsistencies in the evidence and how this impacts how much weight I can give to the evidence provided. As I explained in my PD, I considered the inconsistencies here to be significant. For example, Mrs T referred to a conversation which the Supplier has no record of having taken place and an element of the membership which did not exist (the Supplier having a rental scheme).

The PR questioned whether my conclusions regarding Mrs T's witness statement were based on submissions from the Lender and Supplier that they hadn't seen or had the chance to respond to. But, as I've outlined above, we've already shared with the PR the documents they've referred to. And, it's important to be clear here that the points I made in my PD (and make again here) are based on my own assessment of all of the evidence provided in this case.

Turning back to the evidence provided, the PR hasn't disputed the points I've made regarding the timing of the witness statement. And, it hasn't provided any new evidence regarding Mrs T's motivations for her purchase at the Time of Sale. I agree with the PR that there can be multiple reasons a consumer may purchase a product, but I don't think it's unfair to rely on Mrs T's own testimony (being mindful of any material inconsistencies as I've outlined above) in relation to her motivation for purchase. And I don't consider it unfair to rely on the sales notes either, since these are contemporaneous evidence made around the

Time of Sale.

So, for all of the above reasons, and those I already explained in my PD, I still don't think that Mrs T's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain. So, it follows that I still do not think the credit relationship between her and the Lender was unfair to her even if the Supplier had breached Regulation 14(3).

Other points

The PR has reiterated that Mrs T was unduly pressured at the Time of Sale. But again, they haven't provided anything new here. For all of the reasons I explained in my PD, there remains insufficient evidence to demonstrate that Mrs T's decision to purchase was made because her ability to exercise that choice was significantly impaired by pressure from the Supplier. As I've said, Mrs T still has not provided a credible explanation for why she did not cancel the membership during the 14-day cooling off period. And again, given that Mrs T was able to consider her purchase overnight and it was then completed the next day, it's difficult to see an unfairness here that requires a remedy.

The PR has also reiterated that the Lender's assessment of Mrs T's ability to afford the loan contributed to the unfairness of the credit relationship. They haven't provided anything new here either and I note they've acknowledged that it's difficult to prove the loan was unaffordable with a lack of evidence about Mrs T's financial circumstances in 2016 when the loan was taken out. The PR said that I shouldn't only consider actual unaffordability but also the Lender's process and due diligence and questioned whether the Lender obtained sufficient verified information to make a responsible lending decision.

But, as I already explained in my PD, even if I agreed that the Lender failed to do everything it should have when it agreed to lend (and I still make no such finding), I would have to be satisfied that the money lent to Mrs T was unaffordable before also concluding that she lost out as a result and then consider whether the credit relationship was unfair to her for this reason. As the PR has provided no further evidence, I still don't think the lending was unaffordable for Mrs T.

The PR also again raised the issue of commission, saying that even if commission was not paid there was still an unfairness, in summary, due to the close connection between the Supplier and the Lender. But, as I explained in my provisional decision, there was no commission paid in this case. I therefore fail to see how this caused any unfairness in the credit relationship between Mrs T and the Lender, or the relevance of the 'interconnectedness' of the Supplier and the Lender to this issue.

Lastly, the PR said that I needed to look beyond the contract terms to the overall context and conduct of the Supplier and Lender. And, that I should have explicitly considered the Supplier's conduct against the aforementioned RDO code. But, as I outlined in my PD, I have considered the entirety of the credit relationship between Mrs T and the Lender, not just the contractual terms. And, I also explained that I'd taken the RDO code into account in reaching my conclusions – it's not necessary for the purposes of this decision to go through each part of the code in turn in the way the PR has suggested. As I explained at the outset of this decision, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision. This is in line with our Service's role, which includes resolving complaints with minimum formality.

So, for the reasons I've explained above, as well as those already outlined in my provisional decision (set out above), I still don't think the credit relationship between the Lender and Mrs T was unfair to her for the purposes of Section 140A. And taking everything into account, I still think it's fair and reasonable to reject this aspect of the complaint on that basis.

Conclusion

Overall, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mrs T's Section 75 claims, and I'm 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. I also don't see any other reason why it would be fair or reasonable to direct the Lender to compensate her.

My final decision

For the reasons set out above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs T to accept or reject my decision before 9 June 2025.

Fiona Mallinson
Ombudsman