DRN-5498503

The complaint

Mr and Mrs M complain that First Holiday Finance Ltd (the "Lender") has failed to uphold claims they brought under Section 75 of the Consumer Credit Act 1974 ("CCA") and Section 140A of the same act, in respect of alleged mis-selling of a timeshare financed by a loan provided by the Lender.

What happened

I issued a provisional decision on Mr and Mrs M's case on 5 April 2025, in which I set out the background to, and my provisional findings on, the complaint. A copy of the provisional decision is appended to, and forms a part of, this final decision. Because of this, it's not necessary for me to go over all the details again, but I'll summarise the context to Mr and Mrs M's complaint briefly:

- Mr and Mrs M bought a membership to a timeshare club (the "Fractional Club") in May 2013, from a timeshare provider (the "Supplier"). The membership cost £14,709, which included the trade-in of an existing timeshare and the consolidation of previous borrowing with the Lender. The purchase was financed by a £500 card payment and a further loan of £14,209 from the Lender, which included an amount to refinance Mr and Mrs M's existing borrowing.

- Mr and Mr M later complained that the timeshare had been mis-sold due to misrepresentations and other wrongful acts or omissions by the Supplier, which included selling the timeshare as an investment in contravention of the regulations which cover the sale of timeshares (the "Timeshare Regulations"). Mr and Mrs M sought to bring their complaint against the Lender (as opposed to the Supplier) on two grounds:

    - The Lender was jointly liable for the Supplier's misrepresentations under Section 75 of the CCA.

    - The Supplier's wrongful acts or omissions, along with the Lender's own irresponsible lending decision, had rendered the credit relationship between them and the Lender, unfair under Section 140A of the CCA.

In my provisional decision, I said I was not minded to uphold Mr and Mrs M's complaint. The full reasoning and analysis can be found in the appended document, but to again summarise briefly:

- The various statements Mr and Mrs M had said were misrepresentations by the Supplier were either:

    - Not misrepresentations – because the statements had not been false statements of fact.

    - Lacking evidence that they had been made, or made in the way Mr and Mrs M had alleged.

- The credit relationship with the Lender had not been rendered unfair for the reasons alleged, because:
    - No commissions, secret or otherwise, had been paid by the Lender to the Supplier.
    - While there was insufficient information to determine whether or not the Lender had carried out proportionate checks before lending to Mr and Mrs M, no evidence had been submitted of the loan actually being unaffordable.
    - I was unable to conclude Mr and Mrs M had only made their purchase in May 2013 because their ability to exercise a choice to do so had been significantly impaired by pressure from the Supplier.
    - There was an absence of persuasive evidence that the Supplier had sold or marketed the purchase in May 2013 to Mr and Mrs M as an investment. But even if it had done so, there was a lack of evidence that Mr and Mrs M's purchasing decision had been materially influenced by this, which would have been necessary to render the credit relationship unfair.
    - It was possible that some of the terms of the agreement with the Supplier had the potential to operate in an unfair way, but there was no evidence that the terms had led to unfairness arising in Mr and Mrs M's case.

A key factor in a number of my conclusions relating to things which had occurred at the time of sale, was Mr and Mrs M's recollections of what had happened. Of their witness statement, I noted that:

"…it reflects a lack of clear recollection on the part of Mr and Mrs M as to what was said at the time and what their motivations were for their purchase in May 2013. I say this because the witness statement is rather unclear about which purchase Mr and Mrs M are referring to. This is one of the reasons why I requested clarification. And from Mr and Mrs M's response, I think it's unclear if they have any recollection of the May 2013 purchase at all. It seems they do not even recall if they made any payment when they changed from their previous product with the Supplier, to the Fractional Club membership. I note that Mr and Mrs M also make no mention in their clarification, of the Supplier having described any of the products they purchased as an investment, either expressly or implicitly."

I then went on to say:

"I note that there is no real indication in Mr and Mrs M's testimony (either in their witness statement or later), as to why they made their purchase in May 2013. The only evidence available to me is the Supplier's notes from the time, which recorded: "1050 [points] [Fractional Club] 2 weeks FHF cons[olidation] with no giveaways. No queries on product and need more points. Understand [maintenance fee] increase." *This suggests Mr and Mrs M added more points to their existing membership in order to increase their holiday options, not because they were motivated by the prospect of a financial gain."*

I asked both parties to the complaint to provide any further submissions they would like me to consider before I made my final decision. The Lender said it accepted the provisional decision and had no further comment at this time. Mr and Mrs M's professional representative ("PR") expressed its disagreement with the provisional decision. I could summarise the points it raised as follows:

- While they appreciated the passage of time could have caused Mr and Mrs M to

conflate different sales presentations by the Supplier, other ombudsmen had upheld similar complaints, placing reliance on what consumers had remembered being told about the Fractional Club product and their rationale. Mr and Mrs M had clearly stated their motivations for buying the product.

- It was known that the Supplier's sales presentations followed a broadly similar format, which included marketing the product as an investment.

- It considered my provisional decision mis-applied the judgment in the judicial review of *Shawbrook & BPF v* FOS, by finding that Mr and Mrs M's motivation for making their purchase needed to be a prospect of a financial gain or profit, in order for the credit relationship to be rendered unfair. PR considered that if the Timeshare Regulations had been breached, then an unfair credit relationship was the inevitable result.

PR also provided a copy of Mr and Mrs M's response to my provisional decision. In this, Mr and Mrs M expressed their disappointment at the decision and elaborated on their recollections of their relationship with the Supplier.

The case has now been returned to me to review once again.

What I've decided – and why

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

Having done so, I've arrived at the same conclusions I reached in the appended provisional decision and summarised above, and for the same reasons. However, it's important for me to address the points raised by PR and Mr and Mrs M in their responses. I do understand Mr and Mrs M's disappointment, especially considering my provisional decision overturned the findings reached by our Investigator.

Firstly, cases turn on their individual facts and circumstances along with the evidence supplied. So while it may be the case that other ombudsmen have decided cases differently which had broadly similar factual backgrounds, it doesn't necessarily follow that all cases will be decided the same way. My provisional decision was based on the specific facts, circumstances and evidence associated with Mr and Mrs M's case – something which I think was clear from the provisional decision itself.

While I agree with PR that recollections are important, I don't agree that Mr and Mrs M's recollections are helpful to their case, or that they had clearly stated their reasons for buying the product. My analysis of their recollections is reproduced above and I've not seen anything since to indicate this analysis is incorrect.

Mr and Mrs M have said, in response to the provisional decision, that they were *"…talked into going onto fractional points which we were told would give us the investment into property which we would own or could sell, which was untrue."* However, it appears they are again referring to an earlier purchase from the Supplier, when they first purchased Fractional Club membership, and not the purchase this complaint is about. It is also not entirely consistent with previous recollections, in which Mr and Mrs M suggested the Supplier had told them they were being moved from their previous product to the Fractional Club, presenting the situation as a *fait accompli* rather than something which they had persuaded Mr and Mrs M to buy.

It doesn't seem to me that Mr and Mrs M really remember what happened at the time of sale

in May 2013, or indeed at the time of some other purchases they made from the Supplier. This is understandable so many years later, and I make no criticism of them for it, but it does make it very difficult to conclude that the Supplier sold or marketed the Fractional Club product to them in May 2013 as an investment, or that this was a reason *why* they made that specific purchase.

I do of course appreciate PR's point that the Supplier is likely to have sold Fractional Club membership in a broadly consistent way to different consumers. I outlined some of my observations about the training and sales materials in the provisional decision, and noted that these left open the possibility that the product would have been marketed or sold as an investment. But I concluded that even if it had, there was insufficient evidence this had had a material impact on Mr and Mrs M's purchasing decision in May 2013. PR has challenged this, suggesting it is inconsistent with the judgment in *Shawbrook & BPF v FOS*. I don't think that's the case at all. Causation is an important consideration when determining whether a credit relationship has been rendered unfair, and I went into some detail on this point in the provisional decision, quoting from the relevant case law, including *Plevin*, *Kerrigan* and *Carney.* PR has not addressed this analysis or pointed out why it thinks it is wrong, and in my view it remains a reasonable position.

Ultimately, having considered everything again, I see no reason to depart from the conclusions I reached in the appended provisional decision.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs M to accept or reject my decision before **20 May 2025**.

Will Culley
Ombudsman

COPY OF PROVISIONAL DECISION

I've considered the relevant information about this complaint.

Having done so, I'm minded to arrive at a different set of conclusions to our Investigator, so I am issuing a provisional decision to give the parties to the complaint an opportunity to comment further, before I make my decision final.

The deadline for both parties to provide any further comments or evidence for me to consider is **16 April 2025**. Unless the information changes my mind, my final decision is likely to be along the following lines.

If I don't hear from Mr and Mrs M, or if they tell me they accept my provisional decision, I may arrange for the complaint to be closed as resolved without a final decision.

The complaint

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

What happened

Mr and Mrs M purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 21 May 2013 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,050 fractional points at a cost of £14,709 (the 'Purchase Agreement'). The cost included the trade-in of an existing timeshare, which this complaint is not about, and the consolidation of debt owed under a previous loan with the Lender.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs M more than just holiday rights. It also included a share in the net sale proceeds of a property named on their Purchase Agreement (the 'Allocated Property') after their membership term ends. The membership entitled Mr and Mrs M to exchange their fractional points annually for accommodation available in the Supplier's portfolio.

Mr and Mrs M paid for their Fractional Club membership by making an advance payment of £500 and taking finance of £14,209 from the Lender (the 'Credit Agreement'). £10,330 of the loan was a re-financing (consolidation) of an existing loan with the Lender which had been used to fund a previous purchase.

Mr and Mrs M – using a professional representative (the 'PR') – wrote to the Lender on 14 February 2019 (the 'Letter of Complaint'). While the complaint was not clearly particularised, it was, in essence, about the following:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. 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) <u>Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale</u>

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

1. told them that Fractional Club membership was a guaranteed exit from their timeshare when that was not true.
2. told them that Fractional Club membership was a way of owning property when that was not true.
3. told them that Fractional Club membership was an "investment" when that was not true either.
4. told them that the Supplier's holiday resorts were exclusive to its members and made up of five-star accommodation, when that was not true.
5. told them there would be excellent availability of holiday accommodation, but this turned out not to be the case.

Mr and Mrs M say that they have a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs M.

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

The Letter of Complaint set out several points of complaint which I've interpreted as reasons why Mr and Mrs M think the credit relationship with the Lender was unfair to them under Section 140A of the CCA. In summary, they include the following:

1. Fractional Club membership was marketed and sold to them as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. The contractual terms setting out (i) the duration of their Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of their membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
3. They were pressured into purchasing Fractional Club membership by the Supplier, over a period of six hours in which they were told they must convert their membership to the Fractional Club.
4. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
5. The Lender paid a secret commission to the Supplier for arranging the Credit Agreement.

The Lender dealt with Mr and Mrs M's concerns as a complaint. It initially referred the complaint to the Supplier for a response. Later, in July 2020, it responded to the complaint itself, rejecting it.

Mr and Mrs M referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, thought it should be upheld. Our Investigator reasoned that the Supplier had likely breached regulation 14(3) of the Timeshare Regulations when selling the Fractional Club membership to Mr and Mrs M, rendering the credit relationship between them and the Lender unfair.

The Lender disagreed with this assessment. I could summarise its points as follows:

- It considered a witness statement supplied by PR and allegedly written by Mr and Mrs M in 2018, was not what it purported to be. In particular, the document metadata suggested it had been written in 2023, not 2018.

- In any event, the witness statement was full of errors and inaccuracies which called into question its reliability. These included:

    - Mr and Mrs M recalling they had been on a free week when they made their purchase, when in fact they had used their existing points to take the holiday in question.
    - It being impossible that they had been told they had to upgrade their membership to a Fractional Club membership, or as an exit strategy from their existing timeshare, because they were *already* Fractional Club members.
    - It being claimed that the sale lasted for six hours – contemporary sales notes indicated the sale had been completed by 1:30pm.
    - That they had never heard of the Lender – this was impossible because the loan was their fourth loan with the Lender.

- It had seen notes from the Supplier's systems which indicated Mr and Mrs M had made their purchase in May 2013 because they needed more points to take holidays. It also said the Supplier had only had problems fulfilling their holiday requirements on two occasions, and that because Mr and Mrs M had stayed with the Supplier as non-members in 2011, they could not have understood that resorts were exclusive to members.

Our Investigator considered these concerns but ultimately rejected them. No agreement could be reached, and the case has now been passed to me to decide.

Prior to writing this decision, I asked both the Lender and Mr and Mrs M to provide more information about their history of purchases from the Supplier. That's because it was unclear what previous relationship Mr and Mrs M had with the Supplier, prior to May 2013, and I considered the witness statement may have been referring to different purchases, based on how it had been written. I asked if Mr and Mrs M could specifically recall how each purchase had been sold to them.

The Lender said Mr and Mrs M had made four purchases with the Supplier, all financed by loans it had provided. They had made their first purchase of a membership in the Fractional Club in March 2012.

Mr and Mrs M said the following:

"We went to Tenerife on a free week promotion for the new resort and when we were there around the 3rd day we were asked to join the rep in the offices on the complex where we sat and endured around 6/8 hrs of persuading us why we should join the club and purchase select weeks throughout the year in our very own apartment, we agreed to purchase more so to get out of the environment we was subject to.

We then returned to Tenerife on a select week at the same resort and were again pressured to upgrade the package we had already purchased, which as I remember we did. Then again on a separate visit, we were told our package had changed and we had been moved to a fractions program, I can't remember if we paid a further amount at this stage.

The free week was given to us when we were in Tenerife on holiday before we were involved in [Supplier], and I remember when we booked we had to pay a charge for something, but can't remember what, I think maybe they called it a booking charge, I don't remember the dates…"

The legal and regulatory context

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

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

- The CCA (including Section 75 and Sections 140A-140C).
- The law on misrepresentation.
- The Timeshare Regulations.
- The UTCCR.
- 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').

What I've provisionally 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 having done that, I do not currently think this complaint should be upheld.

But before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair

and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

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

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

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

In short, a claim against the Lender under Section 75 essentially mirrors the claim Mr and Mrs M could make against the Supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender does not dispute that the relevant conditions are met in this complaint. And as I'm satisfied that Section 75 applies, if I find that the Supplier is liable for having misrepresented something to Mr and Mrs M 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. They include the suggestion that Fractional Club membership had been misrepresented by the Supplier because Mr and Mrs M were told that they would be owning property when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties would not have been untrue. Mr and Mrs M's share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.

As for the rest of the Supplier's alleged pre-contractual misrepresentations, while I recognise that Mr and Mrs M have concerns about the way in which their Fractional Club membership was sold, they have not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the other reasons they allege. And I say that because:

- It's difficult to see how the May 2013 purchase could have been presented to Mr and Mrs M as a means of achieving a guaranteed exit from their timeshare. This is because Mr and Mrs M were simply adding more points to their existing Fractional Club membership, and it appears the end dates of these would have been the same.

- If the Supplier told Mr and Mrs M that the membership was an investment, then this wasn't false, as there was an investment element to the product (the right to receive the share of the net sale proceeds of the Allocated Property). Marketing a timeshare in this way was prohibited however – and I'll go into that in more detail later in this decision.

- It's also difficult to conclude the Supplier misrepresented the availability of holidays which could be taken under the membership. It's been said the Supplier claimed the availability would be "excellent", which is rather a general statement and difficult to quantify. I note the documents Mr and Mrs M signed, stated that holidays would be

subject to availability, bookings were on a "first-come, first-served" basis, and that accommodation during school holidays in particular needed to be booked as far in advance as possible.

- Regarding the lack of exclusivity, and the standard of the accommodation, the contemporaneous documents I've seen relating to the membership do not say that the resorts in the Supplier's portfolio were exclusive to members. Resorts owned by the Supplier were described as "mixed use", while other resorts were described as resorts in which the Supplier had *"secured accommodation…under its control"* or which were *"available through [our] partnerships with other resorts"*. None of this appears to state or imply that the resorts within the portfolio could only be booked by members. I also note none of these documents describe the accommodation as "five-star", and while I've no doubt the Supplier would have promoted the quality of its resorts and its services more generally, I've not seen evidence that it made specific false statements about them.

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

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

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

I have already explained why I am not persuaded that the contract entered into by Mr and Mrs M was misrepresented by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But I've also interpreted Mr and Mrs M's complaint as being that the credit relationship between them and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that they have concerns about. It is those concerns that I explore here.

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

Under Section 140A of the CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as *"a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]"*. And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to *"finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."*

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

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

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

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

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

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

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

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

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

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

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

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

Mr and Mrs M have alleged a secret commission was paid by the Lender to the Supplier at the Time of Sale. However, my understanding is that although some lenders paid commissions to the Supplier for some sales, the Lender in this case (which was a company associated with the Supplier) did not pay commission to the Supplier. So this point of complaint gets Mr and Mrs M no further.

The PR says that the right checks weren't carried out before the Lender lent to Mr and Mrs M. I don't have enough information to be able to make a determination on this point either way. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mr and Mrs M was actually unaffordable before also concluding that they lost out as a

result and then consider whether the credit relationship with the Lender was unfair to them for this reason. From the information provided, I am not satisfied that the lending was unaffordable for the Mr and Mrs M. If there is any further information on this (or any other points raised in this provisional decision) that Mr and Mrs M wish to provide, I would invite them to do so in response to this provisional decision.

Mr and Mrs M say they were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. They say that the process took six hours and they were either told they had to convert their membership to a Fractional Club membership, or that it was presented to them as a *fait accompli*. The Lender disputes the sales process was this long, although I nevertheless acknowledge that Mr and Mrs M may have felt exhausted after a sales process that went on for a long time. However, a significant problem here is that I don't think their recollections can relate to the purchase they have complained about. In May 2013, they *already had* a Fractional Club membership, so it's difficult to see how they could have been told they must convert their membership at that point in time. They were also given a 14-day cooling off period and they have not provided a credible explanation for why they did did not cancel their purchase during that time, if they did not want to purchase more points. With all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs M made the decision to add more points to their Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

I'm not persuaded, therefore, that Mr and Mrs M's credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why they say their credit relationship with the Lender was unfair to them And that's the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs M 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.

Mr and Mrs M's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in

Regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr and Mrs M as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs M, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was for the primary purpose of holidays and that no representations were made as to the future value of the share in the Allocated Property.

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 Mr and Mrs M 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.

Indeed, in their witness statement, Mr and Mrs M did describe being told by the Supplier that the Fractional Club membership was an investment. Specifically, they said:

"As part of this system, we would have partial ownership of a complex somewhere. This partial ownership was to be an investment, and after 15 years the property would be sold. After this time, we would expect that our investment would grow and provide us with a return."

Direct testimony in cases involving a dispute over what was said verbally during a sales process, is often very important evidence. The Lender has challenged and criticised the witness statement. I don't share the Lender's concerns about the statement being a complete fabrication by PR, but I do think it reflects a lack of clear recollection on the part of Mr and Mrs M as to what was said at the time and what their motivations were for their purchase in May 2013. I say this because the witness statement is rather unclear about *which* purchase Mr and Mrs M are referring to. This is one of the reasons why I requested clarification. And from Mr and Mrs M's response, I think it's unclear if they have any recollection of the May 2013 purchase at all. It seems they do not even recall if they made any payment when they changed from their previous product with the Supplier, to the Fractional Club membership. I note that Mr and Mrs M also make no mention in their clarification, of the Supplier having described any of the products they purchased as an investment, either expressly or implicitly.

In light of the evolving account of events, and the apparently significant gaps in Mr and Mrs M's recollections, I think there is an absence of persuasive evidence to suggest that the

Supplier led them to believe that membership offered them 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 Mr and Mrs M'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, for reasons I'll explain.

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

As the Supreme Court's judgment in *Plevin* makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

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

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

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

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

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

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

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs M and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

But as I've already said, my concerns about Mr and Mrs M's recollections of the sales process at the Time of Sale means I have been unable to find that the Supplier led them to believe that the Fractional Club membership was an investment from which they would make a financial gain. It follows that I find there was no indication that they were induced into the purchase on that basis. I note that there is no real indication in Mr and Mrs M's testimony (either in their witness statement or later), as to why they made their purchase in May 2013. The only evidence available to me is the Supplier's notes from the time, which recorded: *"1050 [points] [Fractional Club] 2 weeks FHF cons[olidation] with no giveaways. No queries*

on product and need more points. Understand [maintenance fee] increase." This suggests Mr and Mrs M added more points to their existing membership in order to increase their holiday options, not because they were motivated by the prospect of a financial gain.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Mrs M'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). And for that reason, I do not think the credit relationship between Mr and Mrs M and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

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

It is clear from the submissions of everyone involved in this complaint that a lot of information, in the form of terms and conditions, checklists, information statements and other documents, passed between the Supplier and Mr and Mrs M when they purchased additional points in the Fractional Club at the Time of Sale. PR says that the contractual terms governing the ongoing costs of Fractional Club membership and the consequences of not meeting those costs were unfair contract terms under the UTCCR.

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

However, as I've said before, the Supreme Court made it clear in *Plevin* that it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A of the CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

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

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

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

The documents the Supplier provided and Mr and Mrs M signed at the Time of Sale in May 2013, set out some information about the ongoing costs that would be associated with the contracts. Broadly speaking, this information included the fact there would be ongoing management charges to pay and what these charges would be for the first year of membership. There was also an indication that the charges would increase over time, but

there was not much information about how the charges would be calculated, or what exactly they covered. Mr and Mrs M were directed to other, rather lengthy, documents, to find out more, but the Supplier did not say where in these documents the relevant information could be found. In these other documents there were details of additional costs which were not mentioned in the documents signed at the Time of Sale.

It follows that it's possible the Supplier didn't meet the requirements of regulation 12 of the Timeshare Regulations to provide, in the prescribed way, an accurate and appropriate description of all costs. And while I've not analysed in detail the position regarding whether any of the terms relating to the management charges were unfair under the UTCCR, I think it's possible that some of the terms had the potential to operate in an unfair way, taking into account the lack of transparency and the level of discretion given to the Supplier as to the setting of various charges. I think it's also possible that terms which could lead to Mr and Mrs M forfeiting their membership and Fractional Club rights for non-payment of management fees, or being liable for management fees for longer than they had expected, had the *potential* to operate in an unfair way.

But given the facts and circumstances of this complaint, I am not persuaded that the Supplier's alleged breaches of regulation 12 of the Timeshare Regulations and the UTCCR are likely to have prejudiced Mr and Mrs M's purchasing decision at the Time of Sale and rendered their credit relationship with the Lender unfair to them for the purposes of section 140A of the CCA. And I say this because:

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

Secondly, Mr and Mrs M have not provided any information or evidence which would lead me to believe that any potential breaches of regulation 12 of the Timeshare Regulations, or the inclusion by the Supplier of unfair terms in their Purchase Agreement, has led to any significant harm or unfairness arising *in practice*. The points made by PR on their behalf have been hypothetical ones.

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

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Mr and Mrs M was unfair to them for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

Conclusion

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

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

My provisional decision

For the reasons explained above, I am not minded to uphold Mr and Mrs M's complaint. I now invite the parties to the complaint to let me have any further submissions they'd like me to consider, by **16 April 2025**.

Will Culley
Ombudsman