DRN-5501211

The complaint

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

Background to the complaint

Mr C and Ms S bought a trial membership from a timeshare provider (the 'Supplier') on 18 August 2011, which was funded by other means and falls outside of the scope of this complaint. On 30 November 2011 (the 'Time of Sale 1'), they purchased membership of a timeshare (the 'Fractional Club 1') from the Supplier. They entered into an agreement with the Supplier to buy 1,290 fractional points at a cost of £21,000 (the 'Purchase Agreement 1'). But after trading in their existing trial timeshare membership, they ended up paying £15,000 for membership of the Fractional Club 1.

Mr C and Ms S paid for their Fractional Club 1 membership by taking finance of £14,500 from the Lender (the 'Credit Agreement 1'). They paid the remaining £500 by other means.

While on holiday on 5 December 2012 (the 'Time of Sale 2'), Mr C and Ms S purchased another timeshare ('Fractional Club 2') from the Supplier. They entered into an agreement with the Supplier to buy 2,241 fractional points. I have not been given a copy of Purchase Agreement 2 by either party, but I have calculated the cash price of Fractional Club 2 to be £11,949 (the 'Purchase Agreement 2'). Mr C and Ms S paid for their Fractional Club 2 membership by taking finance of £25,694 from the Lender (the 'Credit Agreement 2') and paid the remaining £500 by other means. Credit Agreement 2 included the consolidation of the remaining balance from Credit Agreement 1.

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

Mr C and Ms S – using a professional representative (the 'PR') – wrote to the Lender on 3 December 2018 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

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

Mr C and Ms S say that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale 1 – namely that the Supplier:

1. told them they were guaranteed that they would not have to pay maintenance fees, however this was not true.

2. told them that Fractional Club 1 membership had a guaranteed end date when that was not true.
3. told them that they would have "guaranteed availability" of accommodation at the time and place of their choosing, but this was not true.
4. told them that the Supplier's holiday resorts were exclusive to its members when that was not true.

Mr C and Ms S say that the Supplier also misrepresented Fractional Club 2 membership to them at the Time of Sale 2, saying that they were disappointed with the resorts they booked using their Fractional Club 1 membership. They say they were told that they would be able to obtain a higher standard of accommodation if they upgraded their points, but this was not true as there was no change in the standard of accommodation from before.

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

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

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

1. They were pressured into purchasing both the Fractional Club 1 and 2 memberships by the Supplier.
2. There was a payment of commission, and this was not disclosed.
3. The Fractional Club 1 membership was sold to them as an investment.

The PR has also raised the same above allegations of misrepresentation as part of the claim under Section 140A of the CCA.

The Lender dealt with Mr C and Ms S's concerns by passing these to the Supplier, who rejected the complaint in its entirety.

Mr C and Ms S 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 about the sale of Fractional Club 1 on its merits and rejected the complaint about the sale of Fractional Club 2 membership.

The Lender disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. Mr C and Ms S and their PR did not reply.

And having considered the complaint, I reached a different outcome than that of the Investigator. I set out my initial thoughts in a Provisional Decision ('PD'). I invited both the Lender and Mr C and Ms S, and their PR, to respond with any new evidence and arguments if they wished to.

In my PD, I began by setting out the legal and regulatory context:

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 Unfair Terms in Consumer Contracts Regulations 1999*
- *The Consumer Protection from Unfair Trading Regulations 2008*
- *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 Mr C and Ms S could make against the Supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender does not dispute that the relevant conditions are met in this complaint. And as I'm satisfied that Section 75 applies, if I find that the Supplier is liable for having misrepresented something to Mr C and Ms S at the Time of Sale, the Lender is also liable.

While I recognise that Mr C and Ms S have concerns about the way in which their Fractional Club memberships were sold, they have not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale 1 or 2 for the reasons they allege. And I say that because they haven't provided me with much detail about what was said by the Supplier, or what happened when they found out the representations were not true. For instance, they say the Supplier told them they would not need to pay maintenance fees as part of the Fractional Club 1 agreement, but I am not persuaded the Supplier would have said this when the Purchase Agreement includes information about the annual management charge, which was £898 for the following year, and that this would be payable every year after.

They have also said in their witness statement that they "still received maintenance fee demands", but prior to the purchase of Fractional Club 1 membership they had only a trial membership. This entitled Mr C and Ms S to five weeks of holidays to be used in a selection of resorts, but they were not liable to pay any maintenance fees as trial members. So, I do not follow why they were unhappy that they "still" had to pay the fees when they didn't have to pay them before entering the agreement. And if they were made to pay the fees when they were told they would not need to pay them, I would expect more detail from them about what happened when they first received the invoice for the fees, but instead, they seem to have paid the fees every year until 2017.

Mr C and Ms S allege that they had to book holidays two years in advance, that "all the locations that we did book were in rural and remote areas", and that the resorts "failed to have a jacuzzi or many other amenities that were so desirable". But they have not provided any detailed testimony or evidence to support their position that they were told something at the Time of Sale 1 or 2 that turned out to not be true. And the Supplier says that they used their memberships a total of 16 times, booking holidays at an average of 106 days' notice.

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

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

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

I have already explained why I am not persuaded that the contracts entered into by Mr C and Ms S were misrepresented (or breached) by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Mr C and Ms S also say that the credit relationships between them and the Lender were 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 1 and 2 that they have concerns about. It is those concerns that I explore here.

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

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

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

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

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr C and Ms S's memberships of the Fractional Clubs were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

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

"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.' […] Sections 56 and 140A(3) provide

for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."

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

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

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

"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[1]

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

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

1. *The Supplier's sales and marketing practices at the Time of Sale 1 and 2 – which includes training material that I think is likely to be relevant to the sales; and*
2. *The provision of information by the Supplier at the Time of Sale 1 and 2, 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 1 and 2;*
4. *The inherent probabilities of the sales given the circumstances of each.*

I have then considered the impact of these on the fairness of the credit relationship between Mr C and Ms S and the Lender.

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

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

Mr C and Ms S say that they were pressured by the Supplier into purchasing the Fractional Club 1 and 2 memberships at the Time of Sale 1 and 2. I acknowledge that they may have felt weary after a sales process that went on for a long time. But they say little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to. They were also given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel their membership during that time. Moreover, they did go on to upgrade their Fractional Club 1 membership – which I find difficult to understand if the reason they went ahead with that purchase was because they were pressured into it. The Supplier also says that they did not proceed with the Fractional Club 1 membership purchase until the day after the presentation took place. And with all of that being the case, there is insufficient evidence to demonstrate that Mr C and Ms S made the decision to purchase Fractional Club 1 and 2 memberships because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

The PR and Mr C and Ms S say that the Lender and the Supplier did not disclose any payment of commission. But they have not provided any evidence to support its position that there was any commission paid as part of either transaction. As the Lender was, in effect, the Supplier's in-house finance provider, I am not persuaded that there was likely to have been any payment of commission made as part of either Credit Agreement.

I have also thought about whether the alleged misrepresentations might have led to the relationship being unfair. For the same reasons I gave in the earlier section of my provisional decision, I don't think the Supplier misrepresented either of the Fractional Club memberships to Mr C and Ms S.

I'm not persuaded, therefore, that Mr C and Ms S'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 why they say their credit relationship with the Lender was unfair to them. And that's the suggestion that Fractional Club 1 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 C and Ms S's Fractional Club 1 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 Mr C and Ms S and the PR say that the Supplier did exactly that at the Time of Sale 1. 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 C and Ms S'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 1 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 1. They just regulated how such products were marketed and sold.

To conclude, therefore, that the Fractional Club 1 membership was marketed or sold to Mr C and Ms S as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold the 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.

I am aware of evidence to support that the Supplier made efforts to avoid specifically describing membership of the Fractional Club 1 as an 'investment' or quantifying to prospective purchasers, such as Mr C and Ms S, the financial value of their shares in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. I have not seen the specific paperwork relating to this purchase, but I have seen copies of paperwork that were provided alongside other memberships purchased by different customers around the same time as Mr C and Ms S made their purchase of their Fractional Club 1 membership. This includes disclaimers in the contemporaneous paperwork that state that Fractional Club 1 membership was not sold to customers like Mr C and Ms S as an investment.

With that said, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. And I accept that it's possible that Fractional Club membership was marketed and sold to them as an investment in breach of Regulation 14(3) given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Club membership without breaching the relevant prohibition.

However, I don't think it is necessary to make a finding on this point because, as I'll go on to explain, I am not currently persuaded that would make a difference to the outcome in this complaint anyway.

Was the credit relationship between the Lender and Mr C and Ms S rendered unfair?

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

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

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

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

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

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

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

So, it seems to me that, if I were to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr C and Ms S and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) which, having taken place during its antecedent negotiations with Mr C and Ms S, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender) lead them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

But I am not currently persuaded that it did. I will explain why.

Looking closely at what Mr C and Ms S say happened at the Time of Sale 1, I note that they do say they were sold Fractional Club 1 as an investment, saying:

"It was so confusing in there that ultimately, we were not aware of what it was that we were actually buying or selling[.] It just did not make sense [.] The added benefit of using this

system was that we would have partial ownership of a complex somewhere[.] As this was partial ownership, we were told that this was an investment[.] Mainly because, the value of the property would increase and after a certain amount of years the property would be sold, and we would get our money back with some return".

I have thought carefully about what Mr C and Ms S have said about what they were told at the Time of Sale 1. Having done so, I am not persuaded that they were motivated to enter the agreement by the prospect of making a profit from their membership. I will explain why I have reached this conclusion.

Firstly, I find it difficult to place sufficient weight on Mr C and Ms S's testimony as they say they weren't aware of what they were buying and that it did not make any sense to them. And, when I consider what they do say, as retold by the PR, I find that the above phrases lack the necessary colour and context for me to understand what exactly was said by the Supplier that made them believe the product they were purchasing was an investment that would lead to them making a profit. Their testimony does not provide any insight into what they thought about the potential to make money from the membership. They refer to the investment element of their Fractional Club 1 membership as an "added benefit", which to me suggests that it was not something that drove their decision to make the purchase. And they do not make any further mention of the investment element, either in their testimony about their Fractional Club 1 membership, or when they later upgraded to the Fractional Club 2 membership.

Mr C and Ms S's testimony taken as a whole does go into some more detail about what they say they were told about the holiday rights. For instance, they say that they were told they would be able to take holidays during the school holiday period and that they would have guaranteed availability "whenever and wherever" they wanted to go on holiday. Their recollections of what they were told about their holiday rights are significantly more detailed and specific to their circumstances compared to their recollection that the purchases involved an investment in property. I have also considered a contact note from the Supplier dated 22 February 2016, which says that Ms S acknowledged the maintenance fee payment for that year was late. The note suggests that she thought she wasn't getting the best use from the membership, so the Supplier explored different holiday options with her, including cruises and different destinations. So, I think the holiday rights were what ultimately persuaded her and Mr C to enter the agreement and their disappointment with the membership was largely driven by their holiday expectations.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club 1 membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr C and Ms S's decision to purchase their membership at the Time of Sale 1 was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr C and Ms S and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

The investigator did not uphold the complaint about the Fractional Club 2 sale, and neither the PR nor Mr C or Ms S disagreed with that outcome. So, for clarity, I do not think that they went ahead with the sale of Fractional Club 2 membership at the Time of Sale 2 because of any breach by the Supplier of Regulation 14(3) as that is not what they say happened. So, I don't think the credit relationship between them and the Lender was unfair to them 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 Mr C and Ms S was unfair to them for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

I then invited the parties to respond if they wished. The Lender responded to say it had nothing further to add. I did not receive a reply from Mr C and Ms S or their PR.

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.

As neither party provided me with any further submissions, I see no reason to depart from the conclusion I reached in my PD.

I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr C and Ms S's claim under Section 75 of the CCA, and I am not persuaded that the Lender was party to a credit relationship with them for the purposes of Section 140A 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 Mr C and Ms S.

My final decision

My decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C and Ms S to accept or reject my decision before 21 May 2025.

Andrew Anderson
Ombudsman