DRN-5522020

The complaint

Mr and Mrs L complain 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) failing to respond to a claim under Section 75 of the CCA.

What happened

I issued a provisional decision on Mr and Mrs L's case on 7 February 2025, which set out the background to, and my provisional findings on, their complaint. A copy of that provisional decision is appended to, and forms a part of, this final decision. For that reason, it's not necessary for me to go over all the details again, but to summarise the events relevant to the complaint briefly:

- Mr and Mrs L purchased three timeshare products from a timeshare provider (the "Supplier") between April 2011 and July 2012. These were a "Trial" membership, which was traded in for a "Vacation Club" membership in September 2011, which was itself traded in for a "Fractional Club" membership in June/July 2012. The complaint concerns the last purchase only.

- The Fractional Club membership was paid for with a loan from the Lender in both Mr and Mrs L's names of £19,341 (including the consolidation of existing debt) and a £500 card payment. It was a type of asset-backed timeshare that gave the right to exchange an annual allocation of "points" for holiday accommodation, and also entitled Mr and Mrs L to a share in the net sale proceeds of a property (the "Allocated Property") named on their contract at the end of their membership.

- The membership was suspended at some point in 2014 due to non-payment of the annual management fees associated with it. Mr and Mrs L wrote to the Supplier in 2017 to surrender the membership on the grounds of Mrs L's ill health.

- Via a professional representative ("PR") Mr and Mrs L complained to the Lender in 2018 about:

    - Misrepresentations by the Supplier in respect of the membership, which gave them a claim against the Lender under Section 75 of the CCA – specifically:

        - Being falsely told the membership had a guaranteed end date.

        - Being falsely told that Fractional Club membership was a form of property ownership and an investment.

    - The Lender being party to an unfair credit relationship with them under Section 140A of the CCA, because of the following things:

        - The Supplier marketing and/or selling the membership to them as an investment in breach of the regulations pertaining to timeshare sales.

        - The Supplier having pressured them into the purchase, and used poor and aggressive sales practices.
        - The Lender having paid the Supplier a secret commission.
        - The Lender having failed properly to check if the loan was affordable for them.

- The Lender rejected the complaint, which was subsequently upheld by one of our Investigators. Our Investigator reasoned that the Supplier had sold the Fractional Club membership to Mr and Mrs L as an investment and this had caused a unfair credit relationship to arise between them and the Lender. The Lender appealed our Investigator's assessment.

In my provisional decision I said I was minded not to uphold the complaint. My full reasoning is set out in the appended provisional decision, but to summarise very briefly:

- I did not consider any actionable misrepresentations had been made by the Supplier to Mr and Mrs L for the reasons alleged, meaning the Lender would not be liable to pay them compensation as a result of them having a valid Section 75 claim.

- I did not consider the credit relationship between Mr and Mrs L and the Lender had been rendered unfair under Section 140A of the CCA. This was because:

    - Only limited evidence had been provided of the Supplier's alleged aggressive sales practices, and it was difficult to conclude Mr and Mrs L had only made their purchase due to improper pressure from the Supplier, not least because they had been given a 14-day cooling off period and not used it.
    - The Lender had not paid any commission to the Supplier.
    - There was insufficient evidence that the Lender had failed to carry out the appropriate checks before lending to Mr and Mrs L, nor that the loan was actually unaffordable.
    - While I thought it was possible the Supplier had in fact breached the relevant regulations by marketed or selling the membership to Mr and Mrs L as an investment, this wasn't enough by itself to render the credit relationship between them and the Lender unfair. In my view, any breach would have needed to have been *material* to their purchasing decision. I was unable, in this case, to conclude that it had been, because:
        - Mr and Mrs L's witness statement didn't give any reasons as to their motivation for making the purchase of the Fractional Club membership.
        - An attempt had been made to get Mr and Mrs L to provide some explanation of their reasons for purchasing the Fractional Club membership, but they had not done this and had said only that the witness statement was an accurate reflection of a conversation they'd had with PR.
        - Mr and Mrs L's subsequent action in surrendering their membership in 2017, telling the Supplier that it was because they could no longer use it as intended, appeared to point towards them having purchased it for

holiday-related reasons and not because they thought it was an investment.

I asked the parties to the complaint to provide any further submissions they'd like me to consider. The Lender said it had no comment at this time, but I received multiple submissions from PR and from Mr L directly.

From PR I received correspondence which made the following points:

- They were of the view that the version of the Fractional Club membership the Supplier had sold to Mr and Mrs L had been sold as an investment, and other ombudsmen at the Financial Ombudsman Service had agreed with that.

- They considered Mr and Mrs L had been clear that they had regarded the purchase as an investment.

PR also attached an additional witness statement from Mr and Mrs L. This made further points:

- They had bought the Fractional Club membership just 9 months after their initial purchase from the Supplier, and had been told it was a sound investment offering a financial return in 19 years' time when the fractions would be sold and they'd get 2/52nds of the sale price. This had been their motivation to proceed, and they had thought it could be handed down like an inheritance. They had already had points to go on holiday with the Supplier, so clearly their motivation on this occasion was the investment aspect of the product.

- The cost of the membership had actually been £32,841, with them being given consideration of £13,000 for their existing membership.

- The loan had been unaffordable and created financial stress and hardship. As soon as they were expected to pay management fees – such as a bill for about £2,000 they'd received in 2013 – the whole arrangement was unaffordable and they couldn't maintain the membership.

- By 2017 Mrs L's health had declined significantly and they had been having concerns about being able to meet day to day financial commitments. This had been more important to them than maintaining the investment. So they had surrendered the membership out of financial necessity. It didn't mean they hadn't seen it as an investment or that they'd not bought it for that reason.

In a separate email (attaching a second copy of the additional witness statement), Mr L said the following:

- He wanted to reiterate that the membership had been represented to be an investment which would likely increase in value and be sold in 19 years.

- He disagreed that he and Mrs L would have purchased the product without these representations having been made. They had been looking to buy a house together at the time and didn't want to extend themselves further financially. Furthermore, they had no other reason to go from the Vacation Club membership to the Fractional Club membership, other than the investment aspect. They didn't buy it to go on holiday because they could already do that with their Vacation Club membership.

- He didn't think the fact they'd surrendered the membership in 2017 was relevant to

their motivation for them having purchased it.

- The terms of their contract with the Supplier were unfair in that the Supplier could suspend the contract due to non-payment of their management fees and leave the liable for the loan, which is what had happened in their case.

Mr L also explained that the reason why he had not engaged with the questions I'd asked prior to my provisional decision, was because reliving the situation had been painful.

I arranged for further enquiries to be made of both the Lender and Mr and Mrs L following the responses to my provisional decision, on the question of whether the Lender had carried out appropriate affordability checks and whether the loan had been affordable or not.

The Lender was unable to say much about the checks it had carried out, but referred to having carried out a debt-to-income calculation based on the information Mr and Mrs L had provided on their application. It said it no longer had a copy of any credit checks it had undertaken.

Mr and Mrs L were able to provide a copy of their credit files from the relevant time, which they'd retained as part of their correspondence over a potential mortgage. I've also received some bank statements from Mr and Mrs L. I've seen statements covering the period December 2011 to January 2013, which show the starting and ending balances for each month, along with the total money in and out of the accounts, but without details of specific transactions. I have also seen more detailed statements covering parts of the months of July to September 2012 (after the Lender's lending decision), along with a narrative account of the financial situation from Mr L.

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.

There are aspects of my appended provisional decision which have not been challenged, so about those things I will say only that my decision on them remains the same, and for the same reasons.[1] I will focus the rest of this final decision on the points which have been contested Mr and Mrs L, and PR on their behalf.

The points of dispute all relate to matters which could have rendered the credit relationship between Mr and Mrs L and the Lender unfair:

- The appropriateness of the checks carried out by the Lender into whether or not Mr and Mrs L could afford the loan.

- The sale or marketing of the Fractional Club product to Mr and Mrs L as an investment, in breach of the Timeshare Regulations.

- A new point – that the terms of the agreement with the Supplier were unfair to Mr and Mrs L due to the Supplier's ability to suspend the membership for non-payment of the management fees.

[1] It is worth mentioning for the sake of technical correctness, that if it is right that the Fractional Club membership cost over £30,000 as Mr and Mrs L have said, then Section 75 would not apply to their purchase. This makes no difference to the outcome of the complaint, because it would just be another reason why the Section 75 aspect of their claim against the Lender would not succeed.

The Lender's creditworthiness/affordability checks

The Lender was required by law to carry out a creditworthiness assessment before lending to Mr and Mrs L. Guidance on what that creditworthiness assessment should entail could, at the time, be found in the Office of Fair Trading's *Irresponsible Lending Guidance*.

In straightforward terms, the Lender was required to carry out an assessment that was proportionate in the circumstances, and the assessment was meant to be "borrower focused" in the sense that it should have checked whether Mr and Mrs L would be able to make their repayments in a sustainable way, without undue difficulty and out of income or savings. It was not simply a test that assessed the risk that the loan would not be paid back.

Exactly what is proportionate will depend on things such as the information supplied by prospective borrowers as part of their application, the size, term, and repayment amounts associated with the loan, and the results of (for example) any credit check.

The monthly repayments in this case came to about £275. Mr and Mrs L had reported on their application that they had a combined annual income of around £105,000, with mortgage repayments of £760 per month. Based on this information, the loan would have appeared likely to be affordable. However, it appears the Lender also carried out a credit check. It hasn't been able to provide the results of this, but Mr and Mrs L's contemporaneous credit reports give an idea of what any check is likely to have shown.

I think the Lender is likely to have seen that Mr L had had a default on a credit card five years prior, along with a county court judgment (also five years prior). It is also likely to have seen that Mrs L had defaulted on five credit accounts between one and four years prior to the application, was in a payment arrangement on a credit card, and had received a county court judgment two years previously. Mr and Mrs L's current debt balances were quite low however, meaning the Lender would likely have seen a low debt to income ratio.

The general picture the Lender would likely have seen would have been one of relatively recent and possibly serious (given the county court judgments) financial difficulties. In light of this, I think proportionate checks would have involved getting more of an understanding of Mr and Mrs L's regular financial outgoings, to ascertain that they could afford to make the repayments in a sustainable way. It didn't do so, which means it didn't carry out proportionate checks. However, to be able to say that the credit relationship had been rendered *unfair* by this omission by the Lender, I'd need to be able to demonstrate that the loan was in fact unaffordable and that the Lender ought to have realised this and declined the application, if it had carried out the checks it should have.

Having considered the bank statements provided by Mr and Mrs L, along with Mr L's narrative account, I am unable to get much of an idea of their regular income and expenditure in the lead-up to their application to the Lender. It's possible to see that Mrs L was living in her overdraft, while Mr L's balance appeared to fluctuate but he was not in an overdraft position at the end of the month. But this isn't sufficient to draw a conclusion that the loan was unaffordable.

The fragments of the more detailed bank statements do show some regular bills from *after* the loan application had been made, and Mr L's account of events provides some further context. But it's apparent that I have only partial information, and I don't think it would be reasonable of me to conclude the loan was unaffordable on the basis of such limited information. And, in any event, the bills on the partial statements do not obviously make the monthly payments of approximately £275 appear affordable. Ultimately, I'm not in a position to conclude that, had the Lender carried out the checks it should have, it would have seen the repayments were unaffordable and decided not to lend to Mr and Mrs L. It follows that I

don't think their credit relationship with the Lender was rendered unfair by the Lender's failure to carry out a proportionate creditworthiness assessment.

The inclusion of allegedly unfair terms in the contract with the Supplier

Mr and Mrs L have indicated that a term giving the Supplier the ability to suspend their membership for non-payment of the management fees, is an unfair term. While they have not specifically said this, I believe they are making the point that this term renders their credit relationship with the Lender unfair.

This is not a point that has been articulated before in this complaint, but I think it's right to address it in this final decision. It's my understanding that the Supplier's contracts generally did include provisions which, in theory, allowed it to terminate memberships if management fees were unpaid. There is some case law to support the contention that, were the Supplier to invoke and rely on such terms to terminate memberships, the terms would have operated unfairly and *could* lead to any linked credit relationship being rendered unfair.

However, it's important to consider what the real-world consequences have been of any potentially unfair terms, in terms of harm or prejudice to the person affected by the terms in question, when making an assessment of unfairness under Section 140A.

It's my understanding that the Supplier did not, in practice, terminate memberships for non-payment of the management fees, and it did not do so in Mr and Mrs L's case. Mr and Mrs L refer to their membership having been suspended by the Supplier, but that is not the same as it being terminated. They did not permanently lose their membership rights. And I am aware that the Supplier re-instated suspended memberships on payment of the current year's management fees. In fact, it seems Mr and Mrs L's membership was reinstated in 2016. In light of this, I don't think the terms referred to by Mr and Mrs L led to harm or prejudice which would have rendered their credit relationship with the Lender unfair.

The sale and marketing of the Fractional Club membership as an investment

As I outlined in my appended provisional decision, I think there's a possibility that the Supplier did in fact market or sell the Fractional Club membership to Mr and Mrs L as an investment, as well as highlighting its other features.

The difficulty I had in the provisional decision, and that I am afraid I still have now, is in establishing whether any potential breach of the Timeshare Regulations by the Supplier in selling the product in this way, was material to their purchasing decision.

As I said in the provisional decision, the original witness statement doesn't speak to Mr or Mrs L's motivation for making their purchase, or even why they were unhappy with it. It simply outlines their recollections of what happened, drafted by PR following a conversation in 2018. I thought, on balance, that the limited evidence pointed towards Mr and Mrs L being motivated to purchase the Fractional Club membership for holiday-related reasons. I said this primarily because their 2017 letter to the Supplier surrendering the membership referred to them being *"unable to make proper use of [it]"* due to Mrs L's ill health. I think the "use" mentioned could only realistically mean the use of the membership for holidays, given the nature of the product.

I found this difficult to reconcile with the idea of Mr and Mrs L having bought the membership because of its investment features. After all, being unable to use the membership for holidays due to ill health would not prevent someone from allowing it to mature as an investment, had that been an important feature of the product for them.

Mr and Mrs L have now provided further submissions, following the provisional decision, which do comment on their motivations and explain that there were financial constraints which were an important factor in them surrendering the membership. I thank Mr and Mrs L for these submissions. While I acknowledge the reasons given for not having provided these earlier, it would have been better had they been provided when requested, prior to the provisional decision. It is unfortunately difficult to attach as much weight to submissions received after my reasons for not considering the complaint should be upheld, have been set out for all parties to the complaint to see.

Mr and Mrs L say that there was no reason, other than the investment aspect of the product, for them to move from their Vacation Club membership to the Fractional Club membership, pointing out that they already had access to holidays under the earlier membership. I can understand this argument, but I don't think it fully reflects the facts. Mr and Mrs L had 1,000 points (to be exchanged annually for holiday accommodation) under their Vacation Club membership, so they did already have holiday rights, just as they've said. However, they had 1,494 points under the Fractional Club membership, an increase in points of just under 50%, so when they made their purchase they did in fact gain significant additional holiday rights; it was not simply a case of them swapping one product for another. The facts of the purchase are consistent with the motivation having been to use the product for holidays, and don't point towards investment having been a significant motivating factor.

Overall, while I acknowledge Mr and Mrs L now say that their motivation for purchasing the Fractional Club membership was the investment aspect of the product, I don't recognise that statement in their previous submissions, which were made much closer to the events in question. Additionally, the factual matrix of their purchase and the reasons given in 2017 for their surrender of the membership, are to me not indicative of the product's investment features having been a material factor in their purchasing decision at the time.

So, while I don't lack in sympathy for Mr and Mrs L, I'm unable to conclude that any potential breach by the Supplier of the Timeshare Regulations in marketing or selling the Fractional Club membership as an investment, rendered their credit relationship with the Lender unfair under Section 140A of the CCA.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs L to accept or reject my decision before 12 June 2025.

Will Culley
Ombudsman

COPY OF PROVISIONAL DECISION

I've considered the relevant information about this complaint.

Having done so, I'm minded to reach a different outcome to our Investigator, so to give the parties an opportunity to provide further submissions, I'm issuing a provisional decision.

The deadline for both parties to provide any further comments or evidence for me to consider is 21 February 2025. Unless the information changes my mind, my final decision is likely to be along the following lines.

The complaint

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

Background to the complaint

Mr and Mrs L had a history of purchasing timeshare-like products from a company I'll call the 'Supplier'. It appears they first purchased a 'Trial' membership from the Supplier in April 2011 for an unknown price, followed by a 'Vacation Club' membership in September 2011, which cost £11,570 after the trade in of the remainder of the Trial membership.

The purchase which is the subject of this complaint was completed on 4 July 2012, although I understand the sales process itself took place on 19 June 2012. On this occasion, Mr and Mrs L purchased membership of a timeshare I'll refer to as the 'Fractional Club'. They entered an agreement to trade in their Vacation Club membership and pay a further amount for 1,494 'points' in the Fractional Club. These points could be exchanged each year for holiday accommodation in the Supplier's portfolio, but Fractional Club membership was also asset backed – which meant it gave Mr and Mrs L more than just holiday rights. It also included a share in the net sale of the proceeds of a property named on their Purchase Agreement (the 'Allocated Property') after their membership term was due to end.

Mr and Mrs L paid for their Fractional Club membership by taking finance from the Lender in joint names. Mr and Mrs L had purchased their Trial and Vacation Club memberships with loans from the Lender also, and at the Time of Sale there was an unknown balance outstanding which was consolidated into the finance Mr and Mrs L took on this occasion. The final amount borrowed came to £19,341 (after a £500 deposit was paid), repayable in 144 instalments of £275.64 per month.

The Supplier says Mr and Mrs L's membership was suspended in or around 2014 due to non-payment of the annual maintenance fees associated with it. I've also seen correspondence from Mr and Mrs L from 2017 surrendering the membership due to Mrs L's poor health.

Mr and Mrs L – using a professional representative (the 'PR') – wrote to the Lender on 2 July 2018 (the 'Letter of Complaint'). While the correspondence did not set out the specific legal basis for the complaint, I think it would be fair to summarise their concerns, at a high level, as:

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

Mr and Mrs L 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 had a guaranteed end date when that was not true.
2. told them that Fractional Club membership was a form of property ownership, when this wasn't true.
3. told them that Fractional Club membership was an "investment" from which they'd get back at least what they had put in, when this wasn't true.

Mr and Mrs L say 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 L.

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

The Letter of Complaint, while not specifically mentioning Section 140A, set out several reasons why the credit relationship between Mr and Mrs L and the Lender was unfair to them under that legislation. 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. They were subjected to a high-pressure sales presentation by the Supplier, which led them to purchase the Fractional Club membership.
3. The Supplier's sales presentation at the Time of Sale included poor and aggressive sales practices.
4. The Lender paid the Supplier an undisclosed commission.
5. The Lender failed to carry out an appropriate creditworthiness or affordability assessment before agreeing to lend to Mr and Mrs L.

The Lender did not respond to Mr and Mrs L's complaint at the time. It says it didn't receive the complaint until the Financial Ombudsman Service notified it in 2021. It appears there may have been some confusion as this was not the only complaint brought to the Lender by PR on Mr and Mrs L's behalf.

Regardless, Mr and Mrs L referred the complaint to the Financial Ombudsman Service. The Lender did comment on the complaint at this point, rejecting it in its entirety. It was then assessed by an Investigator who, having considered the information on file, considered it should be upheld.

Our investigator concluded the Supplier had marketed the Fractional Club membership to Mr and Mrs L as an investment, in breach of the Timeshare Regulations, and this had caused the credit relationship between them and the Lender to be rendered unfair.

The Lender disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. The Lender put forward a number of points it wanted me to consider, which I could summarise as follows:

- A witness statement which our Investigator had relied on, had never been shared with them or come to light previously.

- They did not think it likely that Mr and Mrs L had written the witness statement. It referred to products which the Supplier had never sold, such as "European points".

- If the matter of the Fractional Club membership being an investment had been a real concern to Mr and Mrs L, they'd have expected this have been evidenced when the complaint was first raised.

- When Mr and Mrs L had written to the Supplier in May 2017 to ask to surrender their membership, they said the reason they were surrendering the membership was because they were "unable to make proper use of [it]". They didn't enquire about the status of their investment or what would become of it or the profits which they said they'd been promised.

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 Contract Regulations 1999 (UTCCR).
- The Consumer Protection from Unfair Trading Regulations 2008 (CPUT).
- Case law on Section 140A of the CCA – including, in particular:

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

Good industry practice – the RDO Code

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

What I've provisionally decided – and why

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 and Mrs L could make against the Supplier.

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

This part of the complaint was made for several reasons 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 L were told that they were buying an interest in a specific piece of "real property" when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr and Mrs L's share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while 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 L 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, for reasons I'll explain.

Regarding the matter of there being a guaranteed end date, there's nothing in the documents dating to the Time of Sale which would lead me to believe that unequivocal guarantees would have been given that the membership would come to end on a specific date. The documents explain that the Allocated Property would be marketed for sale after a set time, and I can't see that Mr and Mrs L were told anything different to that.

Another concern highlighted by PR is that the Supplier allegedly told Mr and Mrs L that the Fractional Club membership was an investment, when that wasn't true. It's clear to me that the product did in fact have an investment element, in that it involved Mr and Mrs L acquiring a share in the proceeds of the future sale of a specific apartment. While, like any investment, this could result in Mr and Mrs L ending up with more or less than they put into it, I don't think it was a misrepresentation for the Supplier to have described it as an investment. I'm also unconvinced that, if the Supplier gave an *opinion* on the future value of the investment, that this would have amounted to an actionable misrepresentation. In order for that to be the case, it would need to be shown that the Supplier did not in fact hold that opinion, which I think would be very difficult to prove in practice.

To have *marketed* the product as an investment would have been prohibited however, for reasons I'll cover later in this decision.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose

of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[2]

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

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

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

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

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

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

1. The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale; 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.
5. The existence of any commission paid by the Lender to the Supplier.

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

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

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

They include the allegation that the Supplier misled Mr and Mrs L and carried on aggressive and poor commercial practices. But given the limited evidence in this complaint, I am not

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

persuaded that anything done or not done by the Supplier was prohibited under relevant law such as the CPUT Regulations.

The PR says that the right checks weren't carried out before the Lender lent to Mr and Mrs L. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mr and Mrs L was actually unaffordable before also concluding that they lost out as a result and then consider whether the credit relationship with the Lender was unfair to them for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for Mr and Mrs L. If there is any further information on this (or any other points raised in this provisional decision) that Mr and Mrs L wishes to provide, I would invite them to do so in response to this provisional decision.

Mr and Mrs L say that they were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledge that the sales process was likely to have been lengthy and that they may have felt tired by the end of it. But they say little about what was said and/or done by the Supplier during their sales presentation that made them feel as though they simply had no choice but to purchase Fractional Club membership when they 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 make use of this to cancel their purchase. I find this difficult to understand if the reason they went ahead with the purchase was because they were pressured into it. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs L made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

Mr and Mrs L also say they were not told about any commission paid by the Lender to the Supplier. However, my understanding is that the Lender did not pay any commission to the Supplier in relation to this purchase, so the matter of commission is not relevant to an assessment of the fairness of Mr and Mrs L's credit relationship with the Lender.

I'm not persuaded, therefore, that Mr and Mrs L 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 L's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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

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

But PR 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.

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

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

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

There is some evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an ‘investment’ or quantifying to prospective purchasers, such as Mr and Mrs L, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was for the primary purposes of holidays and that the Supplier made no representations as to future sale values of 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. I also think the Supplier was likely to have had difficulties 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, especially when this element of the product was one of the main things which set it apart from the Vacation Club membership Mr and Mrs L already owned. And so I accept that it’s *possible* that Fractional Club membership was marketed and sold to Mr and Mrs L as an investment in breach of Regulation 14(3).

In fact, based on Mr and Mrs L’s recollections from the Time of Sale, and what I know of the Supplier’s training and sales materials for the version of the Fractional Club membership that was sold to Mr and Mrs L, it may even be more likely than not that the Supplier marketed the product as an investment in breach of Regulation 14(3).

But I don’t need to make a definitive finding on this question, as I am not currently persuaded that the answer would make a difference to the outcome in this complaint anyway.

Assuming the Supplier marketed the Fractional Club membership as an investment, was the credit relationship between the Lender and Mr and Mrs L rendered unfair?

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

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

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

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

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

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

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

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

Put more simply, if I don't think the potential marketing of the Fractional Club membership as an investment had a material impact on Mr and Mrs L's decision to buy it, then I don't think it would be reasonable to conclude that marketing the product in this way caused the credit relationship between Mr and Mrs L, and the Lender, to be unfair.

I think at this point it's worth considering the witness statement produced by PR, which the Lender has expressed concerns about. It is in this witness statement that Mr L says he recalls the Supplier marketing the product as an investment. In the statement, Mr L also says that he was told "European points" were being phased out by the Supplier and replaced by the Fractional Club, and that he was offered a special price on the day. Other parts of the statement deal with other purchases made from the Supplier and others.

While I don't necessarily share all of the Lender's concerns about the witness statement, it is somewhat lacking in detail and is unsigned. There is no audit trail of the kind PR sometimes

provides with its witness statements. It also, crucially, doesn't say anything about *why* Mr and Mrs L decided to go ahead and purchase the Fractional Club membership.

Prior to writing this decision, I made further enquiries with Mr L around the provenance of the witness statement, and I also specifically asked about Mr and Mrs L's motivations for going ahead with the purchase.

Mr L replied, via PR, that he did not have a copy of the witness statement. He said the statement appeared to be an accurate reflection of a conversation he'd had with PR some years ago. He did not say why he and Mr and Mrs L had gone ahead with the purchase.

So there is a general lack of much evidence of the reasons for Mr and Mrs L's purchasing decision in 2012. The Lender has produced a copy of the correspondence Mr and Mrs L sent to the Supplier in 2017 asking to surrender their membership. In this correspondence, it is explained that Mr and Mrs L wanted to surrender their membership because they could no longer use it as they'd intended, due to Mrs L's health. As the Lender points out, no mention is made of the investment or what would become of it now that Mr and Mrs L were surrendering their membership.

I think Mr and Mrs L's correspondence with the Supplier points away from the prospect of the Fractional Club membership being a financial investment, having been important or material to their purchasing decision in 2012. The content of the correspondence indicates the purpose of the membership, in their eyes, was to take holidays. And if they had thought the membership was a financial investment (or if the future investment return had been important to them), a decision to surrender the membership and lose this investment seems to be at odds with this. If losing the investment was a concern, then I'd also have expected to see some mention of this in the correspondence with the Supplier.

I hope Mr and Mrs L can understand why, on the basis of the limited evidence I have, that I have found it difficult to conclude that any breach by the Supplier in marketing the Fractional Club membership as an investment, must have had a material impact on their decision to make the purchase.

For the reasons I've outlined, I'm not currently of the view that the credit relationship between Mr and Mrs L and the Lender was rendered unfair by the Supplier's actions, or for any other reason.

Section 140A: Conclusion

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

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think it would have been unfair or unreasonable for the Lender to have rejected Mr and Mrs L's Section 75 claims (had it responded to them), and I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to [him/her/them] for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

If there is any further information on this complaint that Mr and Mrs L wishes 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 L's complaint.

If either party to the complaint wants to make further submissions, they should make sure these reach me by 21 February 2025. I will then review the case again.

Will Culley
Ombudsman