DRN-5558362

The complaint

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

What happened

Mrs B and the late Mr B purchased membership of a timeshare (the 'Signature Membership') from a timeshare provider (the 'Supplier') on 25 May 2015 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,200 fractional points at a cost of £21,645 (the 'Purchase Agreement'). But after trading in their existing timeshare, they ended up paying £8,515 for Signature membership.

Signature Membership was asset backed – which meant it gave Mrs B and the late Mr B 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. It also offered guaranteed availability of their Allocated Property in a set week each year, or they could use their points to stay at another property from the Supplier's portfolio of resorts.

Mrs B and the late Mr B paid for their Signature membership by taking finance of £16,881 from the Lender in both of their names (the 'Credit Agreement'). This loan also consolidated their existing loan with the Lender. And, Mrs B and the late Mr B paid off the loan on 11 April 2016.

Mrs B and the late Mr B – using a professional representative (the 'PR') – wrote to the Lender on 12 May 2020 (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. A breach of contract by the Supplier giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

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

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

1. told them that Signature Membership had a guaranteed end date when that was not true.
2. told them that they were buying an interest in a specific piece of "real property" when that was not true.
3. told them that Signature Membership was an "investment" when that was not true.

4. told them that the Supplier's holiday resorts were exclusive to its members when that was not true.

Mrs B and the late Mr B said 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 Mrs B and the late Mr B (now the estate of Mr B).

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

Mrs B and the late Mr B also said that they found it difficult to book the holidays they wanted, when they wanted.

As a result of the above, Mrs B and the late Mr B suggested that they have a breach of contract claim against the Supplier, 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 Mrs B and the late Mr B (now the estate of Mr B).

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

The Letter of Complaint set out several reasons why Mrs B and the late Mr B said 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. The contractual terms setting out (i) the duration of their Signature Membership and/or (ii) the obligation to pay annual management charges for the duration of their membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
2. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as prohibited practices under Schedule 1 of those Regulations.
3. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
4. The Supplier did not give them a copy of the Information Statement prior to entering into the Purchase Agreement, or if they did, they weren't given sufficient time to review it.
5. The Supplier did not give them an adequate or transparent explanation as to the features of the agreement which may have made the credit unsuitable for them or have a significant adverse effect which Mrs B and the late Mr B would be unlikely to foresee, especially given the length of the loan term, the high interest rate and total charge for credit.

The Lender didn't initially provide a response to Mrs B and the late Mr B's complaint. So, the PR referred the complaint to the Financial Ombudsman Service on their behalf.

The Lender subsequently provided a final response to the complaint on 19 March 2021, rejecting it on every ground.

It was assessed by an Investigator at this Service who, having considered the information on file, upheld the complaint on its merits.

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

On 29 January 2025, the PR made our Service aware that Mr B had sadly passed away in July 2024. Therefore, the complaint is now brought by Mrs B and the estate of Mr B.

I considered the matter and issued a provisional decision dated 15 April 2025. In that decision, I said:

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

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

The legal and regulatory context that I think is relevant to this complaint is set out in an appendix (the 'Appendix') at the end of my findings – which forms part of this decision.

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.

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

As both sides may already know, a claim against the Lender under Section 75 essentially mirrors the claim Mrs B and the estate of Mr B could make against the Supplier. Certain conditions must be met if this protection is engaged – which are set out in the CCA. The Lender does not dispute that the relevant conditions are met in this complaint, and I'm satisfied that they are.

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 Signature membership had been misrepresented by the Supplier because Mrs B and the late Mr B 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 B and the late Mr B's share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.

The PR also said the Supplier told Mrs B and the late Mr B that Signature membership had a guaranteed end date when that was not true. But I can't see that what the Supplier said here was actually untrue. I've not seen anything which makes me think that the Allocated Property would not be able to be sold at the conclusion of the contract period. The Terms and Conditions generally set out that the title to the property is held by independent trustees, the sale of the Allocated Property can only be carried out by the Trustees on or after the

proposed sale date, and the Allocated Property cannot be removed from the trust before that sale date. What's more, the sale date can only be delayed by the unanimous written consent of all fractional owners, in which Mrs B and the estate of Mr B are included.

In addition, the PR also said in the letter of complaint that the Supplier told Mrs B and the late Mr B that Signature membership was an 'investment' when that was not true. But, for reasons I'll go on to explain below, Mrs B and the late Mr B's membership plainly did have an investment element to it.

As for the rest of the Supplier's alleged pre-contractual misrepresentations, while I recognise that Mrs B and the estate of Mr B have concerns about the way in which their Signature membership was sold, they haven't persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the other reasons they allege. And I say that because beyond the bare allegations, they haven't provided any evidence to support them such as what exactly they were told, by whom and in what context. I also note that Mrs B and the late Mr B didn't describe such statements being made by the Supplier at the Time of Sale in their testimony, and since they'd already had a previous membership with the Supplier, albeit of a different type, it would seem likely they already knew at the Time of Sale how the Supplier's resorts generally worked.

What's more, as there's nothing else on file that persuades there were any false statements of existing fact made to Mrs B and the late Mr B 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 Mrs B and the estate of Mr B any compensation for the alleged misrepresentations of the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

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

I've already summarised how Section 75 of the CCA works and why it gives Mrs B and the estate of Mr B a right of recourse against the Lender. So, it isn't necessary to repeat that here.

Mrs B and the late Mr B said they could not holiday where and when they wanted to – which, on my reading of the complaint, suggests that they felt that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement. Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork signed by Mrs B and the late Mr B at the Time of Sale states that the availability of holidays was/is subject to demand. Mrs B and the late Mr B didn't provide any details of occasions where they tried to book holidays but were unable to. And, in any event, it looks like they stopped paying their maintenance fees and engaged with timeshare relinquishment services a year or so after their purchase. I accept that they may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mrs B and the estate of Mr B any compensation for a breach of contract by the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

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

I have already explained why I am not persuaded that the contract entered into by Mrs B and the late Mr B was misrepresented (or breached) by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Mrs B and the late Mr B also said 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.

I have considered the entirety of the credit relationship between Mrs B and the late Mr B 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;*
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; and*
4. *The inherent probabilities of the sale given its circumstances.*

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

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

Mrs B and the late Mr B'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 Mrs B and the late Mr B and carried on unfair commercial practices which were prohibited under the CPUT Regulations. But given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.

The PR says that the right checks weren't carried out before the Lender lent to Mrs B and the late Mr B. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mrs B and the late Mr B 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 Mrs B and the late Mr B. If there is any further information on this (or any other points raised in this provisional decision) that Mrs B and the estate of Mr B wish to provide, I would invite them to do so in response to this provisional decision.

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

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

The Lender does not dispute, and I am satisfied, that Mrs B and the late Mr B's Signature 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 Signature membership as an investment. This is what the provision said at the Time of Sale:

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

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

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

Mrs B and the late Mr B'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 Signature membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

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

To conclude, therefore, that Signature membership was marketed or sold to Mrs B and the late Mr B 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 Signature membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

It is clear that the Supplier made efforts to avoid specifically describing Signature membership as an 'investment' or quantifying to prospective purchasers, such as Mrs B and the late Mr B, 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 Signature membership was not sold to Mrs B and the late Mr B as an investment.

Mrs B and the late Mr B also provided a witness statement which was signed and dated as 28 June 2017. Although, it wasn't provided to our Service until 20 September 2023.

In this statement, Mr and Mrs B outlined all the purchases they had made with the Supplier. And, at the end of the statement, they said:

> *"We now wish to relinquish our timeshare because we have been misled about the investment value of the property we have purchased. We did not know this was [sic] timeshare.*
>
> *We were told that the property would be sold in 19 years and that it would go up in value and that it would 'definitely' be sold. We have subsequently found out that all owners have to agree to sell and if they dos [sic] not, we could end up owning this in perpetuity".*

But, this comment isn't attributed to any particular purchase. Mrs B and the late Mr B haven't explained what specifically they were told at this Time of Sale. This part of their testimony is also very brief, without having described how the salesperson at this particular Time of Sale explained or justified any 'increase in value' to them, if indeed that is what they were told.

So, I don't find this particularly persuasive evidence that the Supplier told them or led them to believe that Signature membership offered them the prospect of a financial gain.

Therefore, it's possible that Signature membership wasn't marketed or sold to them as an investment in breach of Regulation 14(3).

But, I acknowledge the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Signature Membership without breaching the relevant prohibition. So, I accept that it's equally possible that Signature membership was marketed and sold to Mrs B and the late Mr B as an investment in breach of Regulation 14(3).

However, whether or not there was a breach of the relevant prohibition by the Supplier is not ultimately determinative of the outcome in this complaint for reasons I will come on to shortly. And with that being the case, it is not necessary to make a formal finding on that particular issue for the purposes of this decision.

Was the credit relationship between the Lender and Mrs B and the late Mr B rendered unfair to them?

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.

And in light of what the courts had to say in Carney and Kerrigan, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mrs B and the late Mr B and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

But as I've already said, Mrs B and the late Mr B's recollections don't sufficiently persuade me that the Supplier led them to believe at this particular Time of Sale that the Signature membership was an investment from which they would make a financial gain nor am I persuaded from what they've said that they were induced into the purchase on that basis.

I say this because the only comment Mrs B and the late Mr B said in their testimony about this Time of Sale in particular, regarding their motivations for purchase is regarding the quality of the Signature membership suites. And, one of the benefits of Signature Membership specifically was that it did offer more 'luxury' accommodation than the previous membership types they had purchased with the Supplier.

And from considering all of their comments throughout this complaint, the emphasis of their unhappiness in my view seems to be on how the membership functioned as a holiday product and their concerns about the end date of the contract (already addressed above).

On balance, therefore, even if the Supplier had marketed or sold the Signature membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mrs B and the late Mr B's decision to purchase Signature Membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests 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 Mrs B and the late Mr B and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

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

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mrs B and the late Mr B when they purchased Signature membership at the Time of Sale. But they and PR said that the Supplier failed to provide them with all of the information they needed to make an informed decision. And, that there were unfair terms in the Purchase Agreement.

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

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

Unfair term(s)

The PR says that the Purchase Agreement contains unfair contract terms (under the UTCCR) in relation to the duration of membership and the obligation to pay management charges for that duration.

To conclude that a term in the Purchase Agreement rendered the credit relationship between Mrs B and the late Mr B and the Lender unfair to them, I'd have to see that the term was unfair under the UTCCR and that term was actually operated against Mrs B and the late Mr B in practice.

In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mrs B and the late Mr B, have flowed from such a term, because those consequences are relevant to an assessment of unfairness under Section 140A. Indeed, the judge in the very case that this aspect of the complaint seems based on (Link Financial v Wilson [2014] EWHC 252 (Ch)) attached importance to the question of how an unfair term had been operated in practice: see [46].

As a result, I don't think the mere presence of a contractual term that was/is potentially unfair is likely to lead to an unfair credit relationship unless it had been applied in practice.

Having considered everything that has been submitted, it seems unlikely to me that the contract term(s) cited by the PR have led to any unfairness in the credit relationship between Mrs B and the late Mr B and the Lender for the purposes of Section 140A of the CCA. I say this because I cannot currently see that the relevant terms in the Purchase Agreement were actually operated against Mrs B and the late Mr B, let alone unfairly. The PR hasn't explained why exactly they feel these term(s) cause an unfairness and as I've said, I can't see that these term(s) have been operated in an unfair way against Mrs B and the late Mr B in any event.

The provision of information at the Time of Sale

Mrs B and the late Mr B also said that they weren't given adequate time to review the standard Information Statement before entering into the Purchase Agreement. But, from what I've seen, they were given this document to review at the same time as all of the other sales documentation.

The letter of complaint also says Mrs B and the late Mr B weren't given a transparent explanation as to the features of the loan agreement which may have made it unsuitable for them or have a significant adverse effect which they would be unlikely to foresee, especially given the length of the loan term, their age and high interest rate and total charge for the credit provided.

But the PR hasn't explained what the particular risks or features are that they're referring to here, or why these would have had an adverse effect on Mrs B and the late Mr B. They also haven't described what they feel should have been explained or what information should have been given that wasn't. They've mentioned the length of the loan, their age and the interest rate but haven't given any reason as to why these are unfair in this particular case or why these cause the credit relationship to be unfair.

So, while it's possible the Supplier didn't give Mrs B and the late Mr B sufficient information, in good time, on the above elements of their membership, in order to satisfy its regulatory responsibilities at the Time of Sale, I haven't currently seen enough to persuade me that this, alone, rendered Mrs B and the late Mr B's credit relationship with the Lender unfair to them.

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

Section 140A: Conclusion

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

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

The Lender replied to the provisional decision and confirmed they had nothing further to add. The PR did not agree and provided some further comments they wished to be considered. They also asked for some more time to provide some other submissions and this was provided to them. But, they did not respond or provide anything further by that deadline.

As I've now received a response from both parties and the relevant deadline has passed, I'm now finalising my decision.

What I've decided – and why

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

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

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

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

As I did in my provisional decision, I've again set out the legal and regulatory context that I think is relevant to this complaint in an appendix (the 'Appendix') at the end of my findings – which forms part of this decision.

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

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

As I set out in my provisional decision, in their original complaint the PR set out several misrepresentations they say were made by the Supplier at the Time of Sale.

But in their response, they've only provided some brief further comments in relation to Mrs B and the late Mr B being told at the Time of Sale that membership was an investment. They've highlighted that in their witness statement, Mr B and the late Mr B do refer to the membership as an investment.

But in my provisional decision, I explained that Mrs B and the late Mr B's membership plainly did have an investment element to it (for the reasons I explained within my provisional decision). So, such a statement, if made, would not have been untrue.

The PR has said further investigation is warranted into the precise wording used and the overall impression created during the sales presentation – but they haven't provided any new evidence to be considered in this regard.

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

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

The Lender's creditworthiness assessment at the Time of Sale

The PR has also reiterated that they feel a more thorough examination of the creditworthiness assessment conducted by the Lender is necessary. But again, they haven't provided anything new here either.

And, as I already explained in my PD, even if I agreed that the Lender failed to do everything it should have when it agreed to lend (and I still make no such finding), I would have to be

satisfied that the money lent to Mrs B and the late Mr B was unaffordable before also concluding that they lost out as a result and then consider whether the credit relationship was unfair to them for this reason. As the PR has provided no further evidence, I still don't think the lending was unaffordable for Mrs B and the late Mr B.

The Supplier's alleged breach of Regulation 14(3) and whether the credit relationship was rendered unfair as a result

The majority of the PR's further submissions related to the issue of whether there was a breach of Regulation 14(3) by the Supplier at the Time of Sale and whether the credit relationship was rendered unfair as a result.

Again, the PR hasn't provided any new evidence here. Having read their submissions, they are largely repeating points they've already made and which were already addressed in my provisional decision.

The PR says that I've dismissed Mrs B and the late Mr B's testimony, suggesting this is unfair and inconsistent. But, as I outlined in my provisional decision, I have considered their testimony, along with all the other evidence provided in this complaint. Indeed, I relied on their testimony when reaching my conclusions regarding whether the credit relationship between them and the Lender was rendered unfair.

The PR says that I should have made a finding on whether there was a breach of Regulation 14(3) at the Time of Sale. But, as I explained in my provisional decision, it wasn't necessary for me to do so as it's not ultimately determinative of the outcome of this complaint. And, even if I agreed with the PR that there was such a breach at the Time of Sale (which I still make no such finding on), that is not the end of the matter. As I also explained in my provisional decision, it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. I still had to go on to consider whether any such breach, if it had occurred, had a material impact on their purchasing decision. And, I still don't think it did for the reasons I already gave in my provisional decision.

The PR has referred to two other decisions made by another Ombudsman which they say involve similar circumstances and were upheld. But, those decisions were decided on their own set of facts and circumstances, and I note that of the two decisions the PR has referenced, one relates to an entirely different supplier and the other relates to the same supplier as this case, but a different product to the one being considered here. I'm focused here on the particular circumstances of *this* complaint.

The PR has said that I didn't adequately consider the inherent probabilities of the sale and that this type of membership was inherently difficult to market without creating an impression of investment potential. But, I did clearly acknowledge this in my provisional decision:

> "*But, I acknowledge the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Signature Membership without breaching the relevant prohibition. So, I accept that it's equally possible that Signature membership was marketed and sold to Mrs B and the late Mr B as an investment in breach of Regulation 14(3).*"

In relation to whether the credit relationship was rendered unfair, the PR has said that even if the primary motivation for purchase was other aspects, the investment element of the membership could still have been a material factor. But, the PR hasn't provided any further evidence that this is the case or to support their conclusions here.

The PR's submissions here also appear to be confusing whether there was a breach of Regulation 14(3) at the Time of Sale and whether the credit relationship was rendered unfair. These are two different issues, which it's important not to conflate. As I've already explained

it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A, which is what the PR, at least in part, appears to be suggesting.

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

Other matters

As outlined in my provisional decision, the PR also originally raised some other points of complaint, which I addressed. But, they didn't make any further comments in relation to those in their response to my provisional decision. Indeed, they haven't said they disagreed with any of my provisional conclusions in relation to those other points. Since I haven't been provided with anything more in relation to those other points by either party, it follows that my conclusions in relation to them remain the same as set out in my provisional decision.

Conclusion

Overall, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mrs B and the estate of Mr B's Section 75 claims, and I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA. I also don't see any other reason why it would be fair or reasonable to direct the Lender to compensate them.

Appendix: The Legal and Regulatory Context

The Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) (the 'CCA')

The timeshare(s) at the centre of the complaint in question was/were paid for using restricted-use credit that was regulated by the Consumer Credit Act 1974. As a result, the purchase(s) was/were covered by certain protections afforded to consumers by the CCA provided the necessary conditions were and are met. The most relevant sections as at the relevant time(s) are below.

Section 56: Antecedent Negotiations
Section 75: Liability of Creditor for Breaches by a Supplier
Sections 140A: Unfair Relationships Between Creditors and Debtors
Section 140B: Powers of Court in Relation to Unfair Relationships
Section 140C: Interpretation of Sections 140A and 140B

Case Law on Section 140A

Of particular relevance to the complaint in question are:

1. The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') remains the leading case.
2. The judgment of the Court of Appeal in the case of *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')* sets out a helpful interpretation of the deemed agency and unfair relationship provisions of the CCA.
3. *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*') – in which the High Court held 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 relationship or otherwise the date the relationship ended.

4. The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*') – which approved the High Court's judgment in *Patel*.
5. *Deutsche Bank (Suisse) SA v Khan and others* [2013] EWHC 482 (Comm) – in Hamblen J summarised – at paragraph 346 – some of the general principles that apply to the application of the unfair relationship test.
6. *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
7. *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
8. *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*').

My Understanding of the Law on the Unfair Relationship Provisions

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."*

So, the negotiations conducted by the Supplier during the sale of the timeshare(s) in question was/were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140A(1)(c) CCA.

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

"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the

negotiator whether or not he was the creditor's agent.' […] *Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."*

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

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

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

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

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

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

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

"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.

<u>The Law on Misrepresentation</u>

The law relating to **misrepresentation** is a combination of the common law, equity and statute – though, as I understand it, the Misrepresentation Act 1967 didn't alter the rules as

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

to what constitutes an effective misrepresentation. It isn't practical to cover the law on misrepresentation in full in this decision – nor is it necessary. But, summarising the relevant pages in *Chitty on Contracts (33rd Edition)*, a material and actionable misrepresentation is an untrue statement of existing fact or law made by one party (or his agent for the purposes of passing on the representation, acting within the scope of his authority) to another party that induced that party to enter into a contract.

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

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

Silence, subject to some exceptions, doesn't usually amount to a misrepresentation on its own as there is generally no duty to disclose facts which, if known, would affect a party's decision to enter a contract. And the courts aren't too ready to find an implied representation given the challenges acknowledged throughout case law.

The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations')

The relevant rules and regulations that the Supplier in this complaint had to follow were set out in the Timeshare Regulations. I'm not deciding – nor is it my role to decide – whether the Supplier (which isn't a respondent to this complaint) is liable for any breaches of these Regulations. But they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair. After all, they signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

The Regulations have been amended in places since the Time of Sale. So, I refer below to the most relevant regulations as they were at the time(s) in question:

- Regulation 12: Key Information
- Regulation 13: Completing the Standard Information Form
- Regulation 14: Marketing and Sales
- Regulation 15: Form of Contract
- Regulation 16: Obligations of Trader

The Timeshare Regulations were introduced to implement EC legislation, Directive 122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts (the '2008 Timeshare Directive'), with the purpose of achieving 'a high level of consumer protection' (Article 1 of the 2008 Timeshare Directive). The EC had deemed the 2008 Timeshare Directive necessary because the nature of timeshare products and the commercial practices that had grown up around their sale made it appropriate to pass specific and detailed legislation, going further than the existing and more general unfair trading practices legislation.[2]

The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations')

The CPUT Regulations put in place a regulatory framework to prevent business practices that were and are unfair to consumers. They have been amended in places since they were first introduced. And it's only since 1 October 2014 that they imposed civil liability for certain breaches – though not misleading omissions. But, again, I'm not deciding – nor is it my role to decide – whether the Supplier is liable for any breaches of these regulations. Instead, they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair as they also signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

Below are the most relevant regulations as they were at the relevant time(s):

- Regulation 3: Prohibition of Unfair Commercial Practices
- Regulation 5: Misleading Actions
- Regulation 6: Misleading Omissions
- Regulation 7: Aggressive Commercial Practices
- Schedule 1: Paragraphs 7 and 24

The Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR')

The UTCCR protected consumers against unfair standard terms in standard term contracts. They applied and apply to contracts entered into until and including 30 September 2015 when they were replaced by the Consumer Rights Act 2015.

Below are the most relevant regulations as they were at the relevant time(s):

- Regulation 5: Unfair Terms
- Regulation 6: Assessment of Unfair Terms
- Regulation 7: Written Contracts
- Schedule 2: Indicative and Non-Exhaustive List of Possible Unfair Terms

The Consumer Rights Act 2015 (the 'CRA')

The CRA, amongst other things, protects consumers against unfair terms in contracts. It applies to contracts entered into on or after 1 October 2015 – replacing the Unfair Terms in Consumer Contracts Regulations 1999.

[2] See Recital 9 in the Preamble to the 2008 Timeshare Directive.

Part 2 of the CRA is the most relevant section as at the relevant time(s).

Relevant Publications

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 final decision

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

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

Fiona Mallinson
Ombudsman