DRN-5558373

## The complaint

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

## What happened

Mr and Mrs S were existing customers of a timeshare provider (the 'Supplier'), having purchased a trial membership in 2010. They then traded this in for membership of the Supplier's 'Vacation Club' in 2011.

On 8 August 2012 (the 'Time of Sale'), Mr and Mrs S traded in their existing Vacation Club membership for a different type of timeshare membership (the 'Fractional Club'). They entered into an agreement with the Supplier to buy 1,050 fractional points at a cost of £17,681 (the 'Purchase Agreement').

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

Mr and Mrs S paid for their Fractional Club membership by paying a £500 deposit and taking finance for the remaining amount of £17,181 from the Lender in both of their names (the 'Credit Agreement').

Mr and Mrs S – using a professional representative (the 'PR') – wrote to the Lender on 15 April 2021 (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

Mr and Mrs S say 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 they were buying an interest in a specific piece of "real property" when that was not true.

3. told them that Fractional Club 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.

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

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

Mr and Mrs S also say that they found it difficult to book the holidays they wanted, when they wanted.

As a result of the above, Mr and Mrs S suggest 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 Mr and Mrs S.

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

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

1. Mr and Mrs S were not given a copy of the standard Information Statement before entering into the Purchase Agreement, or if they did, they weren’t given adequate time to review it.
2. The contractual terms setting out (i) the duration of their Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of their membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the ‘UTCCR’).
3. They were pressured into purchasing Fractional Club membership by the Supplier.
4. 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.
5. The decision to lend was irresponsible because the Lender didn’t carry out the right creditworthiness assessment. And, the Supplier didn’t give an adequate or transparent explanation to Mr and Mrs S of the features of the agreement which may have made the credit 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.

The Lender initially forwarded Mr and Mrs S’s concerns to the Supplier and asked for its response The Lender subsequently dealt with Mr and Mrs S’s concerns as a complaint and issued its final response letter on 4 May 2021, where it attached the Supplier’s response rejecting it on every ground.

Mr and Mrs S then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

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

I considered the matter and issued a provisional decision dated 22 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***

*In this part of Mr and Mrs S's complaint, they are alleging that the Lender was unfair and unreasonable in refusing to allow their claim under Section 75 of the CCA. Their complaint is that the Lender ought to have allowed it as there were misrepresentations made by the Supplier at the Time of Sale, and these misrepresentations induced them into making the purchase.*

*The Investigator in this case felt it would be reasonable for the Lender to reject this claim as they would have a defence to it under the Limitation Act 1980 (the 'LA').*

*Creditors can reasonably reject Section 75 claims that they're first informed about after the claim has become time-barred under the LA. The reason being, that it wouldn't be fair to expect creditors to look into such claims so long after the liability arose and after a limitation defence would be available in court.*

*Having considered everything, I think Mr and Mrs S's claim for misrepresentation was likely to have been made too late under the relevant provisions of the LA, which means it would have been fair for the Lender to have turned down a Section 75 claim for this reason.*

*A claim under Section 75 is a 'like' claim against the creditor. A claim for misrepresentation against the Supplier would ordinarily be made under Section 2(1) of the Misrepresentation Act 1967. And, the limitation period to make such a claim expires six years from the date on which the cause of action accrued, as per Section 2 of the LA.*

*But a claim like this one under Section 75 is also "an action to recover any sum by virtue of any enactment" under Section 9 of the LA. The limitation period under that provision is also six years from the date on which the cause of action accrued.*

*The date on which the cause of action accrued was the Time of Sale. I say this because Mr and Mrs S entered into the membership at that time based on the alleged misrepresentations by the Supplier, which Mr and Mrs S say they relied on. And, as the loan from the Lender was used to finance this membership, it was when Mr and Mrs S entered into the Credit Agreement that they suffered a loss.*

*Mr and Mrs S first notified the Lender of their Section 75 claim on 15 April 2021. Since this was more than six years after the Time of Sale, I don't think it would be unfair or unreasonable of the Lender to reject Mr and Mrs S's concerns about the Supplier's alleged misrepresentations at the Time of Sale.*

## *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 Mr and Mrs S a right of recourse against the Lender. So, it isn't necessary to repeat that here.*

*It is unclear when the alleged breach(es) occurred in this case, and this is necessary information to have when considering whether the Lender might have a defence under the LA, just as it did against Mr and Mrs S's concerns of misrepresentation. The contract in question here still seems to be in existence. So, it is possible that the alleged breach(es) occurred within six years of the date Mr and Mrs S notified the Lender of the claim, but from the evidence provided, I cannot say that with any degree of certainty.*

*However, I don't find it necessary to make a finding on this point because, as I go on to explain, I don't think the Lender acted unfairly or unreasonably in not accepting Mr and Mrs S's claim anyway. I'll explain.*

*Mr and Mrs S say that they could not holiday where and when they wanted to – which, on my reading of the complaint, suggests that they consider 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 Mr and Mrs S states that the availability of holidays was/is subject to demand. I also note the Supplier has said that there was only one reservation request which could not be met for Mr and Mrs S and that was because the particular resort they wanted didn't offer the unit size they had requested. 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 Mr and Mrs S 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?*

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

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 Mr and Mrs S and the Lender.*

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

*Mr and Mrs S'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 S 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 Mr and Mrs S. 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 S 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 S. If there is any further information on this (or any other points raised in this provisional decision) that Mr and Mrs S wish to provide, I would invite them to do so in response to this provisional decision.*

*Mr and Mrs S suggest that they were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledge that they may have felt weary after a sales process that went on for a long time. But they say little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to. They were also given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel their membership during that time. I note that Mr and Mrs S have said they were not informed of the cooling off period, but I can see that they signed a 'Right of Withdrawal' form at the Time of Sale which made them aware of this. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs S made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.*

*I'm not persuaded, therefore, that Mr and Mrs S's credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above. But there is another reason, 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 S'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.*

*Mr and Mrs S's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club 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 S as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold 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 competing evidence in this complaint as to whether Fractional Club membership was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations.*

*On the one hand, it is clear 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 S, 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 not sold to Mr and Mrs S as an investment.*

*I've also considered Mr and Mrs S's testimony. This wasn't provided to our Service until 5 January 2024, although it was signed by Mrs S and dated 15 January 2021. In that statement, they said:*

> *"We were subjected to another high-pressure sales presentation, which took up most of the day, and was about [the Supplier's] 'Fractional Property Owners Club'. This involved buying shares in an apartment, for 19 years, after which it would be sold, and the proceeds divided between all the owners.*
>
> *[…]*
>
> *We were told that this would be something we could leave to our children as an inheritance.*
>
> *[…]*
>
> *We were told it was an investment, which it is not."*

*On my reading of what they've had to say here, their description of what they were told at the Time of Sale only seems to be a factual description of how the product worked. And, there isn't anything in what they've said in this statement that suggests to me that they were told or led to believe at the Time of Sale that purchasing Fractional Club membership offered them the prospect of a profit or financial gain.*

*So, given all of this, it's possible that Fractional Club membership <u>wasn't</u> marketed or sold to them as an investment in breach of Regulation 14(3).*

*On the other hand, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's equally possible that Fractional Club membership <u>was</u> marketed and sold to Mr and Mrs S 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.*

*<u>Was the credit relationship between the Lender and Mr and Mrs S rendered unfair to them?</u>*

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

*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 Mr and Mrs S 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, based on the evidence provided, I'm not persuaded that Mr and Mrs S's decision to purchase at the Time of Sale was motivated by the prospect of a profit. I'll explain.*

*In their aforementioned witness statement, Mr and Mrs S also said:*

*"We were told that if we purchased Fractional Property Ownership, we would also get Points, which would give us a minimum of two weeks' luxury accommodation, for our holidays every year, at any of [the Supplier's] resorts, anywhere in the world at any time of the year. Being teachers, this was especially important, so that we would have access during school holidays, as we are only permitted to go on holiday during those times.*

*We were also informed that buying Fractional Property Ownership would enable us to have longer holidays and we would be guaranteed good quality accommodation every time we went on holiday, wherever we went.*

*At first, we thought it would cost too much, but they told us of financial packages available, and also that we would be able to trade our Points in for the Fractionals, thus bringing the price down. We were reluctant, but were encouraged to think about it, over 'refreshments'."*

*I think it's clear from what they've said here that holidays, particularly at certain times of year, was an important factor for them in their purchasing decision. And, they've said that they initially didn't want to purchase due to the cost (which is difficult to understand if they were purchasing due to the prospect of a financial gain) but were then persuaded to do so by the offer of finance and trading in their existing membership.*

*In the rest of their statement, Mr and Mrs S have also set out why they're unhappy with their membership now and in my view, the emphasis of their unhappiness appears to be on how the membership functioned as a holiday product. For example, they've said:*

> *"Subsequently, we discovered that access to other resorts was unavailable, especially during the time we required it – school summer holidays. We were put on a waiting list for Malta for two consecutive seasons and were told there was no availability. Other places were limited except for Turkey and Spain."*

*Mr and Mrs S also provided a further witness statement following the Investigator's view, signed and dated as 25 January 2024. I've also considered this and I acknowledge that their testimony in this statement has evolved to suggest they were told at the Time of Sale they could potentially make a profit and places more emphasis on that element. But, I don't consider I can place much, if any, weight on this later testimony. I say this due to the date it was provided, that being after the Investigator's view and the outcome of the judgement in Shawbrook & BPF v FOS. Given their evolving recollection of events I think there is a very real risk it has been influenced by both the Investigator's view and the judgment. And, if the prospect of a financial gain or profit specifically was a significant reason for their purchase, I also find it difficult to understand why this was not mentioned in their initial testimony.*

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

*think the credit relationship between Mr and Mrs S 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 Mr and Mrs S when they purchased Fractional Club 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 they also say 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 Mr and Mrs S 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 unfairly against Mr and Mrs S in practice.*

*In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mr and Mrs S, 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].*

*I can see that the Information Statement signed by Mr and Mrs S at the Time of Sale explained that they would be required to pay a management fee each year and that these would be distributed between the fractional owners in proportion to the number of weeks they had purchased. It also explained the charges would be subject to increase or decrease according to the costs of managing the club. So, I can't see that it was unfair for the Supplier to charge such a fee in and of itself on the aforementioned basis.*

*But in any event, the PR hasn't explained why exactly they feel these term(s) cause an unfairness, and I also can't see that these term(s) have been operated in an unfair way against Mr and Mrs S.*

*The provision of information at the Time of Sale*

*Mr and Mrs S 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. And in any case, I haven't seen anything which makes me think that had Mr and Mrs S been given more time to review this particular document, it would have made any difference to their purchasing decision.*

*The letter of complaint also says Mr and Mrs S 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 Mr and Mrs S. 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 Mr and Mrs S 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 Mr and Mrs S'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 Mr and Mrs S was unfair to them because of an information failing by the Supplier, I'm not persuaded it was.*

***Section 140A: Conclusion***

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

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 Mr and Mrs S'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 accepted my provisional decision and confirmed they had nothing further to add. The PR initially asked for some more time to provide their response, which was provided to them. But, they didn't respond by this new deadline either.

As the deadline for responses 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.

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.

As neither party has provided any new evidence or arguments, I don't believe there is any reason for me to reach a different conclusion from that which I reached in my provisional

decision (outlined above). I do wish to stress that I have considered all the evidence and arguments afresh before reaching that conclusion.

## 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 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.

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

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

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

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.

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 these reasons, I do not uphold Mr and Mrs S's complaint.

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

Fiona Mallinson
**Ombudsman**