DRN-5580928

The complaint

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

What happened

Mrs C and Mr S were existing customers of a timeshare provider (the 'Supplier') having bought a trial timeshare membership on 9 June 2018. This cost them £4,395 and they took out a loan with the Lender for £3,895 to help pay for this purchase. This purchase (and the associated loan) does not form part of this complaint and is included for background purposes only.

The trial membership entitled Mrs C and Mr S to five weeks of holiday accommodation from the Supplier's portfolio of resorts over the following three years.

On 24 October 2018 (the 'Time of Sale') while on holiday, Mrs C and Mr S purchased full membership of a timeshare (the 'Fractional Club') from the Supplier. They entered into an agreement with the Supplier to buy 1,320 fractional points at a cost of £20,530 (the 'Purchase Agreement'). But after trading in their trial membership, they ended up paying £16,135 for membership of the Fractional Club.

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

Mrs C and Mr S paid for their Fractional Club membership by taking finance of £19,458 from the Lender in their joint names (the 'Credit Agreement'). This amount consolidated the outstanding balance of the loan they had taken out for the trial membership.

Mrs C and Mr S – using a professional representative (the 'PR') – wrote to the Lender on 15 November 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.
4. The Credit Agreement being unenforceable because it was not arranged by a credit broker regulated by the Financial Conduct Authority (the 'FCA') to carry out such an activity.

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

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

- Told them that Fractional Club membership was an "investment" which would considerably increase in value.
- Told them that they were buying a share of a property, and its value would considerably increase.
- Told them they could sell their membership back to the resort or easily sell it at a profit.
- Told them that they would have access to the apartment at any time all year round.

Mrs C and Mr 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 Mrs C and Mr S.

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

Mrs C and Mr S say that the Supplier breached the Purchase Agreement because it went into liquidation, which means they will not be able to recover any amounts due to them.

As a result of the above, Mrs C and Mr S say 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 C and Mr 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 Mrs C and Mr 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:

- Fractional Club membership was marketed and sold to them as an investment in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
- The contractual term (Clause D) setting out that the membership would be defaulted in the event of non-payment by the member is an unfair contract term[1].
- The Credit Agreement being unenforceable because it was not arranged by a credit broker regulated by the Financial Conduct Authority (the 'FCA') to carry out such an activity.

The Lender dealt with Mrs C and Mr S's concerns as a complaint and issued its final response letter on 6 December 2021, rejecting it on every ground.

Mrs C and Mr 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.

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

The provisional decision

[1] Although not set out as such, this is alleging a breach of the Consumer Rights Act 2015 ('the CRA').

Having considered everything that had been submitted, I agreed with the outcome reached by the Investigator, in that I didn't think the complaint ought to be upheld, but I expanded on the reasons for not doing so. I set out my initial thoughts in a provisional decision (the 'PD') and asked all parties to respond with any new evidence or arguments that they wished me to consider.

In the PD I began by setting out what I considered to be the legal and regulatory context and then moved on to the merits of the complaint. I said:

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

And having done that, I do not currently think this complaint should be upheld.

But before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

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

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

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

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

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

This part of the complaint was made for several reasons that I set out at the start of this decision. They include the suggestion that Fractional Club membership had been misrepresented by the Supplier because Mrs C and Mr S were told that they were buying a share of property, and its value would considerably increase. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mrs C and Mr S'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.

It has also been alleged that the Supplier misrepresented that Fractional Club was an investment that would considerably increase in value. I will address this further below, but for reasons I will explain, had Mrs C and Mr S been told Fractional Club membership was an investment (and I make no finding on that point here), that would not have been untrue.

In addition, it has been said that the Supplier told Mrs C and Mr S that they could sell their membership back to the resort, or easily sell it at a profit, when that was untrue. But other than setting out the bare allegation in the Letter of Complaint, there is no evidence to support that they were told this by the Supplier. And the terms and conditions of the membership expressly set out that the Supplier has no repurchasing programme.

As for the Supplier's other alleged pre-contractual misrepresentation, while I recognise that Mrs C and Mr S have concerns about the way in which their Fractional Club membership was sold, they have not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the other reason they allege. And I say that because there is no evidence to suggest that the Supplier told them that they would be able to have access to the Allocated Property at any time, all year round. And I think it is inherently unlikely that the Supplier would have said this anyway as this is not the way their Fractional Club membership worked. The membership gave Mrs C and Mr S no rights to access or use the Allocated Property in any way, and this is set out in bullet point 4 of the Purchase Agreement. And in any case, holiday accommodation was subject to availability, and each membership has a limit to the number of weeks holiday members can take, dependant on the number of points they had. So, I am not persuaded that the Supplier would have told Mrs C and Mr S that they would be able to use their membership to stay at the property at any time, all year round.

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

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

Section 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 C and Mr S a right of recourse against the Lender. So, it isn't necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, the Lender is also liable.

Although not set out in terms of a breach of contract, Mrs C and Mr S say that the Supplier went into liquidation, and this means that they would be unable to recover any monies which may be due to them. I can see that certain parts of the Supplier's business were put into administration, however, it would seem that any breach of contract (if that occurs) lies in the future and is currently uncertain. And in any case, neither Mrs C and Mr S nor the PR have said, suggested or provided evidence to demonstrate that they are no longer:

1. *members of the Fractional Club;*
2. *able to use their Fractional Club membership to holiday in the same way they could initially; and*
3. *entitled to a share in the net sales proceeds of the Allocated Property when their Fractional Club membership ends.*

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mrs C and Mr 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?

I have already explained why I am not persuaded that the contract entered into by Mrs C and Mr S 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 C and Mr 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.

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

Under Section 140A of the CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement. Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

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

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

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

"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual

capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.' […] Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."

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

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

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

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

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

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

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

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

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

I have considered the entirety of the credit relationship between Mrs C and Mr S and the Lender, along with all of the circumstances of the complaint. When coming to my conclusion,

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

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 C and Mr S and the Lender. And having done this, I do not think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A.

<u>The Supplier's sales & marketing practices at the Time of Sale</u>

Mrs S and Mr C'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 there is an unfair term in the contractual documentation (Clause D) which means that their Fractional Club membership can be defaulted should Mrs C and Mr S fail to make a required payment within 14 days of it being due.

To conclude that a term in the Purchase Agreement rendered the credit relationship between Mrs C and Mr S and the Lender unfair to them, I'd have to see that the term was unfair under the CRA, and that the term was actually operated against them in practice. In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mrs C and Mr S, have flowed from such a term, because those consequences are relevant to an assessment of unfairness under Section 140A. For example, the judge in 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 cited by the PR has led to any unfairness in the credit relationship between Mrs C and Mr S and the Lender for the purposes of Section 140A of the CCA. I say this because I cannot currently see that the relevant term in the Purchase Agreement has actually been operated against Mrs C and Mr S, let alone unfairly. The PR hasn't explained why exactly it feels this term causes an unfairness, and as I've said, I can't see that this term has been operated in an unfair way against Mrs C and Mr S in any event.

The PR has also said that the Credit Agreement was not brokered by a properly authorised person, because although the Supplier had the correct authorisation by the regulator, the specific salesperson did not as they were not an employee of the Supplier. But I am not persuaded that this is the case. I can see that the Supplier was correctly authorised by the Financial Conduct Authority to broker credit, and it was the Supplier, not an individual, who was named as the credit broker. But in any case, I cannot see how this, if what the PR is saying is correct, (and I make no finding on this point) has rendered the associated Credit Agreement unfair to Mrs C and Mr S, because I cannot see how they have lost out as a result. They obtained the finance for the purchase of the Fractional Club membership they wanted, and I've not seen any evidence which leads me to think they had any other means to pay for the membership.

So, I'm not persuaded, therefore, that Mrs C and Mr S's credit relationship with the Lender was rendered unfair to them under Section 140A for either 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 the 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 Mrs C and Mr 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 the PR said in the Letter of Complaint 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 C and Mr 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 Mrs C and Mr 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 Mrs C and Mr 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 Mrs C and Mr S as an investment. So, it's possible that Fractional Club membership wasn't 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 was marketed and sold to Mrs C and Mr S as an investment in breach of Regulation 14(3).

In addition to this, Mrs C has submitted written testimony, dated 24 March 2024, setting out her recollections of their relationship with the Supplier and the Lender, and I have considered this closely.

When considering how much weight I can place on Mrs C's statement, I am assisted by the judgement in the case of Smith v Secretary of State for Transport [2020] EWHC 1954 (QB).

At paragraph 40 of the judgment, Mrs Justice Thornton helpfully summarised the case law on how a court should approach the assessment of oral evidence. Although in this case I have not heard direct oral evidence, I think this does set out a useful way to look at the evidence Mrs C has provided. Paragraph 40 reads as follows:

> *"At the start of the hearing, I raised with Counsel the issue of how the Court should assess his oral evidence in light of his communication difficulties. Overnight, Counsel agreed a helpful note setting out relevant case law, in particular the commercial case of Gestmin SPGS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) (Leggatt J as he then was at paragraphs 16-22) placed in context by the Court of Appeal in Kogan v Martin [2019] EWCA Civ 1645 (per Floyd LJ at paragraphs 88-89). In the context of language difficulties, Counsel pointed me to the observations of Stuart- Smith J in Arroyo v Equion Energia Ltd (formerly BP Exploration Co (Colombia) Ltd) [2016] EWHC 1699 (TCC) (paragraphs 250-251). Counsel were agreed that I should approach Mr Smith's evidence with the following in mind:*
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> a. *In assessing oral evidence based on recollection of events which occurred many years ago, the Court must be alive to the unreliability of human memory. Research has shown that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts (Gestin and Kogan).*
> b. *A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence (Kogan).*

c. *The task of the Court is always to go on looking for a kernel of truth even if a witness is in some respects unreliable (Arroyo).*

d. *Exaggeration or even fabrication of parts of a witness' testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony (Arroyo).*

e. *The mere fact that there are inconsistencies or unreliability in parts of a witness' evidence is normal in the Court's experience, which must be taken into account when assessing the evidence as a whole and whether some parts can be accepted as reliable (Arroyo).*

f. *Wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, may be neither reliable nor even truthful, the difficulty of discerning where the truth actually lies, what findings he can properly make, is often one of almost excruciating difficulty yet it is a task which judges are paid to perform to the best of their ability (Arroyo, citing Re A (a child) [2011] EWCA Civ 12 at para 20)."*

From this, and from my own experience, I find that inconsistencies in evidence are a normal part of someone trying to remember what happened in the past. So, I'm not surprised that there are some inconsistencies between what Mrs C said happened and what other evidence shows. The question to consider, therefore, is whether there is a core of acceptable evidence from Mrs C that the inconsistencies have little to no bearing on whether her testimony can be relied on, or whether such inconsistencies are fundamental enough to undermine, if not contradict, what she says about what the Supplier said and did to market and sell Fractional Club membership as an investment.

I have also considered when the testimony was completed. This was after the Investigator's view, and after the ruling in Shawbrook & BPF v FOS, so I have considered whether there is a risk that the testimony may have been, even subconsciously, influenced by those.

And having thought about all of these things, I do not feel I am able to place much weight on what Mrs C has said in her testimony. I'll explain.

As I've said, inconsistencies in the testimony are unsurprising, but in this case, I do feel that they are significant enough that they undermine what Mrs C has said. For example, Mrs C begins as follows:

> *"I, [Mrs C] was initially contacted by the [Supplier's] marketing department around May/June 2018 by phone informing me I had won a free 7-night stay at one of their resorts in Spain. I was a little sceptical at first as I had no idea where they had obtained my contact details from.*
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> *On the day of arrival (Sunday 21st October 2018), we were given a letter at the reception desk inviting us to a presentation on Wednesday 24th October 2018 at 9.00am, which included a complimentary breakfast. We were informed that it was important/mandatory to attend this presentation."*

But this does not appear to actually be what happened. As I've said, the evidence shows that Mrs C and Mr S bought a trial membership from the Supplier on 9 June 2018. This would have involved a sales presentation by the Supplier, and Mrs C and Mr S paid over £4,000 for this membership, financed in the main by a loan from the Lender. I find it hard to understand how Mrs C has not mentioned this, and it certainly does not reflect what she has said about how she and her family came to be at the Supplier's resort in October 2018. I feel this is a fundamental omission, as it goes to the heart of what Mrs C says happened. After all, the purchase of the trial membership, with the holidays it provided, shows that she and

Mr S must have been interested in taking holidays, and specifically the type of holidays provided by the Supplier.

And she continues:

> *"I remember being in a large presentation room with other families. We were informed that [the Supplier] was not a timeshare company and that it was a fractional property company; meaning that we would own a fraction of a particular property. We were informed that the property value would increase and that we would earn profit after selling our percentage of the property and enjoy taking as many holidays as possible, at any time of the year.*
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> *I remember spending the whole day (9.00am around 7.30pm) in the presentation room, my children were feeling hungry, tired, restless, and upset, bear in mind they were 4 and 2 years old at the time. Our eldest son who was 15 years old, decided not to join us at the presentation. My husband and I were made to feel under pressure to decide, hungry, tired, and restless. We couldn't leave the room (not even use [sic] the restroom). We were told we couldn't leave the room and have a think because this was a once in a life-time opportunity. With so many people in one room, so many voices, it was hard to focus. We really felt pressured to go with the deal."*

But I have concerns about several aspects of this part of the testimony. Although it is quite detailed, it was written over five years after the sale, so it's likely her memories will have understandably faded over time. And I find it hard to understand how Mrs C and Mr S were in a presentation room for over 10 hours with two small children under 4 years old, and unable to leave even to use the restroom. I acknowledge that the presentation process may have been long, and they may have felt weary, but it seems inherently unlikely that Mrs C and Mr S would have been prevented from leaving by the Supplier, even to look after their children or to use the restroom. While I am not calling in to question the truthfulness of what Mrs C has set out, I think there is a significant risk that she may have been subconsciously influenced by matters since the complaint was first made.

Mrs C then says:

> *"It was to my [sic] understanding that once we had paid for 19 years, we could sell our part of the property and earn a profit after selling our fraction of the property. I do feel that this type of ownership never existed, I feel angry and upset. I worry on the financial burden this may have on my children; they don't deserve this.*
>
> *We spent between around [sic] 10 hours with the sales rep and one of the managers pressured us into taking up the offer, signing up was time sensitive. I believe the sales representative introduced himself as David 'Dave' and the sales manager was called Rob. I noticed he was hanging around a lot and eavesdropping in our conversation with the [sic] 'Dave'.*
>
> *We were shown a webpage illustrating comparisons between other holiday companies and [the Supplier], how much money we could be saving in comparison to other holiday companies and what we could save of [sic] we signed up for the offer.*
>
> *We were not given the opportunity to go away and review the purchase agreement before signing. We were not informed we had a cooling off period."*

Here Mrs C sets out what they were told about the Fractional Club membership and how it worked. But she goes on to say how she now thinks the type of membership they bought never existed – this also makes me think that she may have been influenced by external factors, and she hasn't said why she feels this way. She also says they were not told that they had a cooling-off period. This, again, does not reflect the evidence I've seen. As part of

the evidential submission prepared by the PR, there is a form, signed and dated by Mrs C and Mr S at the Time of Sale called a "SEPARATE STANDARD WITHDRAWAL FORM TO FACILITATE THE RIGHT OF WITHDRAWL". This sets out that Mrs C and Mr S had the right to withdraw from the contract within 14 calendar days without giving any reason, starting on 24 October 2018. So, as they've signed this form, and it was submitted to this Service by the PR, they clearly received it. So, I can't see that Mrs C's statement that they were not informed of this is accurate. I think it's also unlikely that they would have both signed it without any consideration whatsoever as to what it was or what it meant. So, this is another significant inconsistency which I feel undermines what Mrs C has said as a whole.

So, overall, taking into account that it was written after the judgement in Shawbrook & BPF v FOS and after the Investigator's view, and while I am not doubting Mrs C's truthfulness here, I have sufficient doubts as to the reliability of her memories, as set out in the testimony, to mean I do not feel I can place much, if any, weight on it.

So, I do not think the testimony helps me in my considerations about whether there was a breach of Regulation 14(3) of the Timeshare Regulations here. 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>If there was a breach of Regulation 14(3), was the credit relationship between the Lender and Mrs C and Mr S rendered unfair as a result?</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.

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

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

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

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

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

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

same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

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

But as I've already said, although Mrs S has said in her testimony that the Supplier led them to believe that the Fractional Club membership was an investment from which they would make a financial gain, I don't feel I can place much, if any, weight on this in my determination of this case. Nor can I do so when considering whether any such breach by the Supplier likely induced them into the purchase.

Further, I also return here to the fact that Mrs S and Mr C made a purchase of a trial membership from the Supplier only a few months before their Fractional Club purchase. This, I think, indicates that they wanted to take family holidays, and specifically the type of holiday provided by the Supplier.

So given this, and given that I don't feel able to place reliance on her testimony, on balance, 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 Mrs C and Mr 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 for the holidays it provided, 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 C and Mr S and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

Section 140A: Conclusion

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

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mrs C and Mr S'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. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them."

The responses to the provisional decision

The Lender replied to say that it agreed with the provisional outcome and had nothing further to add.

[3] which, having taken place during its antecedent negotiations with Mrs C and Mr S, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender

The PR, on Mrs C and Mr S's behalf, did not agree, and sent a comprehensive response. It said, that upon receiving the PD, it sent Mrs C and Mr S a series of questions designed to clarify certain issues. It said that it had not, at any point, provided Mrs C and Mr S with a copy of either the Investigator's view nor the PD, so they could not have been influenced by the contents of either before answering the questions. These questions and Mrs C's answers are set out below:

"Q: *Firstly, I would like to ask you to confirm have you seen the initial decision of the investigator, rejecting your claim.*

A: No, I have not seen the initial decision of the investigator. This information was not shared with me and I never requested this information.

Q: Secondly, I would like to ask you whether you have heard / read (something in the press or elsewhere) about the Judicial Review proceedings of a case similar to yours between Shawbrook Bank Ltd and Barclays Partner Finance against the Financial Ombudsman Service and the decision of the court?

A: No, I have not heard or seen anything in relation to the case. I have no knowledge of any media coverage about the case.

Q: In your witness statement, you said: "I, [Mrs C] was initially contacted by the [the Supplier's] marketing department around May/June 2018 by phone informing me I had won a free 7-night stay at one of their resorts in Spain. I was a little sceptical at first as I had no idea where they had obtained my contact details from."

However, you have signed a trial membership with [the Supplier], which means that you must have sat another sales presentation before the October 2018 fractional ownership purchase. You did not say anything about this in your previous email.

Could you please explain a little bit more about this?

A: Regarding the trial membership purchase, that was signed on 09/06/2018, I was contacted around May 2018 to say that I had won a free 7-night stay in Spain, my husband and I were invited to a sales presentation in Central London and we signed the trial membership. I did not mention this before because the sales presentation was not so intense, and because this was traded-in for the new purchase anyway.

Q: You said in your witness statement that you were the whole day (9.00am around 7.30pm) in the presentation room, and your children (4 and 2 years old at the time) were feeling hungry, tired, restless, and upset, and you could not leave the room even to go to the restroom.

How was that possible? Could you please explain a little bit more?

A: Regarding your question about the length of the sales presentation, please bear in mind that [the Supplier] had a childcare facility in an a [sic] nearby room, and our children were there. I was anxious and restless because they were hungry and tired. I felt very much under pressure because my children were there. We were constantly pressured to make a decision there and then, but since we were hesitating, they made us feel we could not leave the room before we made the decision. It was presented in this way because since the very beginning we were told that this sales presentation was obligatory as part of our free week. I even think that having our children there in the childcare was part of their manipulative techniques to put more pressure on us.

Q: You said in your witness statement: "It was to my understanding that once we had paid for 19 years, we could sell our part of the property and earn a profit after selling our fraction of the property. I do feel that this type of ownership never existed, I feel angry and upset. I worry on the financial burden this may have on my children; they don't deserve this."

Why now [do] you think that this ownership never existed and you feel angry and upset?

A: Regarding why we feel angry, upset and scammed, this is because our overall experience with [the Supplier] was a nightmare. Looking back, everything that was presented at that meeting was a complete lie. I think we were grossly misrepresented about all the benefits of this fractional membership, including that we were part owners in that property. It was sold to us that we had a stake, but everyone who has a fraction in that property should agree in order [for] the sale to go ahead.

Q: You said that after 19 years you could earn profit after the property is sold.

Was this an important part that influenced your decision to purchase? Would you have purchased if there was only the holidays benefit?

A; Whether we would have purchased if it was only holidays, the answer is no. We already had the trial membership, so we could use holidays if we wanted holidays. This time they were offering us a part ownership in a property that would increase in value and we would earn a profit. They emphasised that this was the difference between the trial membership and the new membership.

Q: Long time has passed since your purchase in October 2018.

Do you think that your recollections are correct and clear? Do you think that what you remembered about the sales representatives of [the Supplier] telling you that "property value would increase and that we would earn profit" is accurate?

A: Yes, I am confident that my recollections are correct and clear. We were about to spend a lot of money, so the profit was important to us. As I said we already had the holidays, why would we spend more money if there was nothing more to get?

Q: You said in your statement that you were not informed you had a cooling off period, but there is a separate standard withdrawal form as part of your purchase contract which gives you 14 days to withdraw from it.

Have you seen that form? You have signed this form at the bottom.

Please explain about the loan application with First Holiday Finance Ltd (FHFL).

A: Regarding the cooling off period, as I said we were at the sales presentation for so many hours, we were hungry and tired. When it came to signing we were already exhausted and we weren't given the opportunity to read the whole paperwork and the small print. I did ask if we could think about it overnight and they said no. They said that we had to do it there and then. We were simply shown where to sign and we did it. We trusted their words and their experience, which appeared to be our biggest mistake.

Q: Were you rejected by another bank before they arranged the FHFL loan?

A: Regarding the loan application, I thought I could not afford to pay for the loan and I told them that my credit score wasn't good. They said not to worry, they would arrange it. The application was initially rejected by another bank and they quickly arranged the loan through First Holiday Finance."

The PR said that Mrs C's original statement and her subsequent answers above were untainted by any publicity about timeshare complaints, nor by the Investigator's opinion, and were her honest recollections of events, and the answers she gave to the above questions provided reasons for the omissions in her original testimony. It went on to say that Mrs C and Mr S just signing documentation without reading it was as a result of spending many hours in the sales presentation, and this is similar to the situation in *Johnson v Firstrand Bank Ltd (t/a Motonovo Finance) [2024] EWCA Civ 1282.* The PR said Mrs C and Mr S had just signed where they were shown and had not read the text of the documentation.

The PR said that *Carney* and *Kerrigan* showed that the investment element of the Fractional Club did not have to be the only motivating factor or the primary motivating factor. There only had to be "*some material impact*", and Mrs C's additional statement confirmed that the investment element, and the potential profit, influenced their decision to purchase.

As the deadline for further submissions has now passed, the complaint has come back to me for a final decision to be made.

The legal and regulatory context

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

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

- The CCA (including Section 75 and Sections 140A-140C).
- The law on misrepresentation.
- The Timeshare Regulations.
- The CRA.
- The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations').
- Case law on Section 140A of the CCA – including, in particular:
    - The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') (which remains the leading case in this area).
    - *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
    - *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*').
    - The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*').
    - *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
    - *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
    - *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner*

Finance)) v Financial Ombudsman Service [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').

Good industry practice – the RDO Code

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

What I've decided – and why

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

And having done so, and having considered everything that has been submitted in response to my PD, I remain satisfied that this complaint ought not to be upheld, for broadly the same reasons set out in the PD. I will however address the points raised by the PR, but in doing so, I note again that my role as an Ombudsman is not to address every single point that has been made in response. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I have read the PR's response in full, I will confine my findings to what I think are the salient points.

Firstly, I will address what the PR and Mrs C say about my assessment of the original testimony.

As I said in the PD, inconsistencies in evidence are a normal part of someone trying to remember what happened in the past. So, I'm not surprised that there are some inconsistencies between what Mrs C said happened and what other evidence shows. But I reiterate, the question to consider is whether there is a core of acceptable evidence from Mrs C that the inconsistencies have little to no bearing on whether her testimony can be relied on, or whether such inconsistencies are fundamental enough to undermine, if not contradict, what she says about what the Supplier said and did to market and sell Fractional Club membership as an investment.

Part of my assessment of the testimony was to consider *when* it was written, and whether it may have been, even subconsciously, affected by external factors such as other similar complaints. I appreciate that Mrs C has confirmed that she has no knowledge of the Judicial Review[4], and I have no reason to doubt that. But I find it unlikely that she would not have seen the Investigator's view, which was sent to the PR on 19 February 2024. I think this because on 11 March 2024 the PR responded to the Investigator's view saying;

> *"In any case, my clients disagree with the decisionj [sic] and wish for the dispute to be reviewed by an Ombudsman."*

I find it hard to accept that Mrs C and Mr S would be in a position to decide whether or not to accept the Investigator's outcome, without actually seeing what the Investigator said. So, I maintain there is a risk that Mrs C's testimony was tainted by the Investigator's view. I still also think that there is a risk that Mrs C's memories have been influenced by publicity about timeshare complaints. I understand that she says it hasn't, and I am not calling into question her truthfulness here, but I am drawn to one of the answers she gave to the PR. When

[4] *Shawbrook & BPF v FOS*

asked: "*Why now [do] you think that this ownership never existed and you feel angry and upset?"* Mrs C said:

> *"Regarding why we feel angry, upset and scammed, this is because our overall experience with [the Supplier] was a nightmare. Looking back, everything that was presented at that meeting was a complete lie. I think we were grossly misrepresented about all the benefits of this fractional membership, including that we were part owners in that property.* ***It was sold to us that we had a stake, but everyone who has a fraction in that property should agree in order [for] the sale to go ahead."***
>
> (bold my emphasis)

This (bold) part is an incorrect interpretation of how fractional membership worked that I have seen repeated in many complaints about this (and other) timeshare suppliers. I think that the most likely reason for this misinterpretation on Mrs C's behalf is from seeing it repeated in commentary about other similar complaints. And after all, this particular aspect didn't form part of their original complaint against the Lender, so I think it likely that this misunderstanding was formed relatively recently, and probably *after* the complaint was first made.

I also find it hard to understand that Mrs C didn't mention in her testimony that the reason they were on holiday at the Time of Sale was because they had bought a trial membership from the Supplier. This was an important part of the purchase, and apparently was, if I am to believe what she says in her answers to the PR's questions, a fundamental reason for them to make the subsequent purchase – that being that Fractional Club membership provided the profit potential rather than just holidays, as provided by the trial membership. So, I cannot see how the trial membership was on the one hand not something worth mentioning, but then the difference between it and the full membership was subsequently described as the main reason why the full membership was bought. I simply don't find this description of the reason for this omission persuasive.

I have also considered the clarification Mrs C has given to what she originally said about the presentation lasting 10 hours and how their children were cared for during this time. But I think that this omission (that the children were looked after and provided for with childcare in the next room) from her testimony was significant, and ran the risk of seemingly enhancing the portrayal of the intensity of the presentation process to the reader. That said, I repeat that I understand that the presentation may have been lengthy and Mrs C and Mr S may have felt weary as a result, but given the inconsistencies and omissions, I am not persuaded that I can place much weight on her description of what happened.

I accept that the PR may not have provided Mrs C and Mr S a copy of the PD prior to asking the questions set out above, but when considering Mrs C and Mr S's motivation to make the purchase, I don't find the answers particularly helpful in these circumstances. I say this because there is an element of *leading* in the way the questions are formed. For example, the following question:

> *"You said that after 19 years you could earn profit after the property is sold.*
>
> *Was this an important part that influenced your decision to purchase? Would you have purchased if there was only the holidays benefit?".*

This does rather make it possible that Mrs C's answer could have been influenced by the question. I think there is a distinct possibility that it led Mrs C to answer in a particular way, and as a result I don't feel I am able to place much weight on her answers.

So, in light of all of the above, and having considered the testimony and Mrs C's answers to the PR's questions, I remain unpersuaded that I am able to place much, if any, weight on it.

I also remain unpersuaded that any breach of Regulation 14(3) was material to Mrs C and Mr S's purchasing decision. I have thought about what Mrs C has subsequently said – that if all they had wanted was holidays, they could have just carried on with the trial membership. But they were given the full value of the trial membership as a trade-in allowance off the purchase price of the Fractional Club. And the full Fractional Club membership entitled them to a week's accommodation every year for 19 years, as opposed to five weeks in the following three years. So, I don't think this shows that there was another reason – i.e. the investment potential, for their purchase. Rather, I think it just shows their interest in holidays.

Finally, the PR has said I have misapplied *Carney* and *Kerrigan*, and that there only had to be "some material impact" from a breach of Regulation 14(3) to render the associated credit relationship unfair. But I don't agree that I misapplied either case here. In my PD I said:

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

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

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

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

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

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

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mrs C and Mr 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 as I said in my PD, and I maintain now, although Mrs S has said in both her testimony and her more recent answers that the Supplier led them to believe that the Fractional Club membership was an investment from which they would make a financial gain, I don't feel I can place much, if any, weight on this in my determination of this case. Nor can I do so when considering whether any such breach by the Supplier likely induced them into the purchase. For this reason, and from all of the circumstances, I am simply not persuaded that this was the case.

So, it follows that I am not persuaded that the credit relationship between Mrs C and Mr S and the Lender was unfair to them.

Other matters

I have also reconsidered everything else that I said in the PD in response to the other aspects of the complaint. The PR has not provided any further evidence or arguments in relation to these other points, and having reconsidered them, I see no reason to depart from my findings on these as set out in the PD.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mrs C and Mr S'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. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

My final decision

I do not uphold this complaint against First Holiday Finance Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs C and Mr S to accept or reject my decision before 25 June 2025.

Chris Riggs
Ombudsman