DRN-5583476

The complaint

Mr and Mrs M'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 M were existing timeshare members with a timeshare provider (the 'Supplier'), having purchased a trial membership in June 2014.

On 9 April 2015 (the 'Time of Sale'), they purchased full membership (the 'Fractional Club') from the Supplier. They entered into an agreement with the Supplier to buy 700 fractional points at a cost of £13,467 (the 'Purchase Agreement').

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

Mr and Mrs M paid for their Fractional Club membership by paying a deposit of £500 and taking finance for the remaining amount of £12,967 from the Lender in both of their names (the 'Credit Agreement').

Mr and Mrs M – using a professional representative (the 'PR') – wrote to the Lender on 22 September 2020 (the 'Letter of Complaint') to complain about:

1. A misrepresentation 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 misrepresentation at the Time of Sale

Mr and Mrs M say that the Supplier made a pre-contractual misrepresentation at the Time of Sale – namely that the Supplier told them that Fractional Club membership was an "investment" when that was not true because it is worthless.

Mr and Mrs M say that they have a claim against the Supplier in respect of the misrepresentation 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 M.

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

Mr and Mrs M say that the Supplier breached the Purchase Agreement because it went into liquidation.

As a result of the above, Mr and Mrs M 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 Mr and Mrs M.

(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 M 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. Commission was paid to the Supplier by the Lender which was not disclosed to Mr and Mrs M.
2. They were pressured into purchasing Fractional Club membership by the Supplier.
3. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment and the loan was unaffordable.

The Lender dealt with Mr and Mrs M's concerns as a complaint and issued its final response letter on 12 October 2020, rejecting it on every ground.

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

At this stage, the PR provided further comments, suggesting the membership was sold to Mr and Mrs M as an investment in breach of Regulation 14(3) of the Timeshare Regulations, and that this breach was fundamental to their purchase.

I considered the matter and issued a provisional decision dated 12 May 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.

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

- *The CCA (including Section 75 and Sections 140A-140C).*
- *The law on misrepresentation.*
- *The Timeshare Regulations.*
- *The Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR).*
- *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, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time – which, in this complaint, includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code').

My provisional findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

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

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

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

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

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

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

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

Here, Mr and Mrs M have said the Supplier told them that Fractional Club membership was an "investment" when that was not true because it is worthless.

But, for reasons I'll come on to further below, Mr and Mrs M's membership plainly did have an investment element to it. So, such a statement by the Supplier, if made, would not appear to have been untrue. In addition, beyond the bare allegation, no evidence has been provided to support it, such as what exactly they were told, by whom and in what context. What's more, as there's nothing else on file that persuades me there were any false statements of existing fact made to Mr and Mrs M by the Supplier at the Time of Sale, I do not think there was an actionable misrepresentation by the Supplier.

For these reasons, therefore, I do not think the Lender is liable to pay Mr and Mrs M any compensation for the alleged misrepresentation 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 Mr and Mrs M 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.

Mr and Mrs M say that the Supplier breached the Purchase Agreement because it went into liquidation. I can see that certain parts of the Supplier's business were put into administration. And I can understand why the PR is alleging that there was a breach of the Purchase Agreement as a result. However, neither Mr and Mrs M 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 Mr and Mrs M 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 Mr and Mrs M 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 Mr and Mrs M 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 Mr and Mrs M and the Lender was unfair.

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

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

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

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr and Mrs M'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 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.

I have considered the entirety of the credit relationship between Mr and Mrs M 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;*

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

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 M and the Lender.

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

Mr and Mrs M'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.

The PR says that the right checks weren't carried out before the Lender lent to Mr and Mrs M. 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 M 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 M. If there is any further information on this (or any other points raised in this provisional decision) that Mr and Mrs M wish to provide, I would invite them to do so in response to this provisional decision.

Mr and Mrs M also say 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 (if anything) 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 signed a 'right of withdrawal' form confirming they understood this) and they have not provided a credible explanation for why they did not cancel their membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs M made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

The PR also said that commission was paid to the Supplier by the Lender at the Time of Sale and because this was not disclosed to Mr and Mrs M, this made the credit relationship unfair. But the PR has not provided any evidence that this was the case, and the Lender has confirmed to this Service that they did not pay any commission to the Supplier.

I'm not persuaded, therefore, that Mr and Mrs M'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 M'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 M'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 M 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 evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs M, 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 M as an investment.

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

So, I have taken all of that into account. However, on my reading of the evidence provided, that is not what appears to have happened at that time. I say this because, beyond the bare

allegation, neither Mr and Mrs M nor the PR have provided any evidence to support it. I acknowledge that the Letter of Complaint says that Mr and Mrs M were told that the membership was an investment, and the product would increase in value. And that after a few years, they would be able to sell the membership at a considerable profit. But a Letter of Complaint is not evidence of what was said or what happened at the Time of Sale, and as I've said, no evidence has been provided to support the allegation made here.

And with that being the case, in the absence of persuasive evidence to suggest otherwise, I find that it is unlikely that the Supplier led them to believe that membership offered them the prospect of a financial gain (i.e., a profit).

But even if I am wrong to conclude that, on this occasion, membership was unlikely to have been sold in that way, given what I have already said about the evidence provided, I am not currently persuaded that would make a difference to the outcome in this complaint anyway.

<u>If there was a breach of Regulation 14(3), did it render the credit relationship between Mr and Mrs M and the Lender unfair?</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 Mr and Mrs M and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) which, having taken place during its antecedent negotiations with Mr and Mrs M, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the

creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

But as I've already said, there has been no evidence provided in this case to support that the Supplier led them to believe that the Fractional Club membership was an investment from which they would make a financial gain, nor was there any indication that they were induced into the purchase on that basis. I also note from the Letter of Complaint that in their brief description of the sales process, it suggests Mr and Mrs M were sold the membership on the basis of the benefits of it as a holiday product. And, that they initially told the Supplier they couldn't afford to purchase, but then only did so because the Supplier offered a reduced price.

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 M'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 M and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

Section 140A: Conclusion

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

Overall, 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 M'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 agreed with the provisional decision and confirmed they had nothing further to add. The PR did not agree and provided some further comments they wished to be considered.

Having received the responses from both parties, I'm now finalising my decision.

What I've decided – and why

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

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

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

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

I firstly note that on 17 February 2025, the PR submitted a further complaint to the Lender about the same sale and loan being considered here. Our Service was not made aware of this until 23 May 2025 i.e. after I issued my PD. But in any event, the Lender did not consider this to be a new complaint and responded to the PR's letter accordingly. And, having reviewed this, this simply appears to be an attempt by the PR to refine the complaint somewhat, at a late stage. Mr and Mrs M's complaint ultimately remains the same - that the Lender was party to an unfair credit relationship with her under Section 140A of the CCA and the Lender deciding against paying claims under Section 75 of the CCA.

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

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

As explained in my PD, the PR says the Supplier misrepresented the Fractional Club membership to Mr and Mrs M at the Time of Sale because they told her it was an "investment" when that was not true because it is worthless.

In their response to the PD, the PR said they acknowledge the existence of an investment element in the membership. But, they said the Supplier's representation here wasn't just false but also misleading and created a false impression, as well as being fraudulent. And, that I hadn't considered whether the Supplier's overall representation about the financial outcome of the investment was misleading. They also explained that their original allegation of the membership being 'worthless' also related to the value of the product in relation to holidays and how the Supplier had overstated this. And, overall, that I should consider whether Mr and Mrs M were induced to enter into the Purchase Agreement based on these misrepresentations.

As I've explained above, I don't consider that the PR has said much new here, nor have they provided any new evidence to support what they've said. And, in my view, their comments here are simply an attempt to try and refine the complaint point made at a late stage.

They seem to now accept that the membership did have an investment element to it, as I explained in my PD. But, in summary, have said the Supplier misled Mr and Mrs M by overstating the value and function of the membership as an investment and as a holiday product.

I think it's useful here to again set out what a misrepresentation is. A material and actionable misrepresentation is an untrue statement of existing fact or law made by one party (or his agent for the purposes of passing on the representation, acting within the scope of his authority) to another party that induced that party to enter into a contract.

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

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

Given the above, and the lack of evidence in this case, I'm still not persuaded there was an actionable misrepresentation here for the reason(s) Mr and Mrs M have alleged. And, even if I agreed that there was a misrepresentation here, in any event the PR hasn't provided any evidence which shows that Mr and Mrs M relied on these representations when making their purchase.

Further, whether such memberships were of value to consumers in a general sense, either as an investment or as a holiday product seems, in my view, to be a matter of opinion which isn't relevant to whether there was an untrue statement of fact made to Mr and Mrs M by the Supplier at the Time of Sale.

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

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

Regarding this part of the complaint, the PR has said they feel I've underestimated the impact of the issue(s) raised here on the contract.

But again, the PR has not said much new here, nor provided any new evidence. Rather, it's simply repeating its stance.

Specifically, the PR said I'd set too high a bar and ignored the material impact on Mr and Mrs M. They said this had introduced significant uncertainty as well as potential disruption to services and questionable viability of the agreement in the long term. And, that this was therefore a breach of terms implicitly agreed upon regarding the secure and reliable provision of the benefits over the duration of the contract.

But, the key question here is whether the services the Supplier agreed to provide to Mr and Mrs M under the contract continued to be provided. And again, as I explained in my PD, neither Mr and Mrs M nor the PR have said, suggested or provided evidence to demonstrate that they are no longer members of the Fractional Club, no longer able to use their membership to holiday in the same way they could initially or no longer entitled to a share in the net sales proceeds of the Allocated Property when their membership ends. So, while I appreciate the PR's concerns, I still can't see that there has been a breach of contract here for this reason.

Overall, therefore, I still 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?

The Supplier's alleged breach of Regulation 14(3)

Here, the PR reiterated its stance that the Supplier did breach Regulation 14(3) at the Time of Sale by selling the membership to Mr and Mrs M as an investment. They said certain information was not disclosed to Mr and Mrs M at the Time of Sale which is against the CPUT Regulations, and this contributed to the '*misleading impression that this was a sound investment*'.

They said they felt I had put too much weight on the relevant disclaimers in the sales paperwork. And they said that due to the nature of the product, it would be difficult for the Supplier to have sold it without breaching the relevant provision.

But again, the PR hasn't said much new here nor has it provided any new evidence. I already acknowledged in my PD that it's possible Fractional Club membership was sold to Mr and Mrs M as an investment (despite the aforementioned disclaimers), given both the Supplier's training materials and the difficulty they were likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature without breaching Regulation 14(3). But, while possible, I explained in my PD I didn't think it was *probable* based on the evidence I had seen – and I haven't been provided with anything new

that changes my view on that.

And in any event, I explained in my PD that even if I was wrong about that, and the Supplier *did* sell membership to Mr and Mrs M in a manner that breached Regulation 14(3), I didn't think that made a difference to the outcome of the complaint anyway. I'll now address the PR's further comments on that point.

Was the credit relationship between the Lender and Mr and Mrs M rendered unfair?

Here, the PR correctly suggests in their response that what needs to be considered here is whether any breach by the Supplier of Regulation 14(3) at the Time of Sale had a material impact on Mr and Mrs M's decision to purchase. But, that is what I did in my PD and having considered everything afresh, I still don't think the credit relationship between Mr and Mrs M and the Lender was rendered unfair to them for this reason. I'll explain.

Here, the PR has highlighted that in the Letter of Complaint, they said that Mr and Mrs M were told that the product was an investment that would increase in value and could be sold for a considerable profit. And, that certain information allegedly not being disclosed to them at the Time of Sale would only have made what the Supplier said in this regard '*more potent*'.

They've said this shows that a financial return was presented as a significant benefit and a compelling reason to purchase. And, that it was therefore illogical of me to dismiss this in my PD based on other motivating factors or later comments relating to an interest in holidays.

But, I think here the PR is confusing the issue of whether there was a breach of Regulation 14(3) at the Time of Sale, and whether any such alleged breach had a material impact on the consumer's purchasing decision. These are two separate issues which it's important not to conflate. I also fail to see the relevance of whether certain information was not provided to Mr and Mrs M at the Time of Sale to either of these issues.

But I already acknowledged in my PD that the Letter of Complaint contained an allegation that the Supplier may have sold membership to Mr and Mrs M as an investment. And as I explained in my PD, a Letter of Complaint isn't evidence - I don't consider this alone to be sufficient evidence that any such breach had a material impact on Mr and Mrs M's purchasing decision. Instead, it seems to simply be a description of what potentially they were told during the sale. I also note that the PR seems to suggest I should rely on some of the comments in the Letter of Complaint here, but then went on to suggest that I shouldn't rely on some of the other comments in the Letter of Complaint I had referred to in my PD relating to Mr and Mrs M's interest in holidays. This, in my view, seems rather contradictory.

I've still considered the Letter of Complaint, along with all of the other evidence available, as I'm required to do. But, it's also my role to weigh the relevant evidence and it's up to me to decide how much weight to place on that evidence as well as what information I need to see in order to fairly decide a complaint.

The PR questioned whether there was other specific evidence from the Lender which refuted their allegations, but it seems they're already aware of what the Lender has provided in this case. And, it's important to be clear here that the points I made in my PD (and make again here) are based on my own assessment of all of the evidence provided in this case.

Turning back to the evidence provided, the PR hasn't provided any new evidence regarding Mr and Mrs M's motivations for their purchase at the Time of Sale. So, for this and all of the above reasons, and those I already explained in my PD, I remain unpersuaded that Mr and Mrs M's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain. So, it follows that I still do not think the credit relationship between them and the Lender was unfair to her even if the Supplier had breached Regulation 14(3).

Other points

The PR has reiterated that Mr and Mrs M were unduly pressured at the Time of Sale. But again, they haven't provided anything new here. For all of the reasons I explained in my PD, there remains insufficient evidence to demonstrate that Mr and Mrs M's decision to purchase was made because their ability to exercise that choice was significantly impaired by pressure from the Supplier. As I've said, Mr and Mrs M still have not provided a credible explanation for why they did not cancel the membership during the 14-day cooling off period, if, as set out in the Letter of Complaint, they only made the purchase due to the pressure placed on them at the Time of Sale.

The PR has also reiterated that the Lender's assessment of Mr and Mrs M's ability to afford the loan contributed to the unfairness of the credit relationship. They haven't provided anything new here either and I note they've acknowledged that I've given them the opportunity to provide any further information on this point. The PR said that I shouldn't only consider demonstrable unaffordability but also the Lender's process and due diligence and questioned whether the Lender obtained sufficient verified information to make a responsible lending decision.

But, as I already explained in my PD, even if I agreed that the Lender failed to do everything it should have when it agreed to lend (and I still make no such finding), I would have to be satisfied that the money lent to Mr and Mrs M was unaffordable before also concluding that they lost out as a result and then consider whether the credit relationship was unfair to them for this reason. As the PR has provided no further evidence, I still cannot see that the lending was unaffordable for Mr and Mrs M.

The PR also again raised the issue of commission, saying that even if commission was not paid there was still an unfairness, in summary, due to the misrepresentation of the financial arrangements between the Supplier and the Lender underpinning the sale. But ultimately, as I explained in my provisional decision, there was no commission paid in this case. Even if Mr and Mrs M previously thought otherwise, since no commission was paid, I fail to see how this caused any unfairness in the credit relationship between Mr and Mrs M and the Lender or the relevance of the 'close operational relationship' the PR has referred to between the Lender and Supplier to this issue.

Lastly, the PR said that I needed to look beyond the contract terms to the overall context and conduct of the Supplier and Lender. And, that I should have explicitly considered the Supplier's conduct against the aforementioned RDO code and CPUT Regulations. But, as I outlined in my PD, I have considered the entirety of the credit relationship between Mr and Mrs M and the Lender, not just the contractual terms. And, I also explained that I'd taken the RDO code and the CPUT Regulations into account in reaching my conclusions – it's not necessary for the purposes of this decision to go through each part of the aforementioned code and regulations in turn in the way the PR has suggested. As I explained at the outset of this decision, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision. This is in line with our Service's role, which includes resolving complaints with minimum formality.

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

Lastly, the PR referred to several other decisions issued by this Service, relating to the sale of fractional timeshares which were upheld, providing some wider comments on these and our Service's general approach to them. I note that the majority of the decisions the PR has referred to here relate to an entirely different supplier and entirely different product to those involved in this particular complaint. So, I fail to see the relevance of these. But in any event,

those cases were decided on their own individual facts and circumstances so they do not change my own findings here that Mr and Mrs M's complaint should not be upheld.

Conclusion

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

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M and Mr M to accept or reject my decision before 3 July 2025.

Fiona Mallinson
Ombudsman