DRN-5592729

The complaint

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

What happened

Mr and Mrs F were existing customers of a timeshare provider (the 'Supplier'). Their previous purchases are not part of this complaint but are included here for background information only.

On 10 August 2014 (the 'Time of Sale'), they purchased a new type of membership (the 'Signature membership') from the Supplier. They entered into an agreement with the Supplier to buy 5,820 points at a cost of £37,651 (the 'Purchase Agreement'). But after trading in their existing timeshare, they ended up paying £21,217 for Signature membership.

Signature membership was asset backed – which meant it gave Mr and Mrs F more than just holiday rights. It also included a share in the net sale proceeds of a property named on their Purchase Agreement (the 'Allocated Property') after their membership term ends. It also offered guaranteed availability of their Allocated Property in a set week each year, or they could use their points to stay at another property from the Supplier's portfolio of resorts.

Mr and Mrs F paid for their Signature membership by paying a £500 deposit and £10,000 via bank transfer. They then took finance for the remaining amount of £10,717 from the Lender in both of their names (the 'Credit Agreement').

Mr and Mrs F – using a professional representative (the 'PR') – wrote to the Lender on 3 June 2021 (the 'Letter of Complaint') to complain about 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.

The Letter of Complaint set out several reasons why Mr and Mrs F 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. Misrepresentations by the Supplier at the Time of Sale.
2. There were various breaches of the Timeshare Regulations 2010.*[1]
3. The Lender may have paid the Supplier commission.
4. They were pressured into purchasing Signature membership by the Supplier.*
5. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations

[1] *In the Letter of Complaint, the Supplier said these points related to Mr and Mrs F's earlier purchase in 2012 and also mentioned other lenders not part of this complaint. I can only assume these are errors, but will respond to these points briefly in this decision accordingly.

2008 (the 'CPUT Regulations').*

The Lender dealt with Mr and Mrs F's concerns as a complaint and issued its final response letter on 26 July 2021, rejecting it on every ground.

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

Mr and Mrs F 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 some further comments, namely that they felt the membership was sold to Mr and Mrs F at the Time of Sale as an investment, in breach of the Timeshare Regulations 2010.

I considered the complaint and issued a provisional decision (the 'PD') dated 28 April 2025. In that decision, I said:

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

Mr and Mrs F say that the credit relationship between them and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that they have concerns about. It is those concerns that I explore here.

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

1. *The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale; and*
2. *The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*
3. *Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;*
4. *The inherent probabilities of the sale given its circumstances.*

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

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

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

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

The PR also suggested there had been various breaches of the Timeshare Regulations. But beyond the bare allegations, I haven't been provided with any evidence that such breaches occurred.

But even if they did occur (which I make no finding on here), I'm not persuaded that the Supplier's alleged breaches are likely to have prejudiced Mr and Mrs F's purchasing decision at the Time of Sale and rendered their credit relationship with the Lender unfair for the purposes of Section 140A of the CCA. I say this because I can't see how the points the PR have raised were material in any way to their decision to purchase. For example, I can't see how Mr and Mrs F would have acted differently had the Supplier allowed the purchase price to be paid in instalments, given that they took finance with monthly repayments to fund it anyway. In my view, the breaches identified in the PR's original explanation of the complaint were, if found to have occurred, wholly technical in nature and were immaterial to Mr and Mrs F's decision to purchase Signature membership. I'm aware that the PR has also alleged there was a breach of Regulation 14(3), which I'll address separately below.

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

As outlined above, the PR, in the Letter of Complaint, said there were misrepresentations made by the Supplier at the Time of Sale which made the credit relationship unfair. Misrepresentations could also be something that led to an unfair debtor-creditor relationship[2], so I've considered what Mr and Mrs F have had to say with this in mind.

They include the suggestion that Signature membership had been misrepresented by the Supplier because Mr and Mrs F were told that membership was an 'investment' when that was not true. But, for reasons I'll go on to explain below, Mr and Mrs F's membership plainly did have an investment element to it.

As for the rest of the Supplier's alleged pre-contractual misrepresentation(s), while I recognise that Mr and Mrs F have concerns about the way in which their Signature membership was sold, they haven't persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the other reasons they allege. And I say that because beyond the bare allegations, little to no evidence has been provided to support them, including in Mr and Mrs F's evidence (which I will discuss further below) about what happened at the Time of Sale.

Lastly, the PR also said that commission may have been paid to the Supplier by the Lender at the Time of Sale and suggested that this therefore may have 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 F's credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why they say their credit relationship with the Lender was unfair to them. And that's the suggestion that Signature membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

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[2] See Scotland & Reast v. British Credit Trust Limited [2014] EWCA Civ 790

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs F's Signature membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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

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

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

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

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

There is competing evidence in this complaint as to whether Signature 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 Signature membership as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs F, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Signature membership was not sold to Mr and Mrs F as an investment.

I've also considered the evidence that Mr and Mrs F have provided.

Mr and Mrs F's PR have not provided a witness statement in this complaint. And, they didn't provide any direct evidence from Mr and Mrs F when the complaint was made, and when it was subsequently referred to this Service.

In December 2023, they provided a questionnaire which is not dated but they say was completed in August 2020, prior to the Letter of Complaint being sent. This asked Mr and Mrs F a large number of questions, but in particular I note the following:

Did the sales representative tell you the purchase was an asset that could be sold? Was it described to you as an investment?	Yes – In Great Demand & Easily Sold Back To Company Or On To Another Person ([illegible])

And:

Was the timeshare described to you as an investment?	Yes
Did the representative say anything to you about the purchase that has since turned out to be incorrect? If so what?	Yes – Open To Non Memberships, Cheaper & [illegible] More Opportunities Dates Than We Were Offered

What's been written here is quite difficult to read, but it seems to suggest that Mr and Mrs F say they were told there was high demand, and the Allocated Property could be sold back to the Supplier or on to another person. And, they say that they were told about the exclusivity of the membership, and that it would give them more availability for holidays but this turned out not to be true.

Following the Investigator's view, the PR also provided some undated notes that they say were made prior to the original complaint being made to the Lender. In this, regarding this Time of Sale, it says:

> *"Once again we were told this product was an investment that could easily be sold on and that there was great demand for it. We were told that, because of the demand, the offer was only available that day. Once again, we were told that the resorts were exclusive to members and that we would have no problems with booking."*

While I acknowledge Mr and Mrs F have mentioned 'investment', there is nothing in what they've had to say which makes me think the Supplier told them or led them to believe that purchasing Signature membership offered them the prospect of a financial gain or profit. The evidence here is also extremely light on detail as to how exactly membership was sold to them and what exactly they were told at the Time of Sale, and by whom.

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

With all of that said, on the other hand, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Signature membership as an investment. And, I also acknowledge the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Signature membership without breaching the relevant prohibition.

So, I accept that it's equally possible that Signature membership <u>was</u> marketed and sold to Mr and Mrs F as an investment in breach of Regulation 14(3).

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

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

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

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

But as I've already said, there was no suggestion in Mr and Mrs F's initial recollections of the sales process at the Time of Sale that the Supplier led them to believe that the Signature membership was an investment from which they would make a financial gain or profit, nor was there any indication that they were induced into the purchase on that basis. For example, the evidence provided seems to suggest that it was how the membership they bought at the Time of Sale functioned as a holiday product which was the main source of their unhappiness.

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

Conclusion

In conclusion, given the facts and circumstances of this complaint, 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 Lender agreed with the PD and confirmed they had nothing further to add. The PR, on behalf of Mr and Mrs F, did not agree. And, they provided some further comments they wished to be considered.

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

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.

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

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.

The PR's further comments in response to the PD only relate to the issue of whether membership was sold to Mr and Mrs F as an investment at the Time of Sale and in turn, whether that caused the credit relationship between them and the Lender to be unfair.

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

Turning to the further comments the PR have provided, in my view, they are simply re-stating their stance that they think membership was sold as an investment to Mr and Mrs F at the Time of Sale. And, that this caused the credit relationship to be unfair. But they haven't provided anything new or any further evidence to support this. So, I'll respond briefly to the points they've made with this in mind.

The PR has referred in their response to another decision I had issued previously on a separate case which was upheld and say this involved similar facts and issues. But that other case the PR has referred to involved a completely different timeshare supplier to the one in question here, and a completely different product to the one Mr and Mrs F purchased at the Time of Sale. So, I fail to see the relevance of this. And further, each case is decided on its own individual facts and circumstances so this does not change my own findings here that this complaint should not be upheld.

The PR has also suggested that in their view, memberships like the one in question here were generally always sold as investments. But I don't think the PR has taken sufficient account of the following part of my PD where I explained:

> "*Mr and Mrs F's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Signature membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract <u>as an investment</u>. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of*

such a timeshare contract per se.

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

The PR has gone on to refer to some of the Supplier's training materials and reiterate that based on this and Mr and Mrs F's comments in the questionnaire provided, they think the membership was sold to Mr and Mrs F as an investment. But, the type of membership and training material referred to by the PR in their response is not correct – they've referred to material relating to one of the Supplier's other products (Fractional Club membership), but Mr and Mrs F did not buy that product, they bought Signature membership, the sale of which involved different materials.

In any event, I acknowledged in my PD, and continue to acknowledge here, that the Supplier's training materials (in relation to Signature membership) left open the possibility that the sales representative may have positioned Signature membership as an investment. And, I continue to accept that it's possible that Signature membership was marketed and sold to Mr and Mrs F as an investment in breach of Regulation 14(3).

But, as I went on to explain in my PD, even if the Supplier did breach Regulation 14(3) at the Time of Sale, this is not the end of the matter and does not automatically mean that this complaint ought to be upheld.

The PR has said this part of my PD was based on an assumption that even if the relevant regulations had been followed and complied with, Mr and Mrs F would still have made their purchase. But I think the PR has misunderstood the point I was making here and I don't think they've taken sufficient account of the part of my PD where I said the following:

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

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

But as I've already said, there was no suggestion in Mr and Mrs F's initial recollections of the sales process at the Time of Sale that the Supplier led them to believe that the Signature membership was an investment from which they would make a financial gain or profit, nor was there any indication that they were induced into the purchase on that basis. For example, the evidence provided seems to suggest that it was how the membership they bought at the Time of Sale functioned as a holiday product which was the main source of their unhappiness.

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

Mr and Mrs F and the Lender was unfair to them even if the Supplier had breached Regulation 14(3)."

The PR has said the Supplier's alleged breach was a material factor in Mr and Mrs F's decision to purchase but haven't provided any further explanation as to why they think this or any further evidence to support it. I have reconsidered this point, but I haven't seen anything which persuades me that the credit relationship was unfair to them for this reason.

Conclusion

Overall, given the facts and circumstances of this complaint, I am not persuaded that the Lender was party to a credit relationship with Mr and Mrs F 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.

Appendix: The Legal and Regulatory Context

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

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

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

Case Law on Section 140A

Of particular relevance to the complaint in question are:

1. The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') remains the leading case.
2. The judgment of the Court of Appeal in the case of *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')* sets out a helpful interpretation of the deemed agency and unfair relationship provisions of the CCA.
3. *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*') – in which the High Court held that determining whether or not the relationship complained of was unfair had to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"*, which was the date of the trial in the case of an existing relationship or otherwise the date the relationship ended.
4. The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*') – which approved the High Court's judgment in *Patel*.
5. *Deutsche Bank (Suisse) SA v Khan and others* [2013] EWHC 482 (Comm) – in Hamblen J summarised – at paragraph 346 – some of the general principles that apply to the application of the unfair relationship test.
6. *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
7. *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
8. *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner*

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

My Understanding of the Law on the Unfair Relationship Provisions

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

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

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

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

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

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

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

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

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

"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[3]

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

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

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

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

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

<u>The Law on Misrepresentation</u>

The law relating to **misrepresentation** is a combination of the common law, equity and statute – though, as I understand it, the Misrepresentation Act 1967 didn't alter the rules as to what constitutes an effective misrepresentation. It isn't practical to cover the law on misrepresentation in full in this decision – nor is it necessary. But, summarising the relevant pages in *Chitty on Contracts (33rd Edition)*, a material and actionable misrepresentation is an untrue statement of existing fact or law made by one party (or his agent for the purposes of passing on the representation, acting within the scope of his authority) to another party that induced that party to enter into a contract.

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

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

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

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

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

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

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

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

The Timeshare Regulations were introduced to implement EC legislation, Directive 122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts (the '2008 Timeshare Directive'), with the purpose of achieving 'a high level of consumer protection' (Article 1 of the 2008 Timeshare Directive). The EC had deemed the 2008 Timeshare Directive necessary because the nature of timeshare products and the commercial practices that had grown up around their sale made it appropriate to pass specific and detailed legislation, going further than the existing and more general unfair trading practices legislation.[4]

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

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

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

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

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

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

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

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

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

The Consumer Rights Act 2015 (the 'CRA')

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

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

Relevant Publications

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

My final decision

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

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

Fiona Mallinson
Ombudsman