DRN-5601625

The complaint

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

Background to the complaint

Mr and Mrs N purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 5 November 2013 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 900 fractional points at a cost of £10,349 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs N 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 N paid for their Fractional Club membership by paying a deposit of £500 and taking finance of £9,849 from the Lender (the 'Credit Agreement'). Mr N sadly passed away in 2016.

Mrs N – using a professional representative (the 'PR') – wrote to the Lender on 13 June 2018 (the 'Letter of Complaint') to complain about the purchase. The relevant part of the complaint read, in full:

"Our clients bought into [the Supplier] in 2013 after the Legislation changed on 2012, please find copy of said legislation attached which clearly states no deposits to be taken until after a 14 day cooling off period even to a third party The deposit was taken by [a business] which is part of your organisation.

Our clients paid a joining fee of £10349 and a deposit on the day of £500 together with a loan from yourselves of £9849 yet the F H.F document states £10349.

Our client was told by [the Supplier] that his family would get holiday villas but [the Supplier does] not have any villas We would also add that their paperwork was illegal as they state "Notice of Cancellation of Timeshare Credit Agreement under Section 6 of the Timeshare Act of 1992. A new Act came into being in 2012."

The Lender directed Mrs N's concerns to the Supplier who dealt with Mrs N's concerns and issued its response letter on 27 July 2018, rejecting it on every ground.

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

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

After considering all the evidence, I issued a provisional decision ("PD") on this complaint to Mrs N and the Lender on 8 May 2025. An extract of my PD reads as follows:

What is this complaint about?

The PR did not set out on what basis it thought the Lender was responsible for the things that it said went wrong. When assessing the complaint, our Investigator considered the CCA – neither the PR nor the Lender disagreed with this approach, so I've also considered the CCA in this decision too. In doing so, I think the complaint is in essence about:

1. Misrepresentation by the Supplier at the Time of Sale giving her a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. 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

Mrs N says that the Supplier made a pre-contractual misrepresentation at the Time of Sale. Mrs N says the Supplier told her that her family would have access to villas as part of their Fractional Club membership when that was not true.

Mrs N says that she has a claim against the Supplier in respect of the misrepresentation set out above, and therefore, under Section 75 of the CCA, she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mrs N.

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

The Letter of Complaint sets out several other reasons of complaint which I've interpreted as Mrs N alleging that the credit relationship between her and the Lender was unfair to her under Section 140A of the CCA. In summary, they include the following:

1. The Supplier took payment of the deposit within 14 days which was prohibited.
2. The documentation supplied was illegal as it referred to the Timeshare Act 1992 when this wasn't in force at the Time of Sale.
3. The loan agreement referred to the total purchase price of the Purchase Agreement when in fact she paid a £500 deposit.

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.
• Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
• The Unfair Terms in Consumer Contract Regulations 1999.

• The Consumer Protection from Unfair Trading Regulations 2008.
• Case law on Section 140A of the CCA – including, in particular:
    • The Supreme Court's judgment in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 ('Plevin') (which remains the leading case in this area).
    • Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')
    • Patel v Patel [2009] EWHC 3264 (QB) ('Patel').
    • The Supreme Court's judgment in Smith v Royal Bank of Scotland Plc [2023] UKSC 34 ('Smith').
    • Carney v NM Rothschild & Sons Ltd [2018] EWHC 958 ('Carney').
    • Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm) ('Kerrigan').
    • R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service [2023] EWHC 1069 (Admin) ('Shawbrook & BPF v FOS').

Good industry practice – the RDO Code

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

My provisional findings

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

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

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

In short, a claim against the Lender under Section 75 essentially mirrors the claim Mrs N 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 Mrs N at the Time of Sale, the Lender is also liable.

Mrs N claims that the Fractional Club membership had been misrepresented by the Supplier because Mrs N was told her family would have access to holiday villas when that was not true.

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales

representatives – including:

1. a document called the 2013/2014 Sales Induction Training (the '2013/2014 Induction Training');
2. screenshots of an Electronic Sales Aid (the 'ESA'); and
3. a document called the "FPOC2 Fly Buy Induction Training Manual" (the 'Fractional Club Training Manual')

Neither the 2013/2014 Induction Training nor the ESA I've seen included notes of any kind. However, the Fractional Club Training Manual includes very similar slides to those used in the ESA. And according to the Supplier, the Fractional Club Training Manual (or something similar) was used by it to train its sales representatives at the Time of Sale. So, it seems to me that the Training Manual is reasonably indicative of:

> *(1) the training the Supplier's sales representatives would have got before selling Fractional Club membership; and*
> *(2) how the sales representatives would have framed the Supplier's multimedia presentation (i.e., the ESA) during the sale of Fractional Club membership to prospective members – including Mrs N.*

I've thought carefully about what Mrs N has said. Having reviewed the training materials I've referred to, there's no indication that the Supplier would have said Mrs N had access to villas as part of their directory during the normal sales presentation. There was an exchange programme if Mrs N wanted access to a wider range of holidays but it's difficult to know exactly what was available using the exchange programme at the time. It appears Mrs N would have been supplied with a Resort Directory which lists all the types of accommodation the Supplier offered. So, although it's possible Mrs N was told something about villas during the sale, I think it's less probable that the sales representatives told Mrs N something that was easily verifiable as being untrue, particularly as Mrs N hasn't provided anything to support this position other than the bare allegation that has been made.

While I recognise that Mrs N has concerns about the way in which her Fractional Club membership was sold, she has not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the reason she alleges.

For these reasons I do not think the Lender is liable to pay Mrs N 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 140A of the CCA: did the Lender participate in an unfair credit relationship?

I've already explained why I am not persuaded that the contract entered into by Mrs N was misrepresented by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint.

Mrs N has also set out several other reasons of complaint which as I've mentioned, I've interpreted Mrs M's complaint as being that the credit relationship between her and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case. It is those concerns that I explore here.

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

Under Section 140A of the CCA, a debtor-creditor relationship can be found to have been or

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

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

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

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mrs N'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 1 The Court of Appeal's decision in Scotland was recently followed in Smith.

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've considered the entirety of the credit relationship between Mrs N 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've 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've then considered the impact of these on the fairness of the credit relationship between Mrs N and the Lender.

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

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

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Mrs N alleges her deposit payment was taken within 14 days which was prohibited under the Timeshare Regulations. The Supplier has said that the deposit was taken after 14 days. I haven't been provided with any information from Mrs N to suggest otherwise. Even if payment was taken within 14 days, I can't see Mrs N has lost out as a result or something went wrong in the way that meant there was an unfair credit relationship. Afterall, it was held in Plevin that a breach of a duty or regulation did not, in and of itself, lead to an unfair credit relationship. Here, Mr and Mrs N proceeded with their purchase and there's no indication they tried to exercise their right of withdrawal within 14 days, so I can't see they lost out as a result of any advance payment made to the Supplier (if it was taken within the 14 day period).

Mrs N has also claimed the documentation supplied was illegal due to the reference made to the Timeshare Act 1992. By the Time of Sale, the Timeshare Act 1992 had been repealed by the Timeshare Regulations. The section which Mrs N refers to provides her information about her cancellation rights under the Credit Agreement. The Credit Agreement was regulated by the CCA and considering the paperwork Mrs N received at the Time of Sale, it complied with Section 66A of the CCA in respect of Mrs N's withdrawal rights, so she was able to withdraw from the Credit Agreement if she wanted. So, I cannot see how there has been any unfairness or problem caused by the reference to the 1992 Act in the paperwork.

I've also seen a copy of Mrs N's signed loan agreement. The cost set out on the Purchase Agreement was £10,349 and this is reflected on the Credit Agreement correctly as the cash price of goods. The Lender noted an advance payment of £500 was made leaving the amount of credit to be supplied to Mrs N as £9,849. I'm not entirely sure what Mrs N means when she says the Lender could not get the figures correct on the Credit Agreement, but I cannot see that was the case. I'm not persuaded, therefore, that Mrs N's credit relationship with the Lender was rendered unfair to her under Section 140A for any of the reasons above.

Section 140A: Conclusion

Given all of the facts and circumstances of this complaint, I do not think the credit relationship between the Lender and Mrs N was unfair to her for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mrs N's Section 75 claim and I am not persuaded that the Lender was party to a credit relationship with her under the Credit Agreement that was unfair to her 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 her.

Responses to my provisional decision

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

The Lender accepted my provisional decision and had nothing further to add.

The PR responded to my provisional decision and said Mrs N stated in her initial complaint that Mr and Mrs N were misled as their membership was marketed and sold to them as an investment. PR referred to the Supplier's training materials and explained that this was a motivating factor in Mr and Mrs N purchasing their Fractional Club membership. I emailed PR sharing the complaint information that we had received and confirmed that my provisional decision addressed the complaint that had been brought to us, which didn't make any reference to this allegation. I asked PR to provide me with any evidence that this was raised in the initial complaint. PR hasn't responded to me in the timeframe I set, so I won't be commenting on this point any further.

PR reiterated that Mr and Mrs N paid a £500 deposit on the same day. I addressed this point in my provisional decision. The Supplier confirmed the deposit was taken after 14 days and following my provisional decision, I still haven't been provided with any evidence to suggest otherwise. As I mentioned, even if payment had been taken within the 14 day cooling off period, it doesn't appear like Mr and Mrs N exercised their right of withdrawal and lost out as a result of any advance payment being made, after all they proceeded with their purchase. So I'm not persuaded the credit relationship with the Lender is rendered unfair to her under Section 140A for this reason.

PR also reiterated Mrs N's concern that the Fractional Club membership had been misrepresented by the Supplier because they were told their family would have access to holiday villas when that was not true. PR said Mrs N is unable to provide evidence to show this as this representation was made verbally at the Time of Sale. I had thought about this within my provisional decision and as I stated, I find it less probable that the sales representative told Mr and Mrs N something that was easily verifiable as being untrue in light of all of the information they would have been presented with during the sales process. For this reason I do not think the Lender is liable to pay Mrs N any compensation for the alleged misrepresentation.

Taking everything into consideration, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mrs N's Section 75 claim and I am not persuaded that the Lender was party to a credit relationship with her under the Credit Agreement that was unfair to her 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 her.

My final decision

I do not uphold Mrs N's complaint against First Holiday Finance Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs N to accept or reject my decision before 2 July 2025.

Sameena Ali
Ombudsman