DRN-5620534

The complaint

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

Background to the complaint

Mr H and Ms S purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 28 April 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,220 fractional points at a cost of £19,057 (the 'Purchase Agreement'). After trading in their existing timeshare, they ended up paying £6,108 for membership of the Fractional Club.

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

Mr H and Ms S paid for their Fractional Club membership by taking finance of £4,075 from the Lender (the 'Credit Agreement'). They took out a second loan with a separate finance provider for the remainder of the balance. A separate complaint has been raised against that provider.

Mr H and Ms S – using a professional representative (the 'PR') – wrote to the Lender on 2 November 2021 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. A breach of contract by the Supplier giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.
4. The decision to lend being irresponsible because (1) the Lender did not carry out the right creditworthiness assessment and (2) the money lent to them under the Credit Agreement was unaffordable for them.

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

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

1. told them that Fractional Club membership had a guaranteed end date when that was not true.
2. told them that they were buying an interest in a specific piece of "real property" when that was not true.
3. told them that the Supplier's holiday resorts were exclusive to its members when that was not true.

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

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

Mr H and Ms S say that the Supplier breached the Purchase Agreement because there is no guarantee that they will receive their share of the net sale proceeds of the Allocated Property.

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

As a result of the above, Mr H and Ms S say that they have a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to them.

(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 H and Ms S say that the credit relationship between them and the Lender was unfair to them under Section 140A of the CCA. In summary, they include the following:

1. Fractional Club membership was marketed and sold to them as an investment in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. The contractual terms setting out (i) the duration of their Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of their membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
3. Mr H and Ms S were pressured into purchasing Fractional Club membership by the Supplier.
4. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.
5. The money lent to Mr H and Ms S under the Credit Agreement was unaffordable for them.
6. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness and affordability assessments.
7. The Lender paid an undisclosed commission to the Supplier.

The Lender dealt with Mr H and Ms S's concerns as a complaint and issued its final response letter on 15 November 2021. It only addressed concerns about the decision to lend to Mr H and Ms S, which it rejected in full. It said all other concerns were matters to be raised with the Supplier.

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

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

The legal and regulatory context

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

The legal and regulatory context that I think is relevant to this complaint includes the following:

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

The timeshare at the centre of the complaint in question was paid for using restricted-use credit that was regulated by the Consumer Credit Act 1974. As a result, the purchase was 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 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 in question was conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140A(1)(c) CCA.

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

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

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

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

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

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

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

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

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

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

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

<u>The Law on Misrepresentation</u>

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

The misrepresentation doesn't need to be the only matter that induced the representee to enter into the contract. But the representee must have been materially influenced by the misrepresentation and (unless the misrepresentation was fraudulent or was known to be

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

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.[2]

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

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

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

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 provisional decision

I issued a provisional decision on Mr H and Ms S's complaint last month, setting out why I didn't think the complaint should be upheld and giving the parties the opportunity to send me any further comments or information they wanted me to consider before making a final decision. I said:

> **Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale**
>
> As both sides may already know, a claim against the Lender under Section 75 essentially mirrors the claim Mr H and Ms S could make against the Supplier. Certain conditions

must be met if this protection is engaged – which are set out in the CCA. The Lender does not dispute that the relevant conditions are met in this complaint and I'm satisfied that they are.

However, there are certain time limits that apply – and that I think mean Mr H and Ms S's claim would've been time-barred.

The Limitation Act 1980 sets out limitation periods, or time limits, for bringing various types of legal claim. For a claim based on contract, it's not generally possible to start court action more than six years after the cause of action arose. If a claim is brought too late, the respondent is likely to have a complete defence to the claim on that basis.

For claims relating to misrepresentation, the time limit would typically be six years from the date the claimant suffers damage as a result of the misrepresentation. For example, entering into a contract – and incurring liabilities – when they would otherwise not have done.

Mr H and Ms S's claim under Section 75 is that but for the Supplier's various alleged misrepresentations, they wouldn't have entered into the Purchase Agreement (and, therefore, the Credit Agreement). So it is the date on which they entered into those agreements that their cause of action arose, meaning they had six years from that date within which to bring this claim.

Mr H and Ms S entered into the Purchase Agreement and Credit Agreement on 28 April 2014. They raised their claim under Section 75 within the Letter of Complaint dated 2 November 2021 – outside of the six-year period. That being the case, I don't think the Lender acted unfairly or unreasonably in declining the claim. However, I have considered whether these alleged misrepresentations could have been something that caused an unfair credit relationship later in this decision.

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

I've gone on to consider whether there would be any additional time within which Mr H and Ms S could raise a claim under Section 75 for breach of contract, given that their cause of action may have accrued in a different way and therefore at a different point in time.

While not explicitly referenced as such, some of Mr H and Ms S's points could reasonably be interpreted as an alleged breach of contract by the Supplier. Most notably, that they could not holiday where and when they wanted to – which, on my reading of the complaint, suggests that they consider that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement. Their cause of action would therefore accrue when that breach occurred, when they were either unable to holiday when or where they wanted.

Mr H and Ms S haven't provided us with the dates of their attempts to book holidays that ended up falling short of their expectations. So it is hard for me to ascertain when their cause of action arose. But even accepting that this claim was made in time, I don't think it would've been unreasonable for the Lender to decline it.

I say this because the evidence I've seen so far doesn't persuade me that the Supplier breached the terms of the Purchase Agreement. In addition to the vague nature of the allegations as set out above, like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork signed by Mr H and Ms S states that the availability of

holidays was subject to demand. Even if I accept that they may not have been able to take certain holidays, I don't think this necessarily amounts to a breach of the terms of the Purchase Agreement.

Mr H and Ms S also say there is no guarantee that they will receive their share of the net sale proceeds of the Allocated Property, which again could amount to a claim for breach of contract under Section 75 of the CCA. I understand that they're saying that they fear that, when the time comes for the Allocated Property to be sold, they will not receive their share of the sales proceeds. However, it would seem that any breach of contract (if that occurs) lies in the future and is currently uncertain.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mr H and Ms S any compensation for a breach of contract by the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

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

I have already explained why I am not persuaded that the contract entered into by Mr H and Ms S was 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 H and Ms S also say that the credit relationship between them and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that they have concerns about. It is those concerns that I explore here.

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

1. The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale; 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 H and Ms S and the Lender.

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

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

These include the various alleged misrepresentations made by the Supplier. While I don't consider those give rise to an actionable claim under Section 75, I've considered these in my assessment of the fairness of the credit relationship between Mr H and Ms S and the Lender.

Having done so, I'm not currently persuaded that the Supplier misrepresented the Fractional Club membership in the manner Mr H and Ms S allege. I'll explain why.

The first is the suggestion that Fractional Club membership had been misrepresented by the Supplier as "a mechanism for property ownership" when in fact Mr H and Ms S did not go on to own the property. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr H and Ms S's share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give Mr H and Ms S that interest, it did not change the fact that they acquired such an interest.

The second alleged misrepresentation is that Mr H and Ms S were told they would be guaranteed to exit the Fractional Membership at the end of its term, when that wasn't the case. In fact, at the end of the membership term, the Allocated Property was to then be marketed for sale and only once that sale completed would Mr H and Ms S's membership come to an end. And the date of that sale could not be guaranteed.

I think the documentation given to Mr H and Ms S at the Time of Sale made it clear that the membership ended when the Allocated Property was sold (as opposed to a fixed date). It would naturally be very difficult for anyone to guarantee an exact date upon which that sale could take place so far in advance. Mr H and Ms S haven't provided any specifics as to what led them to believe this, and it is notably absent from the most recent recollections they've shared with us. So, weighing up everything the parties have said and provided on this point, I find it unlikely that any "guaranteed" exit date was given.

The third alleged misrepresentation is that the Supplier's holiday resorts were exclusive to its members, when that was not true. My understanding is that Mr H and Ms S didn't actually go on holiday using their membership. So it's difficult to see how they could have been able to determine that the level of accommodation had been misrepresented. I accept it's possible that they decided not to holiday because the resorts on offer didn't meet their expectations. But again, they've provided very little detail on this point and it's also absent from their most recent recollections. I therefore do not think that the Supplier misrepresented the exclusivity of the resorts available to Mr H and Ms S.

There is a further allegation that the Supplier misled Mr H and Ms S and carried on unfair commercial practices which were prohibited under the CPUT Regulations. But given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.

The PR also says that the right checks weren't carried out before the Lender lent to Mr H and Ms S. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mr H and Ms S was actually unaffordable before also concluding that they lost out as a result and then consider whether the credit relationship with the Lender was unfair to them for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for the Mr H and Ms S. If there is any further information on this (or any other points raised in this provisional decision) that the Mr H and Ms S wish to provide, I would invite them to do so in response to this provisional decision.

Mr H and Ms S 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 about what was said

and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to. They were also given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel their membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mr H and Ms S made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

I'm not persuaded, therefore, that Mr H and Ms S's credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why they say their credit relationship with the Lender was unfair to them. And that's the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

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

The Lender does not dispute, and I am satisfied, that Mr H and Ms S's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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

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

But PR says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In *Shawbrook & BPF v FOS*, the parties agreed that, by reference to the decided authorities, "*an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit*" at [56]. I will use the same definition.

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

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

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

circumstances of *this* complaint.

There is competing evidence in this complaint as to whether Fractional Club membership was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations.

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr H and Ms S, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr H and Ms S as an investment. So, it's *possible* that Fractional Club membership wasn't marketed or sold to them as an investment in breach of Regulation 14(3).

On the other hand, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mr H and Ms S as an investment in breach of Regulation 14(3).

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

Was the credit relationship between the Lender and Mr H and Ms S 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 H and Ms S and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

To help me decide this point, I've carefully considered what Mr H and Ms S have said in the course of their complaint about how the membership was sold to them and their motivation for taking it out.

I would note first of all that the evidence in this respect is fairly limited. Looking at the Letter of Complaint sent to the Lender when the complaint was first raised, there is little more than passing reference to the membership having been sold as an investment:

> "*The timeshare product … was also represented as an investment. Our client/s were advised that they were investing in a fraction of the property that would be sold on a set date in the future. It was represented to our client/s that they would receive their purchase price back and in addition and in all likelihood a profit from the sale. They would then exit the contract. This statement was false and misleading … Were it not for the false and misleading statements our client/s would not have entered into the agreement*."

These comments are rather generic in nature and offer little detail, such as how, when and by whom, these alleged misrepresentations were made – or, more importantly, how significant a factor the investment element was in Mr H and Ms S's decision-making. It is said that Mr H and Ms S wouldn't have taken out the membership were it not for assurances about a potential profit. But in addition to being generic, this assertion is repeated numerous times throughout the letter when other misrepresentations are alleged. So it is hard for me to deduce from this whether any marketing of the membership as an investment influenced Mr H and Ms S's decision-making any more or less than a number of other things they were told by the Supplier.

While the complaint was awaiting review by our Investigator, the PR sent us a "Client Statement". Within it, Mr H gives his recollections of the membership. This referred to his and Ms S's previous membership, taken out in 2013, and his recollection that they were "*told the fractional points was* (sic) *an investment which when sold could make a profit*". Any misrepresentations made in 2013 relating to the membership purchased at that time wouldn't render the separate credit relationship Mr H and Ms S entered into in 2014 with the Lender unfair.

Mr H's comments about the 2014 sale – where they upgraded their 2013 membership and that being at issue here – are somewhat limited. He recalls a comment by the Supplier to the effect that their initial purchase "*was not worth much at all*" and that investing in a further fractional week would be "*much wiser*". It is unclear to me whether Mr H is saying that the prospect of a financial gain motivated his and Ms S's decision when saying that, having seen the Allocated Property, he and Ms S were "*impressed by this and feeling this would be a worthwhile purchase, we agreed to this sale*".

I have also taken into account comments made within a separate, earlier complaint raised by Mr H and Ms S. The Lender has sent us copies of paperwork relating to a complaint they made in 2015 to the lender that provided finance to facilitate their previous fractional club membership. In making that complaint, Mr H and Ms S's representative (being different to the PR representing them in this complaint) set out a detailed timeline of events in 2013 and 2014, which I understand to have been based on Mr H and Ms S's recollections. This made no reference to either the membership being marketed or sold to them as an investment, or any prospect of a financial gain or profit they were hoping of expecting to make. Had that been a significant factor in Mr H and Ms S's decision to take out the membership, I would expect it to have been noted.

Rather, Mr H and Ms S recalled at this time that the Supplier had told them their existing membership would only entitle them to "*stay in very low standard accommodation*" and that they "*did not have enough points to ever stay at the resort they were currently staying at*". Their access to a certain level or standard of accommodation is positioned as a significant factor in their decision to upgrade their membership and enter into the 2014 agreement.

Coming just one year after the Time of Sale, these comments were made much closer in time to the events in question and I consider them to be more reliable evidence of Mr H and Ms S's thought process at the time than the comments made several years later as relayed in the Client Statement (which is dated December 2020 but was only submitted to us in December 2023.

Mr H and Ms S had previously purchased a fractional club membership and so it is reasonable to assume that at the Time of Sale they had an understanding of how the membership operated. They were increasing their access to holidays, upgrading from one to two weeks. Mr H recalls in his most recent testimony that he was told the further

fractional week would provide "*more of a stake in the fractional units, as well as entitling us to two weeks of holidays per year*". That was correct – it was not a misrepresentation.

Weighing all of this up, I am not persuaded that the prospect of a financial gain was any more important to Mr H and Ms S than the increased access to holidays and a better range of accommodation options.

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 H and Ms S's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr H and Ms S and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

The provision of information by the Supplier at the Time of Sale

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mr H and Ms S when they purchased membership of the Fractional Club at the Time of Sale. But they and the PR say that the Supplier failed to provide them with all of the information they needed to make an informed decision, most notably with regard to the ongoing management charges due under the membership.

The PR also says that the contractual terms governing the ongoing costs of Fractional Club membership and the consequences of not meeting those costs were unfair contract terms under the UTCCR.

One of the main aims of the Timeshare Regulations and the UTCCR was to enable consumers to understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. And if a supplier's disclosure and/or the terms of a contract did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, that may lead to the Timeshare Regulations and the UTCCR being breached, and, potentially the credit agreement being found to be unfair under Section 140A of the CCA.

However, as I've said before, the Supreme Court made it clear in *Plevin* that it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A of the CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

I've considered firstly the information provided by the Supplier relating to the annual management charges to be paid in respect of the membership. Regulation 12 of the Timeshare Regulations required the Supplier to provide this information in a way that was "*clear, comprehensible and accurate"* and *"sufficient to enable the consumer to make an informed decision about whether or not to enter the contract*".

The specific information the Supplier was required to provide is outlined in schedule 1, part 3 of the Timeshare Regulations. The relevant section states the required information is:

> *"an accurate and appropriate description of all costs associated with the timeshare contract; how these costs will be allocated to the consumer and how and when such costs may be increased; the method for the calculation of the amount of charges relating to occupation of the property, the mandatory statutory charges (for example, taxes and fees) and the administrative overheads (for example, management, maintenance and repairs)."*

I've not seen copies of the full documents provided by the Supplier to Mr H and Ms S. But I think it is safe to assume that they were in keeping with the documents I've seen the Supplier using around the Time of Sale. These set out some information about the ongoing costs that would be associated with the contracts. Broadly speaking, this information included the fact that there would be ongoing management charges to pay, what these charges would be for the first year of membership and the potential consequences of non-payment.

There was not, however, much information about how the charges would be calculated, what exactly they covered or how they might increase over time. Rather, Mr H and Ms S would've been directed to other, lengthy documents to find out more. But the Supplier didn't say where in these documents the relevant information could be found, and it is unclear to me if Mr H and Ms S would've been provided with them at the Time of Sale (or subsequently). These other documents contained details of additional costs that were not mentioned in the contractual paperwork signed at the Time of Sale.

It is possible, therefore, that the Supplier didn't meet the requirements of Regulation 12 of the Timeshare Regulations to provide, in the prescribed way, an accurate and appropriate description of all costs. And while I've not analysed in detail the position regarding whether any of the terms relating to the management charges were unfair under the UTCCRs, I think it's possible that some of the terms had the potential to operate in an unfair way, taking into account the lack of transparency and the level of discretion given to the Supplier as to the setting of various charges.

But given the facts and circumstances of this complaint, and based on what I've seen so far, I am not persuaded that the Supplier's alleged breaches of Regulation 12 of the Timeshare Regulations and the UTCCRs in relation to the costs of membership are likely to have prejudiced Mr H and Ms S's decision to purchase the membership or rendered his credit relationship with the Lender unfair to him for the purposes of section 140A of the CCA. I say this because Mr H and Ms S haven't provided any information or evidence which would lead me to believe that any potential breaches of these provisions by the Supplier have led to any significant harm or unfairness to them arising in practice.

The PR also alleges that the Lender failed to disclose commission arrangements between it and the Supplier. But the Lender has confirmed that no commissions were paid and I've seen no evidence to the contrary. The Lender and the Supplier were linked in that they both were in the same group of companies, so I do not find it surprising that the Lender did not pay any commission to the Supplier. I am therefore satisfied that no commission was paid in this case.

Moreover, as I haven't seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Mr H and Ms S was unfair to them because of an information failing by the Supplier, I'm not persuaded it was.

Section 140A: Conclusion

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

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr H and Ms S's Section 75 claims, and I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

If there is any further information on this complaint that Mr H and Ms S wish to provide, I would invite them to do so in response to this provisional decision.

The Lender replied to say they agreed with my provisional decision. The PR let us know that Mr H and Ms S didn't agree, but didn't provide any further comments or information for me to take into account.

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.

Having done so, and with neither party having provided any further information in light of my provisional findings, I see no reason to reach a different conclusion. So this final decision simply confirms the findings as set out in my provisional decision, as reproduced above.

My final decision

For the reasons I've explained, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H and Ms S to accept or reject my decision before 10 July 2025.

Ben Jennings
Ombudsman