DRN-5635620

The complaint

Mr and Mrs 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 claims under Section 75 of the CCA.

What happened

Mr and Mrs S purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 1 June 2016 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,010 fractional points at a cost of £19,568 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs 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 and Mrs S paid for their Fractional Club membership by paying a £500 deposit and taking finance for the remaining amount due from the Lender in both of their names (the 'Credit Agreement').

Mr and Mrs S – using a professional representative (the 'PR') – wrote to the Lender on 20 January 2022 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. A breach of contract by the Supplier giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.
4. The Credit Agreement being unenforceable because the salesperson who arranged it was self-employed and was not themselves authorised to broker credit by the Financial Conduct Authority (FCA).

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

Mr and Mrs 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 they were buying an interest in a share of a property when that was not true.
2. told them that Fractional Club membership was an "investment" that would appreciate in value when that was not true.
3. told them that they could sell the timeshare back to the resort or easily sell it at a profit when that was not true.

4. told them that they would have access to the holiday apartment at any time all around the year when that was not true.

Mr and Mrs 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 Mr and Mrs S.

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

Mr and Mrs S suggest that the Supplier breached the Purchase Agreement because it went into liquidation in December 2020, meaning they would not be able to recover any amounts that are expected to be awarded by the Spanish courts.

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

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

The Letter of Complaint set out several reasons why Mr and Mrs 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. They were pressured into purchasing Fractional Club membership by the Supplier.
3. The contractual terms setting out that the membership and any money paid in connection with it would be forfeit in the event that Mr and Mrs S failed to make a payment due under the agreement were unfair contract terms (under the Consumer Rights Act 2015 ('CRA')).
4. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mr and Mrs S's concerns as a complaint and issued its final response letter on 28 February 2022, rejecting it on every ground.

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

I considered the matter and issued a provisional decision (the 'PD') dated 9 June 2025. In that 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 and Mrs 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.

This part of the complaint was made for several reasons that I set out at the start of this decision. They include the suggestion that Fractional Club membership had been misrepresented by the Supplier because Mr and Mrs S were told that they were buying an interest in a share of a property when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr and Mrs S's share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.

Mr and Mrs S have also said they were told that membership was an investment when that was not true. But, for reasons I'll go onto explain, the Fractional Club membership plainly did have an investment element to it.

As for the rest of the Supplier's alleged pre-contractual misrepresentations, while I recognise that Mr and Mrs S have concerns about the way in which their Fractional Club membership was sold, they have not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the other reasons they allege. And I say that because beyond the bare allegations, little to no evidence has been provided to support them such as what exactly they were told, by whom and in what context, to add colour and context to them. Some of the misrepresentations also seem inherently unlikely to have been made. For example, I don't think it's likely Mr and Mrs S would have been told they could access a particular property at any time all year round as that simply wasn't how membership worked, and like any holiday accommodation, it was subject to availability.

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

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

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

I've already summarised how Section 75 of the CCA works and why it gives Mr and Mrs S a right of recourse against the Lender. So, it isn't necessary to repeat that here.

The PR suggests that the Supplier breached the Purchase Agreement because it went into liquidation in December 2020. And, in their view, this means Mr and Mrs S can't recover any amounts that are expected to be awarded by the Spanish courts. But, the PR's argument is difficult to square with the claim that seems to be made here under Section 75. After all, suing the Supplier in a Spanish court follows from, and is separate to, the rights and obligations that the parties to a contract might have.

What's more, in light of the Supplier's apparent liquidation, neither Mr and Mrs S nor the PR have said, suggested or provided evidence to demonstrate that they are no longer:

1. *members of the Fractional Club;*
2. *able to use their Fractional Club membership to holiday in the same way they could*

initially; and

3. *entitled to a share in the net sales proceeds of the Allocated Property when their Fractional Club membership ends.*

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mr and Mrs 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 and Mrs S was misrepresented (or breached) by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Mr and Mrs 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 and Mrs 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 and Mrs S and the Lender.

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

Mr and Mrs 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.

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

Mr and Mrs S also suggest 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 signed a 'Right of Withdrawal' form at the Time of Sale which confirmed their receipt of that information. And, they have not provided a credible explanation for why they did not cancel their membership during that time. With all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs S made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

The PR also says that the contractual terms allowing the Supplier to terminate membership where Mr and Mrs S failed to make a payment due under the agreement were unfair.

One of the main aims of the Timeshare Regulations and the CRA 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 CRA being breached, and, potentially the credit agreement being found to be unfair under Section 140A of the CCA.

However, the Supreme Court made it clear in Plevin[1] 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.

So, in order to conclude that a term in the Purchase Agreement rendered the credit relationship(s) between Mr and Mrs S and the Lender unfair to them, I'd have to see that the term was unfair under the CRA, and that the term was actually operated against Mr and Mrs S in practice.

In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mr and Mrs S, have flowed from such a term, because those consequences are relevant to an assessment of unfairness under Section 140A. For example, the judge in Link Financial v Wilson [2014] EWHC 252 (Ch) attached importance to the question of how an unfair term had been operated in practice: see [46].

As a result, I don't think the mere presence of a contractual term that was/is potentially unfair is likely to lead to an unfair credit relationship unless it had been applied in practice.

Having considered everything that has been submitted, it seems unlikely to me that the contract term(s) cited by Mr and Mrs S have led to any unfairness in the credit relationship between them and the Lender for the purposes of Section 140A of the CCA. And I say this because I cannot see that the relevant terms in the Purchase Agreement have actually been operated against Mr and Mrs S, let alone unfairly. So, I can't see that this caused an unfairness in the credit relationship which requires a remedy.

I'm not persuaded, therefore, that Mr and Mrs 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.

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[1] See Appendix.

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs 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 and Mrs 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 and Mrs 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 and Mrs S, the financial value of Mr and Mrs S's share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs 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've also considered the testimony provided in this case by Mr and Mrs S.

The PR didn't provide any testimony or supporting evidence in relation to this allegation when the complaint was first referred to our Service. I acknowledge they alleged in the Letter of Complaint that membership was sold to Mr and Mrs S as an investment at the Time of Sale. But, ultimately, a Letter of Complaint is not evidence.

In February 2024, in response to the Investigator's view, the PR provided some testimony from Mr S in the form of an email dated 30 January 2024. Insofar as it relates to this point of complaint, Mr S said:

> *"There in Spain was one big presentation that took the whole day and a lot of pressure/persuasion to take up the offer on the timeshare property that was going to earn us anything up to double return on investment in ten years when the property we were investing in would be sold on. All this on top of the added benefit that we would be enjoying the use of the said [sic] property for holidays all around the world. It was a no brainer according to them."*

But, I'm mindful that this testimony was only provided in early 2024, following the Investigator's view and the judgment in Shawbrook & BPF v FOS[2]. So, there is a risk that Mr S's testimony here has been influenced by one or both of those. The testimony is also very brief, with little detail as to what exactly they were told, by whom and in what context.

For these reasons, I don't think that I can put much, if any, weight on the testimony that's been provided.

But, I acknowledge what Mr and Mrs S have had to say here. And, 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 and Mrs 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 and Mrs 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[3], 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 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.

I acknowledge that in Mr S's testimony, he suggests that the Supplier sold membership to him and Mrs S as an investment at the Time of Sale. But he also went on to explain why

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[2] See Appendix.
[3] See appendix

they are unhappy with the membership now and what led to their complaint. And, the focus of this part of their testimony appears to be on the availability of holidays.

And again, for the reasons given above, I'm unable to place much, if any, weight on the testimony that's been provided here.

So, having considered everything, there simply isn't sufficient evidence that the Supplier led them to believe that the Fractional Club membership was an investment from which they would make a financial gain nor is there any indication that they were induced into the purchase on that basis.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Mrs 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). And for that reason, I do not think the credit relationship between Mr and Mrs S and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

Section 140A: Conclusion

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

The complaint about the Credit Agreement being unenforceable because it was arranged by a credit broker that was not regulated by the FCA to carry out that activity

The PR says that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that the Lender wasn't permitted to enforce the Credit Agreement as a result.

At the Time of Sale, the regulation of consumer credit was performed by the FCA and I have seen that the broker named on the Credit Agreement did have the requisite authorisation.

But, the actual complaint made by the PR here is that the sales staff were not employees of the Supplier. The Lender has however confirmed to this Service that sales representatives were employed by the Supplier and had undertaken training in brokering sales. I have no reason to doubt this, so I'm not persuaded that the Credit Agreement was arranged by an unauthorised credit broker."

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

The Lender responded to the PD and accepted it, confirming they had nothing further to add. The PR, on behalf of Mr and Mrs S, did not agree and provided some further comments and evidence 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 provisional decision, 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 S 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. And, the unfair term(s) they say they were present in the Purchase Agreement.

As outlined in my PD, the PR also originally raised various other points of complaint, all of 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. I'll now address the PR's points that they raised in response.

<u>The Supplier's alleged breach of Regulation 14(3) at the Time of Sale</u>

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

The PR firstly explained in their response that they hadn't shared either the Investigator's view on this complaint, or my provisional decision with Mr and Mrs S.

The PR also said Mr and Mrs S do not have a legal background and therefore they wouldn't understand the terms and issues involved in the judgement handed down in *Shawbrook and BPF v FOS*[4].

The PR said this means there is no possibility Mr and Mrs S's recollections have been influenced by either the Investigator's view or the aforementioned judgment.

Part of my assessment of the testimony was to consider *when* it was written, and whether it may have been, even subconsciously, affected by external factors such as other similar

[4] See Appendix.

complaints.

I appreciate that the PR says Mr and Mrs S would not have understood the judgement and I have no reason to doubt that, although I note the PR hasn't said they have no knowledge or awareness of it and what it meant, in a general sense, for this type of complaint more widely. I also find it hard to accept that Mr and Mrs S would be in a position to decide whether or not to accept the Investigator's outcome (or indeed my provisional decision), without actually seeing what this said.

So, I maintain there is a risk that Mr and Mrs S's testimony was tainted, even subconsciously, by the Investigator's view and/or the outcome in *Shawbrook & BPF V FOS*. And, for these reasons along with those I already explained in my PD, I don't think I can put much, if any weight on the original testimony provided.

In response to the provisional decision, the PR has explained they asked Mr and Mrs S to write a more detailed statement, given that I'd said that their original testimony was very brief. They've provided a copy of this, dated 16 June 2025, and signed by Mr and Mrs S.

I've considered what Mr and Mrs S have had to say in this statement. But I think there is a possibility this further statement has been influenced, even subconsciously, by either the Investigator's view, my PD, the outcome in *Shawbrook & BPF v FOS* or wider publicity about timeshare complaints, or a combination of these. I say this because while this statement does expand somewhat on what Mr and Mrs S say they were told, the statement is largely made up of generic phrases that I have seen repeated in many complaints about this (and other) timeshare suppliers. And I think the most likely reason for this is from seeing it repeated in commentary about other similar complaints.

So, in light of all of the above, and having considered everything, I remain unpersuaded that I am able to place much, if any, weight on the testimony that's been provided.

I also remain unpersuaded that any breach of Regulation 14(3) was material to Mr and Mrs S's purchasing decision.

The PR, in their response to the PD, said that they disagreed with my comment regarding Mr and Mrs S's original testimony where I said that the focus of a particular part of their testimony appears to be on the availability of holidays. They said that the testimony was 'all' about the loan being unaffordable and the maintenance fees.

As I said in my PD, the original testimony provided was very brief. But, in this testimony, Mr and Mrs S did say *"…we have never even been able to enjoy not one holiday since then.*" which still suggests to me that they were focused here on the availability of holidays. I acknowledge that Mr and Mrs S also say they are unhappy with the loan and the maintenance fees, but the important point here is that there is nothing which suggests the Supplier's alleged breach was material to their purchasing decision – I don't see how it could be if, as the PR seems to accept, this is not the focus of why they've said they're unhappy with the membership now or why they complained.

The PR also said they disagree with my conclusions here because they've highlighted that in their original testimony, Mr and Mrs S suggest that the Supplier sold membership to them as an investment at the Time of Sale. I already acknowledged this in my PD, but here, I think the PR is conflating the issue of whether there was a breach of Regulation 14(3) at the Time of Sale with the issue of whether this was material to their purchasing decision.

As I said before, even if the Supplier had marketed or sold the membership as an investment in breach of Regulation 14(3) (which I still make no finding on here), I'm not persuaded their

decision to make the purchase was motivated by the prospect of a financial gain. So, I don't think the credit relationship between Mr and Mrs S and the Lender was unfair to them for this reason.

Unfair Terms

In this part of my PD, I explained that it seemed unlikely to me that the contract term(s) cited by Mr and Mrs S led to any unfairness in the credit relationship between them and the Lender for the purposes of Section 140A of the CCA. And I said this because I could not see that the relevant terms in the Purchase Agreement had actually been operated against Mr and Mrs S, let alone unfairly. So, I couldn't see that this caused an unfairness in the credit relationship which requires a remedy.

In their response, the PR referred to another decision, made by another Ombudsman at this Service where they say this point was considered. And, they provided a copy of a '*notice of impending cancellation*' which was sent to Mr and Mrs S by the Supplier dated July 2018.

But from what's been provided, the membership was only suspended temporarily at that point and the purpose of the aforementioned notice was only to make Mr and Mrs S aware of this and that there was an outstanding balance of management fees. And, that the membership might be cancelled if the relevant fees remained unpaid, but that Mr and Mrs S could apply for reinstatement of their membership anytime within the next five years. The PR has not said that any cancellation actually proceeded to happen, and I haven't seen any evidence that is the case either.

I've also considered the aforementioned decision the PR has referred to, but that case was ultimately decided on its own individual facts and circumstances, so it doesn't change my own findings here.

For all of the above reasons, along with those I outlined in my provisional decision, I don't think that the relevant terms in the Purchase Agreement were actually operated in an unfair way against Mr and Mrs S or that this caused an unfairness in the credit relationship which requires a remedy.

Conclusion

Overall, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs 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.

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."[5]

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

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

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.

The Law on Misrepresentation

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 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.[6]

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

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

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 Mr S and Mrs S to accept or reject my decision before 18 July 2025.

Fiona Mallinson
Ombudsman