

The complaint

Mr and Mrs R'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.

What happened

Mr and Mrs R purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 20 December 2016 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,130 fractional points, at a cost of £16,867 after trading in their existing timeshare (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs R 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 R paid for their Fractional Club membership by taking finance of £16,367 from the Lender (the 'Credit Agreement').

Mr and Mrs R – using a professional representative (the 'PR') – wrote to the Lender on 9 February 2022 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale and subsequent breaches of contract, giving them a claim against the Lender under Section 75 of the CCA that the Lender failed to accept and pay.
2. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

(1) The claim under Section 75 of the CCA

Mr and Mrs R say that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale and has breached the Purchase Agreement by:

1. presenting the timeshare as an investment.
2. telling Mr and Mrs R that maintenance fees would "*remain steady*", when that was not true.
3. telling Mr and Mrs R that there would be "*no issues with availability*" when it came to booking holidays, which was not true.

Mr and Mrs R say that they have a claim against the Supplier in respect of one or more of the misrepresentations and breaches of contract 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 R.

(2) 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 R 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. The Fractional Club membership was marketed and sold to Mr and Mrs R 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 the obligation to pay annual management charges for the duration of their membership were unfair contract terms under the Consumer Rights Act 2015 ('CRA').
3. They 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 Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs.
6. The Fractional Club membership sold to Mr and Mrs R was an Unregulated Collective Investment Scheme, the promotion and operation of which was illegal.

The Lender dealt with Mr and Mrs R's concerns as a complaint, rejecting it on every ground in its responses of 11 March 2022 and 25 April 2022.

Mr and Mrs R 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 R disagreed with the Investigator's assessment and asked for an Ombudsman's decision, so it was passed to me to decide.

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(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.”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.

¹ The Court of Appeal’s decision in *Scotland* was recently followed in *Smith*.

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.

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.²

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

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

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

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 provisional decision

I issued a provisional decision earlier this month, setting out why I didn't intend to uphold the complaint and giving both parties the opportunity to send me anything else they wanted me to take into account before making a final decision. I said:

Mr and Mrs R's claim under Section 75 of the CCA

As both sides may already know, a claim against the Lender under Section 75 essentially mirrors the claim Mr and Mrs R 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 the Fractional Club membership had been misrepresented by the Supplier as an investment. But, as I'll come into in more detail below, I consider that Mr and Mrs R's acquisition of a share in the Allocated Property did amount to an investment – as it offered them the prospect of a financial return. Presenting the timeshare as an investment would not, therefore, have amounted to a misrepresentation – albeit there are other considerations when it comes to the marketing and selling of a timeshare contract as an investment that I explore below.

Mr and Mrs R also say they were told that maintenance fees would "*remain steady*" and "*wouldn't increase drastically*", which was not true. The Supplier has advised that the fees in question have increase by an average of just over 2% year-on-year. While open to some debate, I do not consider that level of increase to be "drastic", and as such I do not consider that any comments made along the lines alleged to have been a misrepresentation.

Lastly Mr and Mrs R allege they were told that they were told there be "*no issues with availability*" when it came to booking holidays and were not advised they "*would have to book two years in advance to get the holidays they wanted*". This suggests to me that Mr and Mrs R consider that the Supplier was not living up to its end of the bargain and had breached the Purchase Agreement. Again, there is no further detail to this statement, so it is unclear to me what Mr and Mrs R experienced when coming to book holidays.

In any event, 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 and Mrs R states that the availability of holidays was subject to demand. I understand from what the Supplier has said that Mr and Mrs R made use of their fractional points to holiday and the Supplier says that they have never had a request declined. The Supplier also says their bookings have been made at an average of six months prior, so I can't see that they've had to book two years in advance as referenced in the Letter of Complaint.

That notwithstanding, I can accept that they might not have been able to take certain holidays and opted for alternatives that were not their preference. But I have not seen enough to persuade me that the Supplier has breached the terms of the Purchase Agreement.

What's more, as there's nothing else on file that persuades there were any false statements of existing fact made to Mr and Mrs R 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.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay any compensation for the alleged misrepresentations or 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 R 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 R 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 Mr and Mrs R have concerns about. It is those concerns that I explore here.

I have considered the entirety of the credit relationship between Mr and Mrs R 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 R and the Lender.

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

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

They include the allegation that the Supplier misled Mr and Mrs R 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.

Mr and Mrs R 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.

I'm not persuaded, therefore, that Mr and Mrs R'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?

Within the Letter of Complaint, it is asserted that the Fractional Club membership amounted to an Unregulated Collective Investment Scheme (UCIS) – and the promotion and operation of such a scheme to individuals such as Mr and Mrs R was prohibited by law. The Lender and the Supplier reject this assertion.

In this respect, the judgement reached in *Shawbrook & BPF v FOS* is instructive – in which it was found that a timeshare contract is not a Collective Investment Scheme (nor, by extension, a UCIS). I see no reason to depart from the court's conclusion on this point. I'm satisfied that Mr and Mrs R's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Nevertheless, it is possible that the Supplier marketed and sold the Fractional Club membership as an investment to Mr and Mrs R. The PR has stressed throughout the course of this complaint that this is what happened. So that is what I have gone on to consider.

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."

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.

As I’ve said above, I consider that Mr and Mrs R’s share in the Allocated Property 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 R 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 R, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs R 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 and Mrs R 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 R rendered unfair to them?

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

And in light of what the courts had to say in *Carney* and *Kerrigan*, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs R and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) lead 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 and Mrs R 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 limited. Of most significance is this comment within the Letter of Complaint:

"[The Supplier] advised that if our clients were to switch to a fractional ownership, they would have an investment and would later get their money back."

There are other comments to the effect that the timeshare was marketed as an investment when it should not have been. But neither the comment above or anything else within that letter sets out in any detail how, when and by whom these alleged misrepresentations were made – or, more importantly, how significant a factor the investment element was in Mr and Mrs R's decision-making.

I am also conscious that we have not received any testimony directly from Mr and Mrs R as to their recollections of how the membership was presented to them or what motivated them to take it out. Prior to issuing her assessment of the complaint, our Investigator asked the PR for a written statement of fact or witness statement from Mr and Mrs R – but none was provided.

So even if I were to accept that the timeshare was marketed as an investment to Mr and Mrs R, as they and the PR allege, there is nothing in what I've seen so far that would lead me to think this was a motivating factor in their decision to purchase it. It seems more likely to me that the prospect of holidays they could enjoy through the membership was a more motivating factor. I say this because they have evidently taken holidays through their membership. And more significantly, while they have expressed unhappiness with the availability of holiday options, they have not expressed any particular concern about the investment element of the membership and their prospects of a return – which I would expect to see if this had been a key reason for their decision to purchase the membership.

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 R's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr and Mrs R 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 and Mrs R 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 the Fractional Club membership and the consequences of not meeting those costs were unfair contract terms under the CRA.

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, 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)."

The documents the Supplier provided to Mr and Mrs R 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 (€795, as detailed in the "Member's Declaration" and "Information Statement" that Mr and Mrs R signed at the Time of Sale) 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 (beyond reference to the annual management fee as being €795 "currently", which might imply the potential for variation). It appears from what Mr and Mrs R have said that they understood the charges would or could increase, but were assured that any increases would not be "drastic". Beyond this it seems they were given few other specifics. The

contractual paperwork directed Mr and Mrs R 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 and Mrs R were 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 CRA, 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.

However, 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 CRA in relation to the costs of membership are likely to have prejudiced Mr and Mrs R's decision to purchase the membership or rendered their credit relationship with the Lender unfair to them for the purposes of section 140A of the CCA. I say this because Mr and Mrs R haven't provided any information or evidence which would lead me to believe that any potential breaches of Regulation 12 of the Timeshare Regulations by the Supplier, or the inclusion of unfair terms in their timeshare contract relating to the management charges, has 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 were both in the same group of companies. So I don't find it surprising that the Lender did not pay any commission to the Supplier. I am therefore satisfied that the Lender did not pay any commission to the Supplier.

Given the facts and circumstances of this complaint, I am not persuaded that the Supplier's alleged breaches of regulation 12 of the Timeshare Regulations, the CPUT Regulations and the CRA are likely to have prejudiced Mr and Mrs R's purchasing decision at the Time of Sale and rendered their credit relationship with the Lender unfair to them for the purposes of section 140A of the CCA.

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 and Mrs R 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 and Mrs R 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 and Mrs R's Section 75 claim, 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 and Mrs R wish to provide, I would invite them to do so in response to this provisional decision.

The Lender replied to confirm that it accepted my provisional decision. We did not hear back from the PR on Mr and Mrs R's behalf.

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 no further information for me to consider in light of my provisional decision, I see no reason to depart from my initial conclusions. So this final decision simply confirms the findings made in my provisional decision, as outlined above.

My final decision

For the reasons I've explained, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs R to accept or reject my decision before 22 July 2025.

Ben Jennings
Ombudsman