

The complaint

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

Background to the complaint

Mr and Mrs H purchased membership of a timeshare from a timeshare provider, which I'll refer to as "C", in November 2017.

Mr and Mrs H held a Fractional Club membership. Fractional Club membership was asset backed. So in addition to their holiday rights, Mr and Mrs H also held a share in the net sale proceeds of a specific property (the 'Allocated Property') once it was sold at the end of their membership term.

Under this original membership, Mr and Mrs H held 1,040 points that they could use in various ways to reserve holidays at resorts owned and operated by C. This was equivalent to one week's fractional rights – with the points they had corresponding to the cost (in points) of spending one week at the Allocated Property each year.

Mr and Mrs H purchased additional points from C on 22 July 2018 (the 'Time of Sale'). They entered into an agreement with C to buy 1,200 fractional points (an additional 160 points), increasing their fractional rights to two weeks, at a cost of £3,695 (the 'Purchase Agreement').

Mr and Mrs H paid for the additional points by taking finance of £3,195 from the Lender (the 'Credit Agreement').

Mr and Mrs H – using a professional representative (the 'PR') – wrote to the Lender on 10 November 2021 (the 'Letter of Complaint') to complain about their purchase of additional points in 2018. In summary, they said:

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

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

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

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

Mr and Mrs H say that they have a claim against C 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 C, is jointly and severally liable to them.

(2) Section 75 of the CCA: C’s breach of contract

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

Mr and Mrs H also say that they have not always been able to book their first choice of holiday.

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

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

The Letter of Complaint set out several reasons why Mr and Mrs H say that the credit relationship between them and the Lender was unfair to them under Section 140A of the CCA. In summary, they include the following:

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

The Lender dealt with Mr and Mrs H’s concerns as a complaint. It only addressed concerns about the decision to lend to Mr and Mrs H, which it rejected.

Mr and Mrs H 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.

¹ In fact, the legislation relevant to this sale is the Consumer Rights Act 2015.

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

The legal and regulatory context

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

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

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

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

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

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

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

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

In the case of *Scotland & Reast*, the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that "*negotiations are deemed to have been conducted by*

the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law” before going on to say the following in paragraph 74:

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

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

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

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

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

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

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

² The Court of Appeal’s decision in *Scotland* was recently followed in *Smith*.

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.³

³ See Recital 9 in the Preamble to the 2008 Timeshare Directive.

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

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

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

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

The 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 provisional decision

I sent the parties my provisional decision on the complaint last month, setting out why I didn't intend to uphold it. I said:

Section 75 of the CCA: C'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 H could make against the supplier, i.e. the timeshare provider, who I've referred to as "C". 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 C because Mr and Mrs H were told that they were buying an interest in a specific piece of “real property” when that was not true. And that it was falsely portrayed as an investment when in fact it was worthless. Neither of these allegations were set out in a statement provided by Mr and Mrs H, so I don’t know whether they actually allege such statements were made or that they were things they relied on when taking out the membership. It follows, I do not think I am able to make factual findings that any statements were made as alleged by PR. However, I will briefly deal with the allegations.

Firstly, telling prospective members that they were buying a fraction or share of one of the C’s properties was not untrue. Mr and Mrs H’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.

I will come on to the question of whether the membership was marketed as an investment in more detail below. But there is clearly an investment element to it, and the prospect of Mr and Mrs H receiving some money back down the line (once the Allocated Property is sold). So I don’t think there is an actionable claim for misrepresentation on this basis.

A further alleged misrepresentation is that Mr and Mrs H were told they would be guaranteed to exit the Fractional Membership at the end of a finite term, when that wasn’t the case. In fact, at the end of the membership term, the Allocated Property was to then be marketed for sale and only once that sale completed would Mr and Mrs H’s membership come to an end.

I think the documentation given to Mr and Mrs H at the Time of Sale made it clear that the membership ended when the Allocated Property was sold (as opposed to a fixed date). In particular, the terms and conditions of the Purchase Agreement they signed said:

“Duration of Ownership: an Applicant’s Fractional Rights and Points arising shall continue until the Sale Date when the Allocated Property is sold...”

Similar information is contained within the “Fractional Property Owners Club Information Statement” they were given. I also understand that as part of the C’s sales process, Mr and Mrs H would’ve been talked through the Fractional Membership by way of a sales presentation. Looking at the presentation materials that C used around the time of Mr and Mrs H’s purchase, I’ve found the content of the presentation mirrors that of the documentation.

The allegation that Mr and Mrs H were told something other than that set out in the documentation they were given isn’t contained within their own recollection of events, only by way of what I consider to be rather generic comments from the PR in the Letter of Complaint. Weighing everything up, I do not find this most likely to have happened.

For similar reasons I do not find there to have been any misrepresentation with regard to the exclusivity of the resorts available to Mr and Mrs H through their membership. There is nothing to this effect within the documentation they were given, and they made no reference to such an assertion in their own statement. The only mention of it is by the PR in generic terms, which I do not find persuasive.

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

For these reasons, therefore, I do not think the Lender is liable to pay Mr and Mrs H any compensation for the alleged misrepresentations of C. 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: C's breach of contract

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

Mr and Mrs H say that they could not holiday where and when they wanted to – which, on my reading of the complaint, suggests that they consider that C was not living up to its end of the bargain, and had breached the Purchase Agreement. 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 H states that the availability of holidays was/is subject to demand. I accept that they might not have been able to take certain holidays, but I have not seen enough to persuade me that C breached the terms of the Purchase Agreement.

Mr and Mrs H also say that C breached the Purchase Agreement because there is no guarantee that they will receive their share of the net sale proceeds of the Allocated Property. I understand that they are saying that they fear that, when the time comes for the Allocated Property to be sold, they will not receive their share of the sales proceeds. However, it would seem that any breach of contract (if that occurs) lies in the future and is currently uncertain.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mr and Mrs H any compensation for a breach of contract by C. 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 H was misrepresented (or breached) by C in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Mr and Mrs H 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 C'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 H 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. C'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;
2. The provision of information by C at the Time of Sale, including the contractual documentation and disclaimers made by C;
3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; and
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 H and the Lender.

C's sales & marketing practices at the Time of Sale

Mr and Mrs H'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 C misled Mr and Mrs H and carried on unfair commercial practices which were prohibited under the CPUT Regulations. But given the limited evidence in this complaint, including the lack of evidence from Mr and Mrs H about what they were told at the Time of Sale, I am not persuaded that anything done or not done by C was prohibited under the CPUT Regulations.

The PR says that the right checks weren't carried out before the Lender lent to Mr and Mrs H. 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 H 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.

Mr and Mrs H have said they were sceptical as to whether they could afford the monthly repayments that would be due before taking out the loan, and that it went on to prove unaffordable for them. Given this, I asked Mr and Mrs H – through the PR – a series of questions to help me consider whether the loan was unaffordable for them at the outset, and whether this was something the Lender ought to have identified at the time. But few of my questions have been answered. Mr H has only told us he wasn't earning the salary stated on the loan application. He hasn't said what he was earning. Nor has he confirmed his and Mrs H's other outgoings as requested, or when they came to find the loan repayments difficult to manage and how this manifested itself (for example, by way of falling behind on the loan repayments or any other commitments).

I've also noted that Mr and Mrs H have referred to a change in their circumstances *after* the loan was taken out – in Mrs H changing her working hours that “affected our income considerably” – that would seem likely, in my view, to have been a factor in any difficulties they went on to experience in making the loan repayments.

From the information provided therefore, I cannot see that the lending was unaffordable for Mr and Mrs H. If there is any further information on this (or any other points raised in this provisional decision) that Mr and Mrs H wish to provide, I would invite them to do so in response to this provisional decision.

The PR also says that Mr and Mrs H were pressured by C 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 C during their sales presentation that made them feel as if they had no choice but to purchase the additional points when they simply did not want to. They were also given a 14-day cooling off period and they haven't provided a credible explanation for why they did not cancel their membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs H made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from C.

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

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs H'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 C 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 the PR says that C 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 H'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 H as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that C 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 C 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 C made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs H, 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 H 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 C'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 H as an investment in breach of Regulation 14(3).

However, whether or not there was a breach of the relevant prohibition by C 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 H 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 H and the Lender that was unfair to them and warranted relief as a result, whether C's breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

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

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

“The timeshare product being sold was also represented as an investment. Our clients were advised that they were investing in a fraction of the property that would be sold on a set date in the future. It was represented to our clients that they would receive their purchase price back and in addition and in all likelihood a profit from the sale.”

These comments are rather generic in nature and offer little detail, such as how, when and by whom, these alleged misrepresentations were made – or, more importantly, how significant a factor the investment element was in Mr and Mrs H's decision-making. It is said that Mr and Mrs H wouldn't have taken out the membership were it not for assurances about a potential profit. But in addition to being generic, this assertion is repeated numerous times throughout the letter when other misrepresentations are alleged.

Moreover, Mr and Mrs H do not raise any concerns of this nature within their own statement. They do not refer to the investment element of the membership at all, which I would expect them to have done if it had been a significant factor in their decision-making.

Mr and Mrs H had previously purchased a fractional club membership and so it is reasonable to assume that at the Time of Sale they had an understanding of how the membership operated. They were increasing their access to holidays, upgrading from one to two weeks. And comments made within their own statement suggest to me that this was the motivating factor in their decision to purchase more points:

“In July 2018 ... At the meeting, they said that with the deal we had, it was 1 week for 2 people, we could upgrade and get 2 weeks for 6 people for a quarter of the price. There was heavy pressure and the meeting went on for around 6 hours. As such, on the 22nd of July 2018 we purchased a further 1,200 fractional points ...”

I've explained above why I do not think that Mr and Mrs H's ability to choose whether to purchase the membership at issue was significantly impaired by pressure from C. Their statement leads me to think that it was the prospect of improving their holiday options that motivated them to purchase the additional points – rather than the prospect of any financial gain. In fact, no mention of any investment element is made by Mr and Mrs H in respect of either of their timeshare sales. So I am unable to conclude that any investment element of Fractional Club membership was at all important to them.

On balance, therefore, even if C 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 H'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 H and the Lender was unfair to them even if C had breached Regulation 14(3).

The provision of information by C 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 C and Mr and Mrs H when they purchased membership of the Fractional Club at the Time of Sale. But they and PR say that C failed to provide them with all of the information they needed to make an informed decision.

The PR also says that the contractual terms governing the ongoing costs of Fractional Club membership and the consequences of not meeting those costs were unfair contract terms under the 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 C relating to the annual management charges to be paid in respect of the membership. Regulation 12 of the Timeshare Regulations required C 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 C was required to provide is outlined in schedule 1, part 3 of the Timeshare Regulations. The relevant section states the required information is:

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

I've seen copies of the contractual paperwork provided by to Mr and Mrs H by C at the Time of Sale. These set out some information about the ongoing costs that would be associated with the contracts. Broadly speaking, this information included the fact that there would be ongoing management charges to pay, what these charges would be for the first year of membership and the potential consequences of non-payment.

There was not, however, much information about how the charges would be calculated, what exactly they covered or how they might increase over time. Rather, Mr and Mrs H were directed to other, lengthy documents to find out more. But C didn't say where in these documents the relevant information could be found, and it is unclear to me if Mr and Mrs H 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 C 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 C as to the setting of various charges.

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

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

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

I invited both parties to send me anything else they wanted me to take into account when making a final decision. The Lender responded to confirm it accepted my provisional decision and had nothing further to add. The PR on behalf of Mr and Mrs H did not respond.

What I've decided – and why

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

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

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs H to accept or reject my decision before 5 August 2025.

Ben Jennings
Ombudsman