DRN-5694513

The complaint

Mr and Mrs J'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 J were existing members of a timeshare arrangement (the 'Fractional Club') bought from a timeshare provider (the 'Supplier') on 21 April 2019. They held 1,540 fractional points.

While on a holiday, Mr and Mrs J purchased a new timeshare membership (the 'Signature Collection') from the Supplier on 17 September 2019 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 2,200 Signature points at a cost of £33,534 (the 'Purchase Agreement'). But after trading in their Fractional Club membership, they ended up paying £14,013 for membership of the Signature Collection.

In addition to giving holiday rights, both Fractional Club and Signature Collection memberships were asset backed. This meant that Mr and Mrs J's Signature Collection membership included a share in the net sale proceeds of a property named on their Purchase Agreement (the 'Allocated Property') after their membership term ends. But unlike Fractional Club, where accommodation was subject to availability, the Signature Collection membership afforded Mr and Mrs J a guaranteed week of accommodation in their Allocated Property.

Mr and Mrs J paid for their Signature Collection membership by paying a £500 deposit and taking finance of £13,513 from the Lender in their joint names (the 'Credit Agreement').

Mr and Mrs J – using a professional representative (the 'PR') – wrote to the Lender on 22 February 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 it was not arranged by a credit broker regulated by the Financial Conduct Authority (the 'FCA') to carry out such an activity.

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

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

- Told them that they had purchased an investment and that their timeshare would considerably appreciate in value, when this was not true.
- Told them that they would have a share of property, and its value would considerably increase, therefore they were promised a considerable return on investment, when this was not true.
- Told them that they could sell the timeshare back to the resort or easily sell it at a profit, when this was not true.
- Told them that they would have access to the holiday apartment at any time all year round, when this was not true.

Mr and Mrs J 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 J.

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

Mr and Mrs J say that the Supplier breached the Purchase Agreement because it went into liquidation, which means they will not be able to recover any amounts due to them.

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

(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 J 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:

- 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').
- The contractual term (Clause D) setting out that the membership would be defaulted in the event of non-payment by the member is an unfair contract term[1].
- The Credit Agreement being unenforceable because it was not arranged by a credit broker regulated by the Financial Conduct Authority (the 'FCA') to carry out such an activity.

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

Mr and Mrs J 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 J disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. At this point a statement setting out Mr and Mrs J's recollections of their entire relationship with the Supplier was submitted by the PR.

[1] Although not set out as such, this is alleging a breach of the Consumer Rights Act 2015 ('the CRA').

Having considered everything that had been submitted, I agreed with the outcome reached by the Investigator, in that I didn't think this complaint ought to be upheld, but I expanded somewhat on the reasons for that. As such I set out my initial thoughts in a provisional decision (the 'PD') and invited both sides to submit any new evidence or arguments that they wished me to consider prior to me making my final decision.

The provisional decision

I began by setting out what I considered to be the legal and regulatory context that was relevant to the case, and then when addressing the merits of the complaint, I said:

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

And having done that, I do not currently think this complaint should be upheld.

But before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

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 J could make against the Supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase. The purchase price must be more than £100 but no more than £30,000. So, if the purchase price of the product is in excess of £30,000 (irrespective of any trade-in allowance), a claim under Section 75 cannot succeed. But where the purchase price is in excess of £30,000, a claim can be considered under Section 75A of the CCA. But a claim under 75A can only relate to a 'breach of contract' – misrepresentation isn't included. I have gone on to say what I think this means in respect of Mr and Mrs J's Section 75 claims.

The purchase price for Mr and Mrs J's Signature Collection membership was £33,534. As this purchase price is in excess of £30,000 I am satisfied that Mr and Mrs J's claims for misrepresentation under Section 75 of the CCA cannot succeed.

But as I've said, Section 75A of the CCA allows for a claim should the price of the purchase be over £30,000, but only in relation to a breach of contract by the Supplier. Mr and Mrs J say that the Supplier breached the purchase agreement because it went into liquidation, so I'm satisfied the claim includes an element which is an alleged breach of contract, so this could potentially be considered under Section 75A. There are other criteria in order for Section 75A to apply, but I don't consider that I need to make a finding on that because, as I go on to explain below, whether it be under Section 75 or 75A, I do not think that the Lender was unfair or unreasonable when it rejected Mr and Mrs J's claim.

Mr and Mrs J say that the Supplier went into liquidation in December 2020, and this means that they would be unable to recover any monies which may be due to them from the Spanish Courts.

I can see that certain parts of the Supplier's business were put into administration. 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. And in any case, neither Mr and Mrs J nor the PR have said, suggested or provided evidence to demonstrate that they are no longer:

1. *members of the Signature Collection;*
2. *able to use their Signature Collection 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 Signature Collection 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 J 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 claims 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 Mr and Mrs J ought to have had a successful claim under Section 75 or 75A of the CCA and outcome in this complaint. But Mr and Mrs J 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 J 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;*
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; 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 J and the Lender.

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

Mr and Mrs J'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 there is an unfair term in the contractual documentation (Clause D) which means that their Signature Collection membership can be defaulted should Mr and Mrs J fail to make a required payment within 14 days of it being due.

To conclude that a term in the Purchase Agreement rendered the credit relationship between Mr and Mrs J 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 them in practice. In other words,

it's important to consider what real-world consequences, in terms of harm or prejudice to Mr and Mrs J, 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 cited by the PR has led to any unfairness in the credit relationship between Mr and Mrs J and the Lender for the purposes of Section 140A of the CCA. I say this because I cannot currently see that the relevant term in the Purchase Agreement has actually been operated against Mr and Mrs J, let alone unfairly. The PR hasn't explained why exactly it feels this term causes an unfairness, and as I've said, I can't see that this term has been operated in an unfair way against Mr and Mrs J in any event.

The PR has also said that the Credit Agreement was not brokered by a properly authorised person, because although the Supplier had the correct authorisation by the regulator, the specific salesperson did not as they were not an employee of the Supplier. But I am not persuaded that this is the case. I can see that the Supplier was correctly authorised by the Financial Conduct Authority to broker credit, and it was the Supplier, not an individual, who was named as the credit broker. And in any case, the Lender has confirmed that the relevant sales representative who dealt with Mr and Mrs J's sale was employed by the Supplier and had undertaken training in brokering credit agreements. I have no reason to doubt this, so I'm not persuaded that the Credit Agreement was arranged by an unauthorised credit broker.

I'm not persuaded, therefore, that Mr and Mrs J's credit relationship with the Lender was rendered unfair to them under Section 140A for either 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 Signature Collection membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

<u>Was Signature Collection membership marketed and sold at the Time of Sale as an investment in breach of Regulation 14(3) of the Timeshare Regulations?</u>

The Lender does not dispute, and I am satisfied, that Mr and Mrs J Signature Collection 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 Signature Collection 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 in the Letter of Complaint 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 J'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 Signature Collection 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 Signature Collection. They just regulated how such products were marketed and sold.

To conclude, therefore, that Signature Collection membership was marketed or sold to Mr and Mrs J 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 Signature Collection 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 the Signature Collection 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 Signature Collection as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs J, 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 Signature Collection membership was not sold to Mr and Mrs J as an investment. So, it's possible that Signature Collection 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 Signature Collection membership as an investment. So, I accept that it's equally possible, as the Letter of Complaint sets out, that Signature Collection membership was marketed and sold to Mr and Mrs J 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 J 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 J 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.

On 31 January 2024, which was after the Investigator sent his opinion on the merits of Mr and Mrs J's complaint, the PR submitted a statement from Mr and Mrs J. This set out their recollections of their entire relationship with the Supplier, and how they remembered each timeshare purchase they made.

In summary, it set out that:

- *they first purchased a trial membership (5 weeks holiday accommodation over 3 years) in November 2018 for £4,395.*
- *In April 2019, whilst on holiday in Tenerife, they bought Fractional Club membership. They recalled their motivation to make this purchase as "We believed that we were purchasing a fraction of a property and this would certainly pay off in a few years."*

The statement then went on to describe how and when they made their purchase of the Signature Collection. It said:

> *"We attended our very last meeting with CLC representatives in September 2019. The meeting was held at the Costa Del Sol CLC resort where we spent [a] free seven-night stay. The meeting started with a breakfast around 9am. Then a CLC representative gave us a tour of the resort. At the end of the tour, we were taken to a different building where one-to-one meeting [sic] were being held. Again, we filled [sic] a holiday planner but for the next free [sic] years. We were then informed that the 1540 points that were allocated to us, would not be sufficient for us to enjoy luxurious holiday [sic]. We were told it would be best to sign up to the fractional CLC signature collection. They use [sic] a pricing sheet which contained information such as:*
>
> - *Number of points which will be allocated to us; which in this case was upgraded to 2200*
> - *The type of residence which we would be fractional owner, which was the Monterrey Royal 2-bedroom unit in Tenerife*
> - *The number of weeks we would be allowed to stay each year: 1 week*
> - *The cost of the fraction: £33534*
> - *Annual maintenance fees: £1606"*

The statement then went on to describe how the Credit Agreement was arranged.

The last line of the statement is as follows:

> *"Our motivation and belief was that we were investing money and we now realised that this was never the case but we were misled to believe so."*

Having considered everything that Mr and Mrs J have said in this testimony, there is no suggestion in their recollections of the sales process at the Time of Sale that the Supplier led them to believe that the Signature Collection membership was an investment from which they would make a financial gain, nor was there any indication that they were induced into the purchase on that basis. It seems, from what they have said, that they made the upgrade from their Fractional Club because they thought that the additional points (2,200 up from 1,540) would mean they had enough to take the type of holidays they wanted. I acknowledge that they have concluded their testimony by saying that that they thought they were investing money, and they now think they were misled, but this does not persuade me that they were led to believe that a profit from the sale of the Allocated Property was likely.

The allegation that the Signature Collection was sold and/or marketed to them by the Supplier as an investment (i.e. with the potential to make a profit) as set out by the PR in the Letter of Complaint, is simply not born out by what Mr and Mrs J say in their testimony. I understand that memories can fade over time, but if I am to accept that the Supplier led them to believe that the potential profit from the sale of the Allocated Property was a good reason to buy the membership, I find it very hard to understand how Mr and Mrs J have not mentioned that at all in their statement, let alone set out that it was for this reason that they made the purchase. They have, however, set out that the Supplier led them to believe that the upgrade would allow them to take the holidays that they wanted.

On balance, therefore, even if the Supplier had marketed or sold the Signature Collection membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Mrs J's decision to purchase Signature Collection 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 for the potential holidays it would provide, 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 J 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 J 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 J's Section 75 claims, and I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

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

The responses to the provisional decision

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

The PR, on behalf of Mr and Mrs J, did not accept, and submitted a comprehensive response explaining why it did not agree with the provisional decision. In addition, it included some questions that it asked Mr and Mrs J following the PD, and the answers they had given in response:

"Q: I would like to ask you to confirm have you seen the initial decision of the investigator, rejecting your claim.

A: No, we haven't seen any initial decision of an investigator.

Q: I would like to ask you whether you have heard / read (something in the press or elsewhere) about the Judicial Review proceedings of a case similar to yours between Shawbrook Bank Ltd and Barclays Partner Finance against the Financial Ombudsman Service and the decision of the court?

A: No, we have no idea about this the case. This is something that we are unaware of.

Q: I would like to ask you to confirm whether you the attached witness statement was written by you on or before 12/03/2021.

A: We confirm that it was written by us before 12.03.2021

Q: Could you please explain a little bit more about the benefits of the fractional ownership product you purchased when you upgraded on 17/09/2019, and tell us what convinced you to purchase the upgrade?

A: The apartment was very luxurious, there was even a possibility for a chef to come to our apartment and cook for us privately. It was once again emphasised that the property would be a very good investment, and that we would get a better return in the end. Everything else was exactly the same as it would have been in the first purchase, no difference to the rest of the benefits. The only difference was the property we were purchasing. Obviously if you buy something better you would expect to get a better return in the end.

We would also like to point out that at purchase, I (Mrs J) couldn't afford the loan and [Mr J]'s loan application was rejected. They asked for my income and I said that I didn't want the loan to be in my name because I would not pass the credit check and could not afford the loan. I was told that my income was only needed to confirm the household income. I was shocked to find out later that the loan was also in my name."

In summary, the PR said:

- There is no possibility that Mr and Mrs J's recollections have been influenced by the Investigator's decision or the Judicial Review judgement.
- The sale date of the Allocated Property (as set out on the ownership certificate) is 31/12/2034. This is a 15-year contract. However the Information Statement within the purchase documentation states the property will be sold in 19 years. Such contradiction makes the contract unenforceable or unfair and amounts to a misrepresentation.

As both parties have now responded to the PD, the case has come back to me to finalise 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.

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."[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.

<u>The Law on Misrepresentation</u>

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

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

---

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

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]

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

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

- 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').

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.

And having done so, and while I will address the points made by the PR in response, I still do not think this complaint ought to be upheld, for broadly the same reasons as set out in the PD above.

I will firstly address the PR's point regarding the apparent ambiguity in the proposed sale date of the Allocated Property. The PR suggests that a delayed sale date could lead to an unfairness to Mr and Mrs J in the future, as any delay could mean a delay in the realisation of their share in the Allocated Property.

It does appear that the proposed date for the commencement of the sales process, as set out on the owners' certificate, is 31 December 2034. This same date is set out under point 1 of the Members Declaration, which has been initialled and signed as being read by Mr and Mrs J. This date indicates that the membership has a term of 15 years. The ambiguity identified by the PR is that in the Information Statement provided as part of the purchase documentation it says the following:

> *"The Owning Company will retain such Suite until the automatic sale date in **19 years time** or such later date as is specified in the Rules or the Fractional Rights Certificate."* (bold my emphasis).

But it seems clear to me that the commencement date for the start of the sales process is 31 December 2034. This actual date is repeated in the sales documentation as I've set out above. But if a dispute arose at that time, and the sales process was not commenced as set out in the contractual documentation, I think it likely that the dispute would be resolved in favour of Mr and Mrs J. This is because where part of a contract could have more than one meaning, the CRA says it is the meaning which is most favourable to the consumer which will prevail. It is unknown at this point, which of the dates would be considered more favourable to Mr and Mrs J, as this would depend on their circumstances, the management fees at the time, and perhaps the broader state of the property market in the locality of the

Allocated Property. So, I think it is difficult to claim that unfairness will arise in the future given the uncertainties.

It is also difficult to see how there is a misrepresentation here. The date is set out in full twice in the contractual documentation. Whilst the term is described as 19 years, this does not appear to have been relied upon at all by Mr and Mrs J when they decided to make the purchase.

So, I do not think that the apparent ambiguity identified here by the PR means the associated credit relationship between Mr and Mrs J and the Lender is unfair for the purposes of Section 140A of the CCA.

As regards Mr and Mrs J's motivation to make the purchase of the Signature Collection on 17 September 2019, I remain unpersuaded that the potential for a profit from the sale of the Allocated Property was a motivating factor in their decision. I say this having taken into account what they have said following the PD. They said:

> *"It was once again emphasised that the property would be a very good investment, and that we would get a better return in the end."*

But this, in my view, only provides testimony that the Supplier potentially breached Regulation 14(3) in the way the membership was sold and marketed, it does not suggest to me that this was a reason why they ultimately decided to purchase. And as I said in the PD, the Supreme Court's judgment in *Plevin* makes clear that regulatory breaches do not automatically create unfairness for the purposes of Section 140A.

As set out in the PD, in Mr and Mrs J's initial testimony there is no suggestion in their recollections of the sales process at the Time of Sale that the Supplier led them to believe that the Signature Collection membership was an investment from which they would make a financial gain, nor was there any indication that they were induced into the purchase on that basis. Indeed, it seems from what they said initially that they made the 'upgrade' to try and ensure they would have enough points to take the holidays they wanted. And although Mr and Mrs J are now saying that they thought the purchase of a better property meant they would expect a better return in the end, this does not mean they were induced into the purchase by the prospect of a profit. And in any case, I am not persuaded that this was why they bought the membership. For the reasons I set out in the PD I think they most likely went ahead with the purchase of the membership for the holidays it would provide.

Conclusion

Even though I accept that it's possible that Signature Collection membership was marketed and sold to Mr and Mrs J as an investment in breach of Regulation 14(3), I am not persuaded that Mr and Mrs J's decision to purchase Signature Collection membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, and having taken everything into account, I think the evidence suggests they would have pressed ahead with their purchase for the potential holidays it would provide, whether or not there had been a breach of Regulation 14(3).

And for that reason, I remain unpersuaded that the credit relationship between Mr and Mrs J and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

My final decision

I do not uphold Mr and Mrs J's complaint against First Holiday Finance Ltd.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs J and Mr J to accept or reject my decision before 12 August 2025.

Chris Riggs
Ombudsman