

The complaint

Mr P and Ms D'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 P and Ms D purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 30 September 2015 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,250 fractional points at a cost of £19,839 (the 'Purchase Agreement').

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

Mr P and Ms D paid for their Fractional Club membership by making an advance payment of £500 and taking finance, for the remaining amount, of £19,339 from the Lender in their joint names (the 'Credit Agreement').

Mr P and Ms D – using a professional representative (the 'PR') – wrote to the Lender on 12 August 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, while it was arranged by a credit broker regulated by the Financial Conduct Authority (the 'FCA') to carry out such an activity, the representatives acting on its behalf were self-employed rather than being employed by the Lender.

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

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

1. told them that they were buying a share in a specific property when that was not true.
2. told them that Fractional Club membership was an "investment" and would appreciate in value when that was not true.
3. told them that they could sell the product back to the Supplier or easily sell it at a profit when that was not true.
4. made them believe that they would have access to 'the holiday's apartment' at any time, all year round.

Mr P and Ms D 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 P and Ms D.

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

Mr P and Ms D say that the Supplier breached the Purchase Agreement because it went into liquidation in December 2020.

As a result of the above, Mr P and Ms D 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 P and Ms D.

(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 P and Ms D 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 the Supplier's ability to forfeit their membership and all the money they had paid for it if they failed to make payments, such as their management fees, were unfair contract terms.
3. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mr P and Ms D's concerns as a complaint and issued its final response letter on 28 November 2022, rejecting it on every ground.

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

Having considered everything, I came to the same conclusion as our Investigator and thought Mr P and Ms D's complaint should not be upheld. I issued a provisional decision (PD), setting out my thoughts and invited both parties to respond with anything further they wished me to consider before I reviewed the complaint again. The PD included the following:

'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 is as follows:

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

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

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

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

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

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

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

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

they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair.”¹

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

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

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

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

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

The Law on Misrepresentation

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

The misrepresentation doesn’t need to be the only matter that induced the representee to enter into the contract. But the representee must have been materially influenced by the misrepresentation and (unless the misrepresentation was fraudulent or was known to be likely to influence the person to whom it was made) the misrepresentation must be such that it would affect the judgement of a reasonable person when deciding whether to enter into the contract and on what terms.

However, a mere statement of opinion, rather than fact or law, which proves to be unfounded, isn’t a misrepresentation unless the opinion amounts to a statement of fact and it can be proved that the person who gave it, did not hold it, or could not reasonably have held it. It also needs to be shown that the other party understood and relied on the implied factual misrepresentation.

Silence, subject to some exceptions, doesn’t usually amount to a misrepresentation on its own as there is generally no duty to disclose facts which, if known, would affect a party’s decision to enter a contract. And the courts aren’t too ready to find an implied representation given the challenges acknowledged throughout case law.

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

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 in question:

- Regulation 12: Key Information
- Regulation 13: Completing the Standard Information Form
- Regulation 14: Marketing and Sales
- Regulation 15: Form of Contract
- Regulation 16: Obligations of Trader

The Timeshare Regulations were introduced to implement EC legislation, Directive 122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts (the '2008 Timeshare Directive'), with the purpose of achieving 'a high level of consumer protection' (Article 1 of the 2008 Timeshare Directive). The EC had deemed the 2008 Timeshare Directive necessary because the nature of timeshare products and the commercial practices that had grown up around their sale made it appropriate to pass specific and detailed legislation, going further than the existing and more general unfair trading practices legislation.²

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

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

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

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

The Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR')

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

The UTCCR protected consumers against unfair standard terms in standard term contracts. They applied and apply to contracts entered into until and including 30 September 2015 when they were replaced by the Consumer Rights Act 2015.

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

- *Regulation 5: Unfair Terms*
- *Regulation 6: Assessment of Unfair Terms*
- *Regulation 7: Written Contracts*
- *Schedule 2: Indicative and Non-Exhaustive List of Possible Unfair Terms*

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 provisionally 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 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: the Supplier’s misrepresentations at the Time of Sale

As both sides may already know, a claim against the Lender under Section 75 essentially mirrors the claim Mr P and Ms D could make against the Supplier. Certain conditions must be met if this protection is engaged – which are set out in the CCA. The Lender does not dispute that the relevant conditions are met in this complaint and I’m satisfied that they are.

This part of the complaint was made for several reasons that I set out at the start of this decision. They include the suggestion that Fractional Club membership had been misrepresented by the Supplier because Mr P and Ms D were told that they were buying a share of a specific property when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier’s properties was not untrue. Mr P and Ms D’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.

As for the rest of the Supplier’s alleged pre-contractual misrepresentations, while I recognise that Mr P and Ms D have concerns about the way in which their Fractional Club membership was sold, they have not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the other reasons they allege. And I say that because:

- *If the Supplier had told Mr P and Ms D that the membership was an investment then this wouldn't have been untrue, because there was in fact an investment element to the product. Marketing or selling the product as an investment was prohibited however, and I will go into more detail on this issue later in the decision.*
- *It would not have been false for the Supplier to state that Mr P and Ms D could sell the product, as my understanding of how the product operated is that this was possible. I also understand that the Supplier did not operate any resale programme itself and would not buy back products except when traded in against another purchase. I've seen insufficient evidence that the Supplier made representations relating to how much Mr P and Ms D could sell the product for.*
- *The contemporaneous documents do not support an allegation that Mr P and Ms D were told they would have access to a specific apartment, at any time, all year round. I think the documents make it clear enough that Mr P and Ms D were not paying for rights to stay in a specific apartment (rather, they could use their points to book accommodation).*

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

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

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

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

Mr P and Ms D also say that the Supplier breached the Purchase Agreement because it went into liquidation in December 2020. I can see that certain parts of the Supplier's business did go insolvent. And I can understand why it could be alleged that there was a breach of the Purchase Agreement as a result. However, neither Mr P and Ms D nor the PR have said, suggested or provided evidence to demonstrate that they are no longer:

1. *Members of the Fractional Club;*
2. *Able to use their Fractional Club membership to holiday in the same way they could initially; and*
3. *entitled to a share in the net sales proceeds of the Allocated Property when their Fractional Club membership ends.*

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

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

I have already explained why I am not persuaded that the contract entered into by Mr P and Ms D was misrepresented (or breached) by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Mr P and Ms D 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 P and Ms D 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 P and Ms D and the Lender.

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

Mr P and Ms D'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.

More recently, Mr P and Ms D allege that the Supplier pushed or pressured them into purchasing Fractional Club membership at the Time of Sale. I find it curious that none of these allegations were referenced – among the many other allegations set out – in the five-page Letter of Complaint.

In any case, I acknowledge that Mr P and Ms D may have felt weary after a sales process that went on for a long time. But they say little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to. They were also given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel their membership during that time if they felt pressure to buy it. And with that being the case, there is insufficient evidence to demonstrate that Mr P and Ms D made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

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

I'm not persuaded, therefore, that Mr P and Ms D'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 P and Ms D's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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

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

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

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

As I've said above, Mr P and Ms D'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 P and Ms D as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

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

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr P and Ms D, 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 P and Ms D as an investment. So, it's possible that Fractional Club membership wasn't marketed or sold to them as an investment in breach of Regulation 14(3).

On the other hand, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mr P and Ms D 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 P and Ms D 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 P and Ms D 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.

However, prior to the witness statement produced in March 2024, almost nine years after the Time of Sale and following an unfavourable assessment from our Investigator, we had not received any testimony from Mr P and Ms D in their own words, as to how the Supplier marketed the product to them, or why they decided to buy it. The Letter of Complaint from PR was unfortunately somewhat generic in nature, and I did not find it very helpful in ascertaining the reasons for Mr P and Ms D's purchase. Given the circumstances in which the witness statement was received – many years after the Time of Sale, following the case of Shawbrook & BPF v FOS³ and an assessment from our Investigator which stated the complaint ought not to be upheld – I think the weight I can attach to it is significantly limited.

In any event, I have carefully read the witness statement more recently supplied by Mr P and Ms D. In relation to the share in the Allocated Property, they recalled the following:

'Common phrases used during the presentation were guaranteed investment, owning real estate and margin [sic] money upon a future sale of one of the properties shown to us on the presentation day and [sic] that this type of investment was compared to property investment as bricks and mortar'

Mr P and Ms D go on to talk about how they felt pressured into buying the product.

³ This case highlighted the potential significance of breaches of Regulation 14(3) to the fairness of the credit relationship between the timeshare purchaser and the lender that financed the purchase.

Overall, I also don't think that, even if the Supplier had breached Regulation 14(3), there is enough in the witness statement as to Mr P and Ms D's motivations to purchase the Fractional Club membership, to allow me to conclude with any confidence that the Supplier's breaches were material to their decision-making process. The main reason that comes across in the witness statement appears to be that Mr P and Ms D felt overwhelmed and that they'd been pushed or pressured into the purchase. But I don't think this rendered the credit relationship unfair for reasons I've already explained in this decision.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr P and Ms D's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). And for that reason, I do not think the credit relationship between Mr P and Ms D and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

The alleged unfairness of terms in the Purchase Agreement

The PR 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. It doesn't specifically reference the UTCCR, but I consider that to be a relevant consideration.

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

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

The key concern highlighted by the PR is that the Supplier has wide-ranging powers to cancel/repossess Mr P and Ms D's membership and fractional rights and take them for itself, for example, for non-payment of maintenance fees or minor breaches of the Purchase Agreement. No evidence has been provided that the Supplier has used its powers in this way in Mr P and Ms D's case, and my understanding is that in practice the Supplier does not exercise its ability to cancel/repossess memberships in the event of the kind of breaches PR has described, so it appears unlikely these terms will cause unfairness in the future.

I appreciate the PR has referred to a court case (*Link Financial v Wilson*) involving a different product sold by the Supplier where similar terms were found to have rendered a credit relationship unfair, however my understanding is that it was believed by the High Court in that case that the Supplier had, in fact, invoked its right to cancel the membership in question, meaning the term had operated in an unfair way in practice. So, I don't think this case assists Mr P and Ms D, as their circumstances are different.

I haven't seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Mr P and Ms D was unfair to them because of potential unfairness of the terms of the Purchase Agreement, and so my conclusion is that the terms of the Purchase Agreement have not rendered the credit relationship between Mr P and Ms D and the Lender unfair to them.

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 P and Ms D was unfair to them for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

The complaint about the Credit Agreement being unenforceable because the broker's representatives were self-employed

Mr P and Ms D say that, while the Credit Agreement was arranged by an unauthorised credit broker, its representatives were self-employed rather than employed. The upshot of which, they argue, is that the Credit Agreement isn't enforceable as a result.

I'm not convinced the employment status of the individuals who sold the Fractional Club membership and Credit Agreement to Mr P and Ms D, is relevant. What is relevant is that these individuals were representing the entity named as the credit intermediary, and that entity did hold the required permissions – as Mr P and Ms D acknowledge. Ultimately, I don't think this argument advances their complaint any further.

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 P and Ms D'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 P and Ms D wish to provide, I would invite them to do so in response to this provisional decision.'

The Lender accepted my provisional findings and confirmed it had nothing to add. No response from the PR was received.

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 in the absence of further evidence or information provided by the parties to challenge my PD, I see no reason to depart from the decision I reached previously.

My final decision

For these reasons, my final decision is that I don't uphold the complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms D and Mr P to accept or reject my decision before 14 August 2025.

Nimish Patel
Ombudsman