DRN-5705008

The complaint

Mr R's complaint is, in essence, that First Holiday Finance Ltd (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him 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 R and Ms S purchased membership of a timeshare (the 'Signature Collection') from a timeshare provider (the 'Supplier') on 18 June 2019 (the 'Time of Sale'). They entered into two agreements with the Supplier to buy a total of 3,360 fractional points ('the Purchase Agreements'). These points could be used in a variety of ways to reserve holidays at resorts owned and operated by the Supplier, with each agreement operating on a bi-annual basis for alternating years.

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

Mr R and Ms S were existing members of a timeshare club operated by the Supplier at the Time of Sale. They held a "Fractional Club" membership, under which they had also held a share in the net sale proceeds of a nominated property. They held 1,300 points under their Fractional Club membership, which they traded in towards the purchase of their Signature Collection membership. They paid an additional £12,991, which was financed predominantly by way of a loan of £12,491 from the Lender in Mr R's sole name (the 'Credit Agreement').

Mr R – using a professional representative (the 'PR') – wrote to the Lender on 18 February 2022 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreements for the purposes of Section 140A of the CCA.
3. 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) <u>Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale</u>

Mr R says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. told him he had purchased an investment, through which he would have a share of a property – the value of which would "*considerably increase*" and therefore provide him a "*considerable return*".
2. told him that he could sell the timeshare back to the resort or "*easily sell it at a profit*",

when that was not true.
3. told him he would have access to the Allocated Property at any time throughout the year, when that was not true.

Mr R says that he has 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, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr R.

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

The Letter of Complaint set out why Mr R says that the credit relationship between him and the Lender was unfair to him under Section 140A of the CCA. In summary, they include the following:

1. Signature Collection membership was marketed and sold to him as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. The contractual terms setting out the obligation to pay annual management charges for the duration of his membership – and more significantly, the consequences of failing to do so – were unfair contract terms.
3. The decision to lend being irresponsible because the Lender did not carry out the right creditworthiness assessment.
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.

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

Mr R then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

Mr R disagreed with the Investigator's assessment and asked for an Ombudsman's decision, so 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 Agreements) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as *"a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]"*. And Section 11(1)(b) of the CCA says that a restricted-use credit

agreement is a regulated credit agreement used to *"finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."*

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

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

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

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

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

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

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

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

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in *Patel* (which was recently approved by the Supreme Court in the

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

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.

The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations')

The relevant rules and regulations that the Supplier in this complaint had to follow were set out in the Timeshare Regulations. I'm not deciding – nor is it my role to decide – whether the Supplier (which isn't a respondent to this complaint) is liable for any breaches of these Regulations. But they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair. After all, they signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

The Regulations have been amended in places since the Time of Sale. So, I refer below to the most relevant regulations as they were at the time(s) in question:

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

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

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

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

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

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

The 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

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

The Timeshare Regulations provided a regulatory framework. But as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time – which, in this complaint, includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code').

My provisional decision

I issued a provisional decision on Mr R's complaint earlier this month, setting out why I didn't intend to uphold it. I said:

> **Mr R's claim under Section 75 of the CCA**
>
> As both sides may already know, a claim against the Lender under Section 75 essentially mirrors the claim Mr R could make against the Supplier. Certain conditions must be met if this protection is engaged – which are set out in the CCA. The Lender does not dispute that the relevant conditions are met in this complaint, and I'm satisfied that they are.
>
> They include the suggestion that the Signature Collection membership had been misrepresented by the Supplier as an investment, through which Mr R (and Ms S) would have a share of a property and obtain a "*considerable return*". As I'll come on to in more detail below, I consider that the acquisition of a share in the Allocated Property did amount to an investment – as it offered the prospect of a financial return. Presenting the timeshare as an investment would not, therefore, have amounted to a misrepresentation – albeit there are other considerations when it comes to the marketing and selling of a timeshare contract as an investment that I explore below.
>
> The amount of money Mr R and Ms S receive on their investment will only be known after the membership term ends, when the Allocated Property is sold. So even if I were to accept that any such comments were made by the Supplier in this regard, I cannot say they would amount to a misrepresentation.
>
> It is also said in the Letter of Complaint that Mr R was told that he could sell the timeshare back to the resort. No such option was available. This was clearly set out in an Information Statement that Mr R was given at the Time of Sale. The Purchase Agreements he signed included a declaration to the effect that he had received this Information Statement. I do not find it likely that the Supplier would've suggested something so starkly contradictory to not only its standard practice, but to the terms and conditions that were provided to Mr R.
>
> Lastly it was said in the Letter of Complaint that Mr R was "*made to believe that* [he] *would have access to the holiday's apartment at any time all around the year*". I understand this to mean that Mr R thought he would be able to stay at the Allocated Property whenever he wanted, which was not the case. In a separate statement given by Ms S, she recalls being told that they would be able to stay in the Allocated Property "*one week every year in September alternating between weeks 36 and 38*". That recollection is correct – as per the Purchase Agreements, Mr R and Ms S had a preferential right to take holidays in the Allocated Property in week 36 of every other year (under one of the two memberships) and in week 38 of the alternating year (under the second membership). It does not seem to me, therefore, that Mr R was misinformed by the Supplier on this point.

For these reasons, therefore, I do not think the Lender is liable to pay Mr R any compensation for the alleged misrepresentations or any 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 R was misrepresented (or breached) by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Mr R also says that the credit relationship between him 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 he has concerns about. It is those concerns that I explore here.

I have considered the entirety of the credit relationship between Mr R and the Lender along with all of the circumstances of the complaint and I do not think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale;
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 R and the Lender.

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

The PR says that the right checks weren't carried out before the Lender lent to Mr R. 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 R was actually unaffordable before also concluding that he lost out as a result and then consider whether the credit relationship with the Lender was unfair to him for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for Mr R. I note in particular that the statement given by Ms S makes no mention of any difficulty by her and Mr R in affording the monthly loan repayments.

If there is any further information on this (or any other points raised in this provisional decision) that Mr R wishes to provide, I would invite him to do so in response to this provisional decision.

I'm not persuaded, therefore, that Mr R's credit relationship with the Lender was rendered unfair to him under Section 140A for this reason. But there is another reason, perhaps the main reason, why he says his credit relationship with the Lender was unfair to him. And that's the suggestion that Signature Collection membership was marketed and sold to him as an investment in breach of prohibition against selling timeshares in that way.

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?

The Lender does not dispute, and I am satisfied, that Mr R and Ms S's 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 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 R and Ms S's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that 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 R and Ms S as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that 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 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 R and Ms S, 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 R and Ms S 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 that Signature Collection membership was marketed and sold to Mr R and Ms S as an investment in breach of Regulation 14(3).

However, whether or not there was a breach of the relevant prohibition by the Supplier is not ultimately determinative of the outcome in this complaint for reasons I will come on to shortly. And with that being the case, it is not necessary to make a formal finding on that particular issue for the purposes of this decision.

Was the credit relationship between the Lender and Mr R rendered unfair to him?

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 R and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led him to enter into the Purchase Agreements and the Credit Agreement is an important consideration.

To help me decide this point, I've carefully considered what Mr R and Ms S have said in the course of their complaint about how the memberships were sold to them and their motivation for taking it out.

Within the Letter of Complaint, it is said that Mr R and Ms S were told that they had purchased an investment and could expect a profit. There was no further detail underpinning these statements within the Letter of Complaint, which are rather generic in nature. In fact, such assertions are made in an identical fashion by the PR in a number of other complaints. In any case, as set out above I accept that it is possible that the Supplier may have positioned Signature Collection membership as an investment. What I need to establish is whether such positioning was material to Mr R's decision to purchase the memberships.

Following our Investigator's view, the PR provided a statement from Ms S with her recollections of her and Mr R's purchase of the memberships. And I've noted that within this, she said that:

> "[The Supplier] *actually stated that the amount we would be likely to receive would cover the monies we had paid out. This went a long way to convince us this was a good deal.*"

Accepting what Ms S says at face value, then, the prospect of a return was a factor in her and Mr R's decision to purchase the memberships.

At the same time, though, I do not think it was the *only* factor. Mr R and Ms S purchased a significantly larger number of points which increased the holiday options available to them, trading in their existing 1,300 points towards the 3,360 taken under the new memberships. Ms S recalls being "persuaded" by the Supplier that their existing membership "*did not fulfil our holiday needs as we would not be able to take the holidays we wanted to*". So I think a motivating factor in Mr R and Ms S's decision to take out the memberships in question was the greater "purchasing power" that the additional points offered them.

The fact that Mr R and Ms S upgraded to a membership with occupancy rights at the same resort at a specific time of the year further suggests to me that they were looking for specific holiday rights over an investment opportunity.

Mr R and Ms S were upgrading their existing Fractional Club membership, under which they already held a share in the net sale proceeds of a timeshare property. Mr R and Ms S would have increased that share – and therefore the level of potential return they could expect – under the new memberships. But I note that Ms S does not refer to this increase in their investment as a factor in their decision-making, as I might expect her to have done when reflecting on why they upgraded from one type of fractional ownership timeshare membership to another (as opposed to, for example, upgrading from a 'non-fractional' to a fractional one).

In addition, by upgrading from their existing Fractional Club membership to the Signature Collection', Mr R and Ms S obtained access to a higher standard of accommodation. They also obtained the right to use the Allocated Property for holidays as noted above, a benefit that was not available under their existing membership. I think these additional improved holiday options would also have been attractive to Mr R and Ms S.

Given all of this, I do not currently think that the investment element of the Signature Collection memberships was a material factor in Mr R and Ms S's decision to purchase them. I think they were at least as motivated by the improved holiday options the upgrade and additional points offered them. So I think they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3) – given their interest in the holiday-related benefits the membership offered them. And for that reason, I do not think the credit relationship between Mr R and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

Unfair contract terms

The PR also says that the contractual terms included unfair default provisions. On my reading, the provisions in question effectively mean that if Mr R and Ms S were to fail to make a payment due under the Purchase Agreements (such as the annual management charges), they could, ultimately, forfeit their "fractional rights". Non-payment could therefore have significant consequences for Mr R and Ms S, such as the loss of their share in the Allocated Property and the holidays to which their points would otherwise entitle to them – without getting back any of the money they've paid to acquire these rights.

To conclude that a term in the Purchase Agreements rendered the credit relationship between Mr R and the Lender unfair to him, I'd have to see that the term was unfair under the CRA and operated against Mr R in practice.

In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mr R, have flowed from such a term because those consequences are relevant to an assessment of unfairness under Section 140A. Indeed, the judge in the very case that this aspect of the complaint seems based on (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.

With that in mind, it seems unlikely to me that the contract term cited by the PR has led to any unfairness in the credit relationship between Mr R and the Lender for the purposes of Section 140A of the CCA. I say this because I cannot currently see that the term was actually operated against Mr R, let alone unfairly.

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 R was unfair to him because of an information failing by the Supplier, I'm not persuaded it was.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Mr R was unfair to Mr R for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

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

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

However, having looked at the Financial Ombudsman Service's internal records, I can see that the business named on the Credit Agreement as the credit intermediary was, at the Time of Sale, authorised by the FCA. The Lender says the Supplier's permissions covered credit broking. So in the absence of any evidence to the contrary, I am not persuaded that the Credit Agreement was arranged by an unauthorised credit broker.

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 R's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with him under the Credit Agreement that was unfair to him 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 him.

I invited both parties to respond to my provisional decision with any further comments or evidence they wanted me to take into account when making a final decision.

The Lender confirmed it accepted my provisional decision and had nothing further to add.

The PR replied to say that they disagreed with my provisional decision, raising a number of points that I will set out and address in the findings below.

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, with careful consideration of the points raised by the PR in response to my provisional findings, I've not seen reason to depart from my initial conclusions. So I'll explain why the PR's further points haven't changed my mind.

The PR did not respond with anything further for me to consider in respect of Mr R's claim under Section 75, so I have nothing further to add to my provisional findings as set out above on that aspect of the complaint.

With regard to the complaint that Mr R's credit relationship with the Lender was rendered unfair, the PR made a number of points asserting that the membership was marketed and sold as an investment by the Supplier. I accepted in my provisional decision that it may well have been. I did not make a firm finding on that as I did not think it mattered in determining that aspect of the complaint – as even if I found that there had been a breach, that would only lead me to uphold the complaint if I thought that breach had led Mr R to purchase the membership (and, therefore, enter into the Credit Agreement). And I did not think that is what happened. That was because I provisionally found that Mr R's decision to purchase the Fractional Club membership was not motivated by the prospect of a financial gain (i.e., a profit).

In reaching that finding, I cited the fact that Mr R and Ms S had upgraded to a membership with occupancy rights at the same resort at a specific time of the year and said this further suggested to me that they were looking for specific holiday rights over an investment opportunity. The PR says that is" incorrect". But I was not stating that position as fact. It is a matter of opinion. I cannot speak with absolutely certainty as to Mr R and Ms S's motivations at the Time of Sale. But in my opinion, Mr R and Ms S's selection of a particular resort at a particular time of year is additional evidence of specific holiday options being their motivation – on top of the fact they were significantly increasing the number of points and therefore the "purchasing power" these offered, seemingly to better fulfil their holiday needs as Ms S's statement suggests. The PR underlines the level of potential return they could expect from a higher value property as being the main factor in their decision; I noted this as a possible consideration in my provisional decision but concluded that they would have proceeded anyway and I remain of that view.

The PR also objects to the approach I've taken in assessing this aspect of the complaint, saying that it was not found in *Shawbrook & BPF v FOS* that the borrowers under the loan agreements at issue had purchased their timeshare memberships *primarily* for investment reasons. But I did not say that Mr R and Ms S needed to have done so. I said, in summary, that the marketing of the memberships as an investment needed to have been material to Mr R and Ms S's decision to purchase them in order for me to uphold the complaint. I accepted that the investment element may have been a factor in that decision, but went on to discuss other factors that ultimately led me to conclude that Mr R and Ms S would have purchased the memberships even if there had been no breach of Regulation 14(3).

Ultimately, the PR's further submissions have not changed my view that Mr R and Ms S would still have purchased the Signature Collection memberships even if the Supplier breached Regulation 14(3) – and as such, I do not think the credit relationship between Mr R and the Lender was unfair to him.

It follows, therefore, that there is no basis on which I think this complaint should be upheld.

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 R to accept or reject my decision before 21 August 2025.

Ben Jennings
Ombudsman