DRN-5706686

The complaint

Mr P'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 claims under Section 75 of the CCA.

What happened

Mr P previously purchased a trial membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier'). This purchase is not the subject of this complaint but is included here for background information only.

Then, on 14 October 2014 (the 'Time of Sale'), Mr P traded in his trial membership and purchased full membership of the Fractional Club. He entered into an agreement with the Supplier to buy 950 fractional points at a cost of £19,149 (the 'Purchase Agreement'). But after trading in his existing trial membership, he ended up paying £15,554 for membership of the Fractional Club.

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

Mr P paid for his Fractional Club membership by paying a £500 deposit and taking finance for the remaining amount of £15,054 from the Lender in Mr P's name only (the 'Credit Agreement').

Mr P – using a professional representative (the 'PR') – wrote to the Lender on 1 September 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. A breach of contract by the Supplier giving him 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) <u>Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale</u>

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

1. told him that Fractional Club membership was an "investment" which would appreciate in value when that was not true.

2. told him that they would have access to the holiday apartment at any time all year round.

Mr P 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 P.

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

The PR says that the Supplier went into liquidation in December 2020, and this means Mr P won't be able to recover any amounts expected to be awarded by the Spanish courts.

As a result of the above, Mr P suggests that he has a breach of contract claim against the Supplier, 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 P.

(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 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. Fractional Club 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 that the membership and any money paid towards it would be forfeit in the event that Mr P failed to make a payment due under the agreement were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
3. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mr P's concerns as a complaint and issued its final response letter on 3 October 2022, rejecting it on every ground.

The PR, on Mr P's behalf, 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 disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

I considered the matter and issued a provisional decision (the 'PD') dated 7 July 2025. In that decision, I said:

"***Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale***

The CCA introduced a regime of connected lender liability under section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.

In short, a claim against the Lender under Section 75 essentially mirrors the claim Mr P 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 and the nature of the arrangements between the parties involved in the transaction.

Further, creditors can reasonably reject Section 75 claims that they're first informed about after the claim has become time-barred under the Limitation Act 1980 (the 'LA'). The reason being, that it wouldn't be fair to expect creditors to look into such claims so long after the liability arose and after a limitation defence would be available in court.

Having considered everything, I think Mr P's claim for misrepresentation is likely to have been made too late under the relevant provisions of the LA, which means it would have been fair for the Lender to have turned down his Section 75 claim for this reason.

A claim under Section 75 is a 'like' claim against the creditor. A claim for misrepresentation against the Supplier would ordinarily be made under Section 2(1) of the Misrepresentation Act 1967. And the limitation period to make such a claim expires six years from the date on which the cause of action accrued, as per Section 2 of the LA.

But a claim like this one under Section 75 is also "an action to recover any sum by virtue of any enactment" under Section 9 of the LA. The limitation period under that provision is also six years from the date on which the cause of action accrued.

The date on which the cause of action accrued for the claim was the Time of Sale, which was 14 October 2014. I say this because Mr P entered into the membership at that time based on the alleged misrepresentations by the Supplier, which Mr P says he relied on. And, as the loan from the Lender was used to finance this membership, it was when Mr P entered into the Credit Agreement, on 14 October 2014, that he suffered a loss.

Mr P first notified the Lender of his Section 75 claim on 1 September 2022. Since this was more than six years after the Time of Sale, I don't think it was unfair or unreasonable of the Lender to reject Mr P's concerns about the Supplier's alleged misrepresentations at the Time of Sale.

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 a right of recourse against the Lender. So, it isn't necessary to repeat that here.

The PR suggests that the Supplier breached the Purchase Agreement because it went into liquidation in December 2020. And, in their view, this means Mr P can't recover any amounts that are expected to be awarded by the Spanish courts. 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.

What's more, in light of the Supplier's apparent liquidation, neither Mr P nor the PR have said, suggested or provided evidence to demonstrate that he is no longer:

1. *a member of the Fractional Club;*
2. *able to use his Fractional Club membership to holiday in the same way he could initially; and*
3. *entitled to a share in the net sales proceeds of the Allocated Property when his 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 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?

Mr P 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 P 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 the Lender.

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

Mr P'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.

The PR says that the right checks weren't carried out before the Lender lent to Mr P. 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 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 P. If there is any further information on this (or any other points raised in this provisional decision) that Mr P wishes to provide, I would invite him to do so in response to this provisional decision.

The PR also says that the contractual terms allowing the Supplier to terminate membership where Mr P failed to make a payment due under the agreement were unfair.

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

However, the Supreme Court made it clear in Plevin[1] 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.

So, in order to conclude that a term in the Purchase Agreement rendered the credit relationship between Mr P and the Lender unfair to him, I'd have to see that the term was unfair under the UTCCR, and that the term was actually operated against Mr P in practice.

In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mr P, 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(s) cited by Mr P have led to any unfairness in the credit relationship between him and the Lender for the purposes of Section 140A of the CCA. And I say this because I cannot see that the relevant terms in the Purchase Agreement have actually been operated against Mr P, let alone unfairly. So, I can't see that this caused an unfairness in the credit relationship which requires a remedy.

I'm not persuaded, therefore, that Mr P's credit relationship with the Lender was rendered unfair to him under Section 140A for any of the reasons above. 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 Fractional Club membership was marketed and sold to him as an investment in breach of prohibition against selling timeshares in that way.

<u>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?</u>

The Lender does not dispute, and I am satisfied, that Mr P'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.

Mr P's share in the Allocated Property clearly, in my view, constituted an investment as it offered him the prospect of a financial return – whether or not, like all investments, that was

[1] See Appendix.

more than what he 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 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 him as an investment, i.e. told him or led him to believe that Fractional Club membership offered him 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, the financial value of his 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 as an investment. So, it's possible that Fractional Club membership wasn't marketed or sold to him 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 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 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 P 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 Agreement and the Credit Agreement is an important consideration.

I've considered the testimony provided in this case by Mr P.

The PR didn't provide any testimony or supporting evidence in relation to this element of the complaint when it was first referred to our Service.

In February 2024, in response to the Investigator's view, the PR provided some testimony from Mr P in the form of an email dated 26 February 2024. Within this email, Mr P said:

> *"We were taken to a location by transport where we had to stay and listen to a sales pitch without the opportunity to leave if we were not interested or satisfied.*
>
> *The property was sold to us, stating that the value would go up and we would benefit through some concession, which did not happen.*
>
> *We were told we would benefit from the profits when the property was sold, but this did not happen."*

But, Mr P then went on to say:

> *"We were enticed by, [sic] whilst being very tired, after being tempted to purchase after five hours, that would also get free accommodation at another resort if purchased at the time.*
>
> *We were sold the product that stated our holiday week would be available; however, whenever we tried to book that week, it was never available."*

I'm firstly mindful that this testimony was only provided in early 2024, following the Investigator's view and the judgment in Shawbrook & BPF v FOS[2] and there is therefore a risk that Mr P's testimony here has been influenced by one or both of those. So, I don't think that I can put much, if any, weight on the testimony that's been provided.

But in any event, from what Mr P has had to say, he was persuaded to purchase due to the offer of accommodation at another resort. And he's gone on to outline why he's unhappy with the membership now and from what he's said, this is due to how the membership has functioned as a holiday product. For example, he's described issues with poor availability.

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 M P's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests he would have pressed ahead with his purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr P and the Lender was unfair to him 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 P was unfair to him 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 permitted to enforce the Credit

[2] See Appendix.

Agreement as a result, and Mr P could claim a refund of all the money he's paid along with additional compensation.

Section 27 of the Financial Services and Markets Act 2000 ("FSMA") states that where that section applies:

> *"…*
> *(2) The other party is entitled to recover—*
> *(a) any money or other property paid or transferred by him under the agreement; and*
> *(b) compensation for any loss sustained by him as a result of having parted with it.*
> *…"*

The "other party" is Mr P, and the "agreement" is the Credit Agreement.

Subsection (1) of Section 27 of FSMA lists the conditions under which Section 27 will apply, as follows:

> *"(1) This section applies to an agreement that—*
>
> *(a) is made by an authorised person ("the provider") in the course of carrying on a regulated activity,*
>
> *(b) is not made in contravention of the general prohibition,*
>
> *(c) if it relates to a credit-related regulated activity, is not made in contravention of section 20, and*
>
> *(d) is made in consequence of something said or done by another person ("the third party") in the course of—*
>
> *(i) a regulated activity carried on by the third party in contravention of the general prohibition,*
>
> *or*
>
> *(ii) a credit-related regulated activity carried on by the third party in contravention of section 20."*

The "general prohibition" is an important concept in this scenario. It can be found in Section 19 of FSMA and reads as follows:

> *"(1) No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is—*
>
> *(a) an authorised person; or*
>
> *(b) an exempt person.*
>
> *(2) The prohibition is referred to in this Act as the general prohibition."*

Section 27 also refers back to Section 20, which prohibits authorised persons (i.e. entities holding a set of permissions from the Financial Conduct Authority) from acting in a way which exceeds the extent of their permissions. For example, by carrying on regulated activities other than ones which they have permission to carry on.

All of subsections (a), (b), (c) and (d) need to be applicable for Section 27 to apply and for Mr P to be able to claim a return of money paid under the agreement, or further compensation. Having carefully considered the facts of this case, I think all of these subsections apart from subsection (d) are applicable. I'll explain why.

Subsection (d) requires that the agreement was made because of something said or done by another person. In this case the other person is the credit intermediary named on the Credit Agreement. It also requires that the other person was either carrying on a regulated activity in breach of the general prohibition, or that it was an authorised person acting in a way which exceeded the scope of its permissions to carry on credit-related regulated activities.

Having examined the Financial Ombudsman Service's internal records and the Financial Conduct Authority's register, I can see the credit intermediary named on the Credit Agreement (i.e. the entity which arranged the Credit Agreement) was not authorised by the Financial Conduct Authority to carry on regulated activities of any kind at the Time of Sale. The Lender says the credit intermediary had interim permissions from the Financial Conduct Authority at the Time of Sale, but that appears to be factually inaccurate.

That said, it does not appear that the credit intermediary was in breach of the general prohibition. A key limitation to the application of the general prohibition is that it only applies where regulated activities are carried on in the United Kingdom. Section 418 of FSMA extends the meaning of "United Kingdom" in certain circumstances, with each set of circumstances dependent on the entity carrying on the activity having either its registered office, head office, or an "establishment" in the United Kingdom.

In this case, the regulated activity of arranging (broking) the loan took place in Spain and the credit intermediary itself had its registered office in the Isle of Man. I'm not aware of the credit intermediary having a separate head office in the United Kingdom, nor any establishment there. Having considered the various scenarios in the version of Section 418 of FSMA which applied at the Time of Sale, the one which seems to be most relevant is the following:

> *"(5) The fourth case is where–*
>
> *(a) his head office is not in the United Kingdom; but*
> *(b) the activity is carried on from an establishment maintained by him in the United Kingdom."*

The Lender says the individual who brokered the loan – "MM" – was an employee of the credit intermediary and was the same person who went through the paperwork with Mr P after his purchase had been agreed. So, if the credit intermediary was carrying on the regulated activity of credit broking from an establishment which was separate to its registered office in the Isle of Man, this seems more likely to me to have been in Spain in this case, rather than the United Kingdom.

In light of this, I have to conclude that (d)(i) doesn't apply to Mr P's situation. Because the credit intermediary was not an authorised person, (d)(ii) does not apply either.

Given Section 27 (1)(d) does not apply to Mr P's case, the fact that the broker which arranged the Credit Agreement was not authorised by the Financial Conduct Authority does not, in my view, entitle Mr P to redress from the Lender."

In conclusion, given the facts and circumstances of this complaint, I did not think that the Lender acted unfairly or unreasonably when it dealt with Mr P's Section 75 claims, and I was 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 could see no other reason why it would be fair or reasonable to direct the Lender to compensate him.

The Lender responded to the PD and accepted it. They did however clarify that the credit broker who arranged the Credit Agreement in this case did have interim permission from the FCA to do so at the Time of Sale, and they provided some evidence of this – which I acknowledge.

The PR also responded – they did not accept the PD and provided some further comments and evidence they wished to be considered.

Having received the relevant responses from both parties, I'm now finalising 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.

As I did in my PD, I've set out the legal and regulatory context that I think is relevant to this complaint in an appendix (the 'Appendix') at the end of my findings – which forms part of this decision.

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.

Following the responses from both parties, I've considered the case afresh and having done so, I've reached the same decision as that which I outlined in my provisional findings, for broadly the same reasons.

Again, my role as an Ombudsman isn't to address every single point which has been made to date, but to decide what is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, this doesn't mean I haven't considered it.

Rather, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision.

The PR's further comments in response to the PD only relate to the issue of whether membership was sold to Mr P as an investment at the Time of Sale and in turn, whether that caused the credit relationship between him and the Lender to be unfair.

As outlined in my PD, the PR originally raised various other points of complaint, all of which I addressed. But they didn't make any further comments in relation to those in their response to my PD. Indeed, they haven't said they disagree with any of my provisional conclusions in relation to those other points. Since I haven't been provided with anything more in relation to those other points by either party, it follows that my conclusions in relation to them remain the same as set out in my provisional decision. As noted above, the Lender did provide clarification regarding the credit broker's authorisation at the Time of Sale, and I acknowledge this. Again, the PR hasn't disputed this part of the complaint further in any event. I'll now address the PR's points that they raised in response to the PD.

Firstly, I will address what the PR says about my assessment of Mr P's testimony.

The PR explained in their response that they hadn't shared the Investigator's view on this complaint with Mr P, saying "*this was done in order not to influence their recollections*".

The PR also said Mr P confirmed in his witness statement that he hadn't heard about the judgement handed down in *Shawbrook and BPF v FOS*[3].

The PR said this means Mr P's recollections have not been influenced by either the Investigator's view or the aforementioned judgment.

Part of my assessment of the testimony was to consider *when* it was written, and whether it may have been, even subconsciously, affected by external factors such as other similar complaints.

I appreciate that the PR says Mr P hasn't heard about the judgement and I have no reason to doubt that, although I note there is no comment to this effect in his witness testimony as the PR has suggested. I also find it hard to accept that Mr P would be in a position to decide whether or not to accept the Investigator's outcome (or indeed my provisional decision), without actually seeing what this said.

So, I maintain there is a risk that Mr P's testimony was tainted, even subconsciously, by the Investigator's view and/or the outcome in *Shawbrook & BPF v FOS*. And, for these reasons along with those I already explained in my PD, I don't think I can put much, if any weight on the testimony provided.

The PR also said that I'd omitted a particular part of Mr P's testimony in my PD. But, the part they've highlighted was quoted directly in my PD, so I can only assume the PR has said this in error.

The PR ultimately hasn't provided any further evidence in this regard. So, in light of all of the above, and having considered everything, I remain unpersuaded that I am able to place much, if any, weight on the testimony that's been provided.

The PR also said that in the judgment handed down in *Shawbrook & BPF v FOS*, it was not challenged that the product in question was marketed and sold as an investment. But, as I explained in my provisional decision, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold. And, the judgment referred to did not make a blanket finding that all such products were mis-sold in the way the PR appears to be suggesting.

Further, in my PD I explained:

> "*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 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.*"

I also explained:

"*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*

[3] See Appendix.

and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way."

So, in other words, even if the Supplier did breach Regulation 14(3) at the Time of Sale (which I still make no formal finding on), it does not automatically follow that the associated credit relationship was unfair to Mr P, nor that this complaint should be upheld.

Turning to the PR's other remaining comments, I also remain unpersuaded that any breach of Regulation 14(3) was material to Mr P's purchasing decision.

The PR has said they feel the testimony provided states that the expected profit from the sale of the Allocated Property was an important factor to his decision. But, as I've already explained, I don't feel I can place much, if any, weight on the testimony that's been provided.

And, as I already said in my PD, it seems from what Mr P has had to say that he was persuaded to purchase due to the offer of accommodation at another resort. And, that his unhappiness with the membership is due to how it has functioned as a holiday product. For example, he's referred to issues with poor availability.

Lastly, the PR referred to the pricing sheet which was completed at the Time of Sale with details of the aforementioned trade in of Mr P's trial membership. They've highlighted that the pricing sheet included the specific percentage share Mr P had in the Allocated Property. And, they say that this shows the investment element of the membership played an important role in convincing Mr P to purchase.

But I don't agree. This document only shows a very factual representation of how the membership worked – it's purpose ultimately is simply to show customers a breakdown of the relevant costs and trade in value with the unit share they're purchasing. It's not disputed here that Mr P was (and is) entitled to his net share of the proceeds of the sale of the Allocated Property when his membership term ends. I think here the PR is conflating the issue of whether the Supplier breached Regulation 14(3) at the Time of Sale with whether any such breach was material to Mr P's purchasing decision. This document ultimately gives no insight into Mr P's motivations for purchase.

So, as I said before, even if the Supplier had marketed or sold the membership as an investment in breach of Regulation 14(3) (which I still make no finding on here), I'm not persuaded Mr P's decision to make the purchase was motivated by the prospect of a financial gain. So, I still don't think the credit relationship between Mr P and the Lender was unfair to him for this reason.

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's Section 75 claims, 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.

Appendix: The Legal and Regulatory Context

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."[4]

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

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

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.

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.[5]

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

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

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

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

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

The UTCCR protected consumers against unfair standard terms in standard term contracts. They applied and apply to contracts entered into until and including 30 September 2015

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

when they were replaced by the Consumer Rights Act 2015.

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

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

The Consumer Rights Act 2015 (the 'CRA')

The CRA, amongst other things, protects consumers against unfair terms in contracts. It applies to contracts entered into on or after 1 October 2015 – replacing the Unfair Terms in Consumer Contracts Regulations 1999.

Part 2 of the CRA is the most relevant section as at the relevant time(s).

Relevant Publications

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

My final decision

For the reasons set out above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 27 August 2025.

Fiona Mallinson
Ombudsman