DRN-5707138

The complaint

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

What happened

I issued a provisional decision on this complaint on 3 July 2025, in which I set out the background to the case and my provisional findings on its merits. A copy of that provisional decision is appended to and forms a part of this final decision, so it's not necessary for me to go over the details again. However, in brief summary:

- Mr and Ms F purchased a timeshare from a timeshare provider (the 'Supplier') in May 2017, financed by a loan from the Lender. They considered the timeshare and the loan had been mis-sold by the Supplier, giving them a claim against the Lender under Section 75 of the CCA and Section 140A of the CCA.

- Mr and Ms F considered they had a valid Section 75 claim against the Lender because:

    - The Supplier had made various misrepresentations about the timeshare, such as telling them it was an investment and a share in property when it was not, and that they'd be able to use the "holiday's apartment" at any time all year round when this wasn't true.

    - A breach of contract had occurred because the Supplier had gone into liquidation.

- Mr and Ms F considered they had a claim under Section 140A of the CCA, that their credit relationship with the Lender had been rendered unfair to them, because:

    - The timeshare had been marketed and sold to them as an investment by the Supplier, in breach of the regulations on selling timeshares, which prohibited selling in this way.

    - The contract with the Supplier contained terms which were unfair to them.

    - The right affordability assessment hadn't been carried out before the loan was agreed, meaning an irresponsible lending decision had occurred.

In my provisional decision I said I wasn't minded to uphold the complaint. The full reasons for this can be found in the appended document, but briefly:

- There was insufficient evidence the Supplier had misrepresented the timeshare. The allegations were somewhat vague, and the statements which were attributed to the Supplier had either been true, statements of opinion not amounting to

misrepresentation, or clearly denied by the paperwork Mr and Ms F had completed.

- While it was the case that parts of the Supplier's business had become insolvent, evidence had not been offered that this meant Mr and Ms F were no longer members of the timeshare and no longer entitled to avail themselves of the benefits of the product. So it was difficult to say a breach of contract had occurred.

- There wasn't evidence to support an allegation that the Lender had failed to carry out the checks it ought to have done before lending to Mr and Ms F, and additionally no evidence that the loan was unaffordable for them, which would have been necessary to conclude the credit relationship was unfair.

- While there were terms in the contract with the Supplier which had the potential to operate in an unfair way, there wasn't evidence to suggest they had been operated unfairly against Mr and Ms F, nor that they would be in the future.

- Based on what Mr and Ms F had recalled of the sales process, I was unconvinced that the Supplier had in fact marketed or sold the timeshare to them as an investment. But even if it had, it didn't appear that this had had a material impact on Mr and Ms F's purchasing decision, as their evidence suggested they had not understood the product to be an investment in the sense of something that might make them a profit or financial gain.

I invited further submissions from the parties to the complaint. The Lender said it accepted the provisional decision. Mr and Ms F's professional representative ("PR") replied on their behalf, disagreeing with the provisional decision. PR also provided a list of questions which had been asked of Mr and Ms F following the provisional decision, and their answers to these. PR's submissions could, I think, be fairly summarised as follows:

- It was not possible for Mr and Ms F's recollections to have been influenced either by the unfavourable assessment of our Investigator or the case of *Shawbrook & BPF v FOS*. This was because Mr and Ms F had never seen these.

- I had been wrong to conclude that Mr and Ms F had thought they would get back what they'd paid, meaning their holidays would have been free. It was actually the case that Mr and Ms F had thought they would or could make a financial gain or profit from their share in the Allocated Property.

- Even if my conclusion had been correct, and Mr and Ms F had only thought they would get back what they'd paid in monetary terms, this understanding would still be an understanding that the product was an investment. This was because the product, understood this way, was like a capital-guaranteed investment. The investor got back what they'd put in, and received various benefits such as holidays over the investment period. While not cash, these had an economic value, so overall there was a financial gain or profit.

PR's questions to Mr and Ms F asked them to clarify how the Supplier had explained the Fractional Club products to them in 2016 and 2017, which benefits they had been interested in, and what had convinced them to purchase. Mr and Ms F said:

> *"We were promised unlimited holidays all over the world. Although it was long ago, I clearly remember, that they emphasised we were buying a brick of a property, which when sold at the end of the term, would reimburse our investment and most probably get us a profit because the real estate's value increases over time. This was emphasised at both purchases.*

Regarding the 2017 purchase in particular, we were told that it was a very high standard property, that we could have holidays in that specific apartment, with a possibility of a chef coming to cook for us at the apartment, it was a very luxurious property which would bring a higher income at the end when sold.

At both purchases we were told that the investment was expected to grow over time and that there was nothing to lose – free holidays and a good return at the end.

Something that I think was quite important at the 2017 purchase was that the loan application was initially rejected, then they still wanted to push it through, and it was miraculously approved by their internal financing."

The case has now been returned to me to review once more.

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, I've arrived at the same conclusions I set out in my appended provisional decision, and for the same reasons. However, I will address the points made by PR.

PR has said Mr and Ms F could not have been influenced by the case of *Shawbrook & BPF v FOS* or of the Financial Ombudsman Service's assessments of their case to date, because they've not seen any of these. Whether or not that's the case, I think it's reasonable to treat Mr and Ms F's recollections with a degree of caution. The judgment in the case of *Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] 11 WLUK 439*, contains a particularly useful discussion of the difficulties inherent in relying on recollected or reconstructed memories of events which took place many years previously, how those memories can be shaped and influenced by *"…new information or suggestions about an event in circumstances where [the] memory…is already weak due to the passage of time",* and how *"…the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth."* I've borne this in mind when considering Mr and Ms F's evidence.

As I said in my provisional decision, prior to our Investigator's assessment, we had no testimony from Mr and Ms F at all. The first time Mr and Ms F appear to have committed their memory of events to paper was around eight years after they happened. Following my provisional decision, we now have further testimony from them which appears to build on their March 2024 statement and differs from it in some respects.

For example, in the March 2024 statement, Mr and Ms F said:

"…when the property containing 'our brick' was sold on, our investment would be reimbursed. This, combined with the purchase cashback scheme for the maintenance fees meant that we would in the end have had around 18 years of 'free' holidays so there was nothing for us to lose."

In July 2025, following my provisional decision, they said:

"…we were buying a brick of a property, which when sold at the end of the term, would reimburse our investment and most probably get us a profit because the real estate's value increases over time."

These recollections are, in my view, clearly different from one another. This is the first time Mr and Ms F have referred to the possibility of a profit or financial gain from the Fractional

Club membership.

An independent observer might note that Mr and Ms F's recollections appear to have shifted over time in a way which reacts to the reasons which have been given for not finding their complaint should be upheld. That said, I think it's possible Mr and Ms F's most recent testimony reflects their genuine recollection of events. But bearing in mind the obvious inconsistency, and all the difficulties inherent in relying on memories of events which took place long ago as outlined in *Gestmin*, I don't find their July 2025 testimony credible.

So I remain of the view that Mr and Ms F, at best, thought at the Time of Sale that they could get back what they'd paid for the Fractional Club membership at the end of the term, meaning their holidays with the membership had essentially been free.

But PR says that this is also an understanding of the product which fits into the definition of an "investment". The definition of "investment" which I set out in my provisional decision (and which neither party has challenged) is:

"*…a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit.*"

PR's point, I think, is that if Mr and Ms F expected or hoped to receive something on top of the return of the money they'd spent, even if that was holidays or something else which was not money, then this would still fit the definition as it is a financial gain. I do not share this point of view. While I accept that a holiday has a value, the receipt of free holiday accommodation is not a financial gain, it is a saving on a person's holiday costs. So Mr and Ms F may have saved money on their holidays, but they would not have *made* any money. There would be no profit. So it's difficult, in my view, to interpret their understanding of the product as fitting into the agreed definition of an investment, and therefore that, *if* the Supplier marketed it to them as an investment, then this could have played a material part in their purchasing decision.

It follows that my conclusions on this point remain unchanged from my appended provisional decision.

My final decision

For the reasons explained above, and in my appended provisional decision, I do not uphold Mr and Ms F's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Ms F to accept or reject my decision before 22 August 2025.

Will Culley
Ombudsman

COPY OF PROVISIONAL DECISION

I've considered the relevant information about this complaint.

Having done so, I've arrived at the same conclusions as our Investigator, but I've explained my reasons in more detail. For this reason, I've decided to give the parties to the complaint more time to respond before I make my decision final.

The deadline for both parties to provide any further comments or evidence for me to consider is **17 July 2025**. Unless the information changes my mind, my final decision is likely to be along the following lines.

The complaint

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

What happened

Mr and Ms F had purchased a membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') in June 2016. This purchase is not the subject of this complaint, but I'll outline some of the details for the purpose of putting things in context.

The Fractional Club membership was a kind of asset-backed timeshare which entitled Mr and Ms F to a certain number of "points" every other year, which they could use to book holiday accommodation within the Supplier's portfolio. Mr and Ms F were also entitled to a share in the net sale proceeds of an apartment named on their contract (the 'Allocated Property'), which was to be put up for sale after a certain number of years. It appears Mr and Ms F paid £11,399 for the Fractional Club membership, which they financed with a loan from another lender.

Mr and Ms F then made a second purchase from the Supplier on 30 May 2017 (the 'Time of Sale'), which is the subject of this complaint. They traded in their existing membership and signed a contract (the 'Purchase Agreement') for a membership of a variation of the Fractional Club product, known as 'Signature', which entitled them to stay, every other year, in a specific luxury apartment. Alternatively, they could choose to convert (for a fee) their right to stay in this apartment into 1,500 points, which could be used in the same way as their previous membership. As with their previous membership, they were also entitled to a share in the net sale proceeds of an Allocated Property – which in this case was the luxury apartment they were entitled to stay in.

It's my understanding that Mr and Ms F's specific apartment was not ready in 2017 because it was in use as a show apartment, and so the Supplier converted their right to stay in the apartment into 1,500 points, waiving the conversion fee.

The price of the second Fractional Club membership was £8,579 after trading in their previous membership, and Mr and Ms F paid for it by taking finance of £8,079 from the Lender in joint names (the 'Credit Agreement'), and paying £500 by card.

Mr and Ms F – using a professional representative (the 'PR') – wrote to the Lender on 26 November 2021 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. A breach of contract by the Supplier giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.
4. The Credit Agreement being unenforceable because it was not arranged by a credit broker regulated by the Financial Conduct Authority (the 'FCA') to carry out such an activity.

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

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

1. told them they had purchased an investment which included a share in property, the value of which would increase, giving a considerable return, when this was not true.
2. told them they could sell their timeshare back to the resort or easily sell it at a profit, when that was not true.
3. led them to believe they would have access to the "holiday's apartment" at any time all around the year.

Mr and Ms F says that they have a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to them.

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

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

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

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

The Letter of Complaint set out several reasons which I've interpreted as being matters which Mr and Ms F allege made the credit relationship between them and the Lender unfair to them under Section 140A of the CCA. In summary, they include the following:

1. Fractional Club membership was marketed and sold to them as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. Their contract with the Supplier contained terms which were unfair to them.
3. The decision to lend was irresponsible and against the regulations at the time, because the Lender didn't carry out the right creditworthiness or affordability assessment.

The Lender dealt with Mr and Ms F's concerns as a complaint and issued its final response letter on 5 January 2022, rejecting it on every ground.

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

Mr and Ms F disagreed with the Investigator's assessment and asked for an Ombudsman's decision. PR, on Mr and Ms F's behalf, argued in response to the Investigator's assessment, that (in essence), it was quite sure that the Supplier had sold the Fractional Club membership as an investment. It provided a copy of training materials the Supplier gave to its sales representatives, which it said showed staff had been trained to sell the product as an investment. Further, it supplied a witness statement from Mr F, dated 11 March 2024, which it said also supported this contention.

In the witness statement, Mr F said he recalled the following from the Time of Sale:

- Having made their previous purchase in 2016, he and Ms F had been on a free holiday with the Supplier and had been required to spend the morning with one of the Supplier's representatives.
- They had been taken on a tour of the Signature properties, which were more luxurious and had hot tubs, personal food chefs and other premium features.
- When they asked why they'd not been told about these properties previously, they were told the Signature apartments were only available as an upgrade for existing members.
- They were told the upgrade meant they would have a bigger "brick" in the Supplier's estate, which would *"give us an even bigger return on investment so the upgrade was still ultimately going to be free".*
- They were initially declined for finance, but the Supplier had made the deal happen using their own in-house finance company.

The case has now been passed to me to decide.

The legal and regulatory context

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

The legal and regulatory context that I think is relevant to this complaint is set out in an appendix (the 'Appendix') which is attached to, and forms part of, this decision.

What I've provisionally decided – and why

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

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

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

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

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

This part of the complaint was made for several reasons that I set out at the start of this decision. They include the suggestion that Fractional Club membership had been misrepresented by the Supplier because Mr and Ms F were told they were buying an interest or share in a physical property when that wasn't true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr and Ms F's share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while PR might question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.

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

- It would not have been false for the Supplier to state that Mr and Ms F could sell the product, as according to the contemporaneous paperwork this was possible. These documents also state quite prominently that the Supplier did not operate any resale programme itself and would not buy back products except when traded in against another purchase. And if it was in fact the case that the Supplier told Mr and Ms F they could sell the product on for a profit (Mr and Ms F don't allege this in any of their own testimony), then this appears to have been a statement of opinion, rather than fact. And while a statement of opinion can sometimes amount to a misrepresentation, it would need to be shown that the person making the statement did not hold that opinion at the time, which I think would be difficult to prove in practice.

- If the Supplier had told Mr and Ms F that the membership was an investment then this wouldn't have been untrue, because there was in fact an investment element to the product. Marketing or selling the product as an investment was prohibited however, and I go into more detail on this issue later in the decision.

- It's unclear what is meant by PR when it says Mr and Ms F were led to believe they'd have access to the "holiday's apartment" at any time throughout the year. Again, this doesn't seem to be something Mr and Ms F have alleged in their own testimony. But Mr and Ms F did have access to a specific apartment for a specific week, every other year. That was a defining feature of the Signature version of the Fractional Club product, and I think this was made clear on the paperwork they signed at the Time of Sale. Aside from the guaranteed week in the luxury apartment, I note the documents associated with the Fractional Club product stated that holidays would be subject to availability, bookings were on a "first-come, first-served" basis. Overall, I've been unable to identify a specific false statement of fact by the Supplier in relation to the availability of holidays, especially in light of the lack of clarity from PR on this point.

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

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

Section 75 claim in question.

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

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

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

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

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

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

I have already explained why I am not persuaded that the contract entered into by Mr and Ms F 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 and Ms F also say that the credit relationship between them and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that they have concerns about. It is those concerns that I explore here.

I have considered the entirety of the credit relationship between Mr and Ms F 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; and
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;
4. The inherent probabilities of the sale given its circumstances.

I have then considered the impact of these on the fairness of the credit relationship between Mr and Ms F and the Lender.

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

Mr and Ms F's complaint about the Lender being party to an unfair credit relationship was made for several reasons, all of which I set out at the start of this decision.

PR says that the right checks weren't carried out before the Lender lent to Mr and Ms F. I've not been supplied with evidence in this case which would allow me to draw a positive conclusion that the Lender failed to do what was required of it in respect of creditworthiness and affordability assessments. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mr and Ms F was actually unaffordable before also concluding that they lost out as a result and then consider whether the credit relationship with the Lender was unfair to them for this reason. It's not enough simply to assert that the right checks weren't carried out. Again, from the information provided, I am not satisfied that the lending was unaffordable for Mr and Ms F. If there is any further information on this (or any other points raised in this provisional decision) that Mr and Ms F wish to provide, I would invite them to do so in response to this provisional decision.

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

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

The Lender does not dispute, and I am satisfied, that Mr and Ms F's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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

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

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

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

As I've already indicated, Mr and Ms F's share in the Allocated Property clearly constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr and Ms

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

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

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Ms F, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was intended for the primary purpose of holidays, and that the Supplier made no representation as to the future price or value of the share in the Allocated Property. So, it's *possible* that Fractional Club membership wasn't marketed or sold to them as an investment in breach of Regulation 14(3).

On the other hand, while the training manual PR has provided a copy of relates to a different version of the Fractional Club, I am aware that some of the materials relating to the Signature version of the product share similar content, and I acknowledge that the Supplier's training material left open the possibility that the sales representatives may have positioned Fractional Club membership as an investment. So, I accept there's a possibility that Fractional Club membership was marketed and sold to Mr and Ms F as an investment in breach of Regulation 14(3).

Having weighed up all the available evidence however, I do not think, on balance, that the Supplier *did* sell or market the Fractional Club membership to Mr and Ms F at the Time of Sale, as an investment. I'll explain why.

Prior to the March 2024 witness statement, dating around seven years from the Time of Sale and following an unfavourable assessment from our Investigator, we had not received any evidence from Mr and Ms F, in their own words, as to how the Supplier marketed the product to them, or why they decided to buy it. The Letter of Complaint from PR was rather generic and appears to be near-identical in content to other letters of complaint I have seen from PR. It doesn't seem to be personalised to Mr and Ms F's complaint at all. In light of this, I've not found it to be of much assistance in determining what happened at the Time of Sale. Given the circumstances in which the witness statement was received, many years after the Time of Sale when memories of events have had longer to fade, and following the case of *Shawbrook & BPF v. FOS*[1] and an assessment from our Investigator which stated the complaint ought not to be upheld – it's also difficult to attach as much weight to it as a statement produced closer to the events Mr and Ms F complain of.

Nevertheless, I've considered the witness statement carefully. In relation to the events which occurred at the Time of Sale, it consists of three paragraphs and has only a modest amount of detail. Given how long ago the conversations in question occurred, that's perhaps to be expected. Based on what Mr F says in the statement about the 2017 and 2016 sales, it appears his understanding was that the fractional asset was a means of getting back what he and Ms F had paid for the memberships once they came to an end, meaning the holidays taken over that period would essentially be free of charge:

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

"it was explained to us [in relation to the 2016 purchase] that…we would be buying a 'brick' somewhere within [Supplier's] estate…this would enable us to have family holidays for the duration of our membership, then when the property containing 'our brick' was sold on, our investment would be reimbursed. This combined with the purchase cashback scheme for the maintenance fees meant that we would in the end have around 18 years of 'free' holidays so there was nothing for us to lose."

Mr F went on to make similar comments about the 2017 purchase which is the subject of this complaint. While he does refer to it as an investment, it appears Mr F understood from the Supplier that the sale of the Allocated Property would offset his and Ms F's holiday costs, rather than be something that would make them a financial gain or profit. This doesn't fit the definition of investment that I have adopted in this decision, and so while I think it's possible the Supplier sailed close to the wind when explaining how the product worked, in this case I'm not convinced that it went so far as to market or sell the product as an investment in the sense meant in this decision.

But even if I'm wrong about that, and the Supplier did make statements during the sales process that crossed the line, based on Mr F's testimony I don't think he understood the Fractional Club product to be an investment in the sense of something that could lead to a profit or financial gain. And so it would be difficult for me to conclude that any improper marketing by the Supplier had a material impact on his and Ms F's decision to make their purchase in 2017, and it would follow that I would be unable to conclude it had rendered their credit relationship with the Lender unfair.

Ultimately, I don't think that any alleged breach of Regulation 14(3) of the Timeshare Regulations by the Supplier at the Time of Sale, caused the credit relationship between Mr and Ms F and the Lender to be unfair to them.

Potential unfair terms in the contracts with the Supplier

PR says that the contractual terms governing the ongoing costs of Fractional Club membership and the consequences of not meeting those costs were unfair contract terms under the relevant legislation.

The key concern highlighted by PR is that the Supplier has wide-ranging powers under the Purchase Agreement and associated agreements, to cancel or repossess Mr and Ms F's membership, causing them to forfeit their fractional rights and lose all the money they've paid, for non-payment of management fees or minor breaches of the Purchase Agreement.

The Supreme Court made it clear in *Plevin* that it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A of the CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant. So it's not enough to assert that some of the Supplier's terms were unfair under the relevant law or regulations, or could potentially operate in an unfair way. It needs to be shown that significant harm has been, or will be, caused by the inclusion of the allegedly unfair terms.

The terms highlighted by PR are ones which I think could, potentially, operate in an unfair way. But no evidence has been supplied that the Supplier has operated the terms in this way in Mr and Ms F's case. Further, it's my understanding that, in practice, the Supplier does not exercise its power to cancel or repossess memberships in the event of the kind of breaches PR has described, so it appears unlikely the terms will cause unfairness in the future. I appreciate PR has referred to a court case (Link Financial v Wilson) involving a different product sold by the Supplier where similar terms were found to have rendered a credit relationship unfair. However, my understanding is that it was believed by the High Court in

that case that the Supplier *had* invoked its right to cancel the membership in question, meaning the term had operated in an unfair way in practice. So I don't think this case assists Mr and Ms F, due to their circumstances not being quite the same.

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

Section 140A: Conclusion

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

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

PR says that the Credit Agreement was arranged by an individual or individuals who were not authorised credit brokers, the effect of which is to make the Credit Agreement unenforceable and to entitle Mr and Ms F to a refund of money they've paid and further compensation.

However, having looked at the Financial Ombudsman Service's internal records, I can see that the entity named on the Credit Agreement as the credit intermediary was, at the Time of Sale, authorised by the FCA for credit broking.

PR has alleged that the sales representatives themselves were self-employed and were not individually authorised by the FCA, but I'm not convinced the employment status of the individuals who sold the Fractional Club membership and Credit Agreement to Mr and Ms F, is relevant. What is relevant is that the individuals were representing an entity named as the credit intermediary which *did* hold the required permissions. In light of this, I'm unable to conclude the 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 and Ms F's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

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

My provisional decision

For the reasons explained above, I'm currently not minded to say Mr and Ms F's complaint should be upheld.

I now invite the parties to the complaint to let me have any further submissions they'd like

me to consider, by **17 July 2025**. I will then review the case again.

Will Culley
Ombudsman

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."[2]

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

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

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

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

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

<u>The Law on Misrepresentation</u>

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

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

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

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

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

decision to enter a contract. And the courts aren't too ready to find an implied representation given the challenges acknowledged throughout case law.

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

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

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

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

The Timeshare Regulations were introduced to implement EC legislation, Directive 122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts (the '2008 Timeshare Directive'), with the purpose of achieving 'a high level of consumer protection' (Article 1 of the 2008 Timeshare Directive). The EC had deemed the 2008 Timeshare Directive necessary because the nature of timeshare products and the commercial practices that had grown up around their sale made it appropriate to pass specific and detailed legislation, going further than the existing and more general unfair trading practices legislation.[3]

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

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

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

- Regulation 3: Prohibition of Unfair Commercial Practices
- Regulation 5: Misleading Actions
- 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')

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

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

Below are the most relevant regulations as they were at the relevant time(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').

Will Culley
Ombudsman