DRN-5730575

The complaint

Mr L and Ms S's complaint is, in essence, that First Holiday Finance Ltd (the "Lender") acted unfairly and unreasonably by (1) declining to meet their claim in misrepresentation under Section 75 of the Consumer Credit Act 1974 ("CCA") and (2) being party to an unfair credit relationship with them under Section 140A of the CCA.

What happened

Mr L and Ms S say that on16 July 2017 (the "Time of Sale"), whilst on a holiday, they traded in their existing Fractional Property Owners Club (FPOC 2) points for additional FPOC2 points (also referred to as "Fractional Club membership") from a timeshare provider (the "Supplier").

They entered into an agreement (the "Purchase Agreement") with the Supplier to buy 1,200 fractional points at a cost of £16,694. But after trading in their existing timeshare, they ended up paying £6,554 for the membership to the Fractional Club.

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

Mr L and Ms S paid for their Fractional Club membership by paying £655 upfront and taking a loan of £5,899 from the Lender in their joint names, using a restricted use loan (the "Credit Agreement").

Mr L and Ms S – using a professional representative (the "PR") – wrote to the Lender on 24 March 2022 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. 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.

For clarity, details of the complaint allegations include:

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

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

1. told them that they were buying an interest in a specific piece of "real property" when that was not true.
2. told them that Fractional Club membership was an "investment" when that was not true.
3. told them that their share in the property would increase considerably, and they'd receive a considerable return on the investment.
4. told them that they could sell the timeshare back to the resort or "easily sell it at a

profit", when that was not true.
5. told them that they could have access to the holiday's apartment at any time around the year.

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

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

The Letter of Complaint which ran to five pages set out several reasons why Mr L and Ms S say that the credit relationship between them and the Lender was unfair to them under Section 140A of the CCA. In summary, they include the following:

1. Fractional Club membership was marketed and sold to them as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the "Timeshare Regulations").
2. The Supplier used an unauthorised credit intermediary in breach of the Financial Services and Markets Act 2000 ("FSMA").
3. The contractual terms setting out the obligation to pay annual management charges for the duration of their membership – and more significantly, the consequences of failing to do so – were unfair contract terms.
4. The Supplier went into liquidation.

The Lender dealt with Mr L and Ms S's concerns as a complaint and issued its final response letter on 21 April 2022 rejecting it on every ground.

The PR on behalf of Mr L and Ms S then referred the complaint to the Financial Ombudsman Service. The complaint form was dated 2 September 2022.

In a further response dated 15 September 2022, the Lender maintains that the Fractional Club membership wasn't sold as an investment, and that Mr L and Ms S were making the purchase for more points for more holidays.

The Lender also confirmed that Mr L and Ms S were taking regular holidays until they advised that they'd lost their jobs in early 2019 and couldn't afford the fees. Consequently, their membership was suspended for non-payment of management fees.

Following a period of non-payment towards their loan agreement the Lender agreed to write off the balance of the loan in November 2020. It also made clear the person who completed the client compliance confirmation was employed by the Supplier and was fully trained to broker the finance, contrary to what the PR says.

The complaint was assessed by an Investigator who, having considered the information on file, rejected the complaint.

In a view dated 22 January 2024, the investigator said that in the absence of direct testimony from Mr L and Ms S she's unable to determine (with any certainty) what they were told by the Supplier at the Time of Sale. Also, the FPOC training manual (dated 2011) supplied by the PR was unlikely to have been used.

In the circumstances the investigator can't say that the Supplier marketed and sold Fractional Club membership to Mr L and Ms S as an investment contrary to Regulation 14(3) of the Timeshares Regulations. She also can't say that this would've rendered the

relationship between Mr L and Ms S, and the Lender, unfair under Section 140A of the CCA. Furthermore, the Lender has done nothing wrong by entering into a loan agreement using the Supplier as a credit intermediary. The Supplier had the relevant authority to carry out credit brokering which was overseen by the Financial Conduct Authority (FCA).

And, despite what the PR says, it hasn't explained why the Supplier issuing liquidation proceedings in 2020 is relevant to this complaint about the Lender. In any case, the investigator can't see how this could've resulted in unfairness in the relationship between Mr L and Ms S and the Lender.

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

In a response dated 1 March 2024 the PR said that the way the Fractional Club membership was sold created an unfair relationship between Mr L and Ms S and the Lender under Section 140A of the CCA. It maintains that the Supplier marketed and sold the Fractional Club membership as an investment.

The PR says the Fractional Club membership also included a share in the net sale proceeds of a property named on Mr L and Ms S's Purchase Agreement. In this instance, they were entitled to 3.98% of the sale proceeds of the property when it was supposed to be sold at the end of their membership – as per the ownership certificate for the 2017 purchase.

The PR supplied an electronically signed Witness Statement from Mr L and Ms S dated 19 February 2024, in support of its points. The PR also provided a copy of the FPOC2 training manual (which it says must've been used at the Time of Sale) in support of its point that the Fractional Club membership was sold as an investment.

The PR also said that Mr L and Ms S may not remember many details from the sales meeting, but they clearly remember that the product was presented to them as an investment.

On 17 July 2025, I issued my provisional decision, a copy of which is stated below and forms part of my final decision. In the decision I said:

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

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

Section 75 of the CCA: 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 L and Ms S could make against the Supplier. Certain conditions must be met if this protection is engaged – which are set out in the CCA. The Lender does not dispute that the relevant conditions are met in this complaint, and I'm satisfied that they are.

They include the suggestion that the Fractional Club membership had been misrepresented by the Supplier as an investment, through which Mr L and Ms S would have a share of a property and obtain a "considerable return". As I'll come on to in more detail below, I consider that Mr L and Ms S's acquisition of a share in the Allocated Property did amount to

an investment – as it offered them the prospect of a financial return. Presenting the timeshare as an investment would not, therefore, have amounted to a misrepresentation – albeit there are other considerations when it comes to the marketing and selling of a timeshare contract as an investment that I explore below.

The amount of money Mr L and Ms S receive on their investment will only be known after the membership term ends, when the Allocated Property is sold. So even if I were to accept that any such comments were made by the Supplier in this regard, I cannot say they would amount to a misrepresentation.

It is also said in the Letter of Complaint that Mr L and Ms S were told that they could sell the timeshare back to the resort. No such option was available. This was clearly set out in an Information Statement that Mr L and Ms S were given at the Time of Sale. The Purchase Agreement they signed included a declaration to the effect that they had received this Information Statement. I do not find it likely that the Supplier would've suggested something so starkly contradictory to not only its standard practice, but to the terms and conditions that were provided to Mr L and Ms S at the time.

Lastly it was said in the Letter of Complaint that Mr L and Ms S were "made to believe that [they] would have access to the holiday's apartment at any time all around the year". I understand this to mean that Mr L and Ms S thought they would be able to stay at the Allocated Property whenever they wanted, which was not the case. But it may also mean that they thought availability of accommodation more broadly was guaranteed, so I read this as Mr L and Ms S saying that they could not holiday where and when they wanted to – which, on my reading of the complaint, suggests that they consider that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement.

Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork Mr L and Ms S would've been given states that the availability of holidays was subject to demand. And with regard to the usage of the Allocated Property, the Purchase Agreement that Mr L and Ms S signed clearly stated that their Fractional Points "do not transfer or grant the right of use to any allocated property". I find it unlikely that the Supplier would've made promises of the type suggested in the Letter of Complaint. And while I accept that they may not have been able to take certain holidays, I have not seen enough to persuade me that the Supplier breached the terms of the Purchase Agreement.

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

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

I have already explained why I am not persuaded that the contract entered into by Mr L and Ms S 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 L and Ms S 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 L and Ms S 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 L and Ms S and the Lender.

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

Mr L and Ms S'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 suggests that the right checks weren't carried out before the Lender lent to Mr L and Ms S. 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 L and Ms S was actually unaffordable, before also concluding that they lost out as a result, and then consider whether the credit relationship with the Lender was unfair to them for this reason.

Again, from the information provided, I am not satisfied that the lending was unaffordable for Mr L and Ms S. I note that their circumstances changed in 2019, but this wasn't foreseeable. In any case, I note the lender took steps to address that issue.

If there is any further information on this (or any other points raised in this provisional decision) that Mr L and Ms S wish to provide, I would invite them to do so in response to this provisional decision.

Connected to this is the suggestion by the PR 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 Agreement.

I note the PR says that whilst the Supplier was authorised to carry out regulated activity such as credit brokering, the person that signed the loan on behalf of the Lender and acted as agent of the Lender was a self-employed credit intermediary and therefore not authorised to carry out the regulated activity against the general prohibition of FSMA.

However, it looks to me like Mr L and Ms S knew, amongst other things, how much they were borrowing and repaying each month, who they were borrowing from and that they were borrowing money to pay for Fractional Club membership. So, even if the Credit Agreement was arranged by a broker that didn't have the necessary permission to do so (which I make no formal finding on), I can't see why that led Mr L and Ms S to financial loss – such that I can say that the credit relationship in question was unfair on them as a result. And with that being the case, I'm not persuaded that it would be fair or reasonable to tell the Lender to compensate them, even if the loan wasn't arranged properly.

Mr L and Ms S say that they were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledge that they may have felt weary after a sales

process that went on for a long time. But they say little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to.

They were also given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel their membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mr L and Ms S made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

I'm not persuaded, therefore, that Mr L and Ms S'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 L and Ms S'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 the PR says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

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

Mr L and Ms S's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that 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 L and Ms S as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this

complaint.

I can't just take that to have been automatically proved just because of what the High Court said in Shawbrook & BPF v FOS at [77]. The judge did not say that all timeshares will have been sold in breach of regulation 14(3) just because they include an investment element.

Indeed, the judge specifically said at [71] that if the ombudsman whose decision was under consideration in that case had concluded that the timeshare had been mis-sold because of the intrinsic design of fractional ownership timeshares, then that would have indicated that he had made an error of law. So instead, I have to consider the available evidence to decide what happened in this particular instance.

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 L and Ms S the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr L and Ms S as an investment. So, it's possible that Fractional Club membership wasn't marketed or sold to Mr L and Ms S 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. I also note Mr L and Ms S's statement. So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mr L and Ms S as an investment in breach of Regulation 14(3).

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

In other words, even if I did conclude that the membership was sold in breach of Regulation 14(3), I'm not currently persuaded that would've made a difference to the outcome of this complaint anyway. I will explain in the next section.

Was the credit relationship between the Lender and Mr L and Ms S rendered unfair to them?

As the Supreme Court's judgment in Plevin makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

And in light of what the courts had to say in Carney and Kerrigan, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr L and Ms S and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) lead them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On 1 March 2024, the PR supplied an electronically signed and dated Witness Statement from Mr L and Ms L along with its response to the investigator's view.

Several observations flow from what they (purportedly) say in their statement. To begin with it's not entirely clear why they took out the Fractional Club membership in the first place (because they don't provide an explanation) – however they don't express any

dissatisfaction with it either, which on balance suggests that they weren't necessarily unhappy with what they had.

In respect of acquiring additional points, I note Mr L and Ms S now say it wasn't what they wanted, and made this clear to the Supplier from the outset. They say that the more they said "no", the higher the salesperson went through the management chain and the greater pressure they felt to purchase additional points. They say the Supplier kept trying to "force" them to sign the documents which they eventually did, the next day.

But despite what they say, I don't think their motivation can be safely inferred. On the one hand they say that they were pressured into buying something that they didn't want, but on the other hand they say they were told or led to believe that they would make money which is why they went ahead with the purchase. Their reasons therefore contradict and undermine each other.

Despite what they say, its arguable that their previous purchase was motivated by holidays, and that this purchase was also motivated by an opportunity to have access to more holidays. I'm aware that the Contact Note from the Time of Sale recorded that they were happy with their purchase.

I've also seen no evidence that they at any point attempted to sell the Fractional Club membership. If, as the PR claims, the investment was their motivation, I would at least expect them to try and sell their shares rather than simply seek to end their relationship with the Supplier and the Lender, notwithstanding their financial situation. On balance, I can't say that they suffered any detriment as a consequence of this purchase.

The above points notwithstanding, I'm conscious that the Witness Statement wasn't provided until after the Investigator's view, about five years after the Time of Sale and two years after the complaint was made to the Supplier. The timing of this is important as I would've expected to see this evidence presented to our service at the outset, but this didn't happen, and it's not clear why. This is the only account I have from Mr L and Ms S.

I'm conscious that it was only after the Investigator issued his view, and after the judgement in Shawbrook & BPF v FOS was handed down, that Mr L and Ms S stated that the Supplier told them or led them to believe that the Fractional Club membership offered them the prospect of a financial gain – in other words this is when they first said, "when the contract ended we would get a substantial amount of money back equivalent or more than we had already put in".

I'm aware that the more time that passes between a complaint and the event complained about, the more risk there is of recollections being vague, inaccurate and influenced by discussions with others.

In this case, especially in the absence of an earlier account, I simply can't rule out the latter. I find it difficult to explain why Mr L and Ms S didn't, at the outset, just say that they'd been told they would make more money than they put in and this is why they purchased Fractional Club membership if this is what had happened. In the circumstances, and on balance, I think there's a high risk that Mr L and Ms S were influenced by discussions they had with others. In other words, in the circumstances I can't put sufficient weight on Mr L and Ms S's account that would enable me to uphold this complaint.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr L and Ms S'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 they would have pressed ahead with their 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 L and Ms S and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

Unfair contract terms

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

To conclude that a term in the Purchase Agreement rendered the credit relationship between Mr L and Ms S and the Lender unfair to them, I'd have to see that the term was unfair under the CRA and operated against Mr L and Ms S in practice.

In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mr L and Ms S, have flowed from such a term because those consequences are relevant to an assessment of unfairness under Section 140A. Indeed, the judge in the very case that this aspect of the complaint seems based on (Link Financial v Wilson [2014] EWHC 252 (Ch)) attached importance to the question of how an unfair term had been operated in practice: see [46].

As a result, I don't think the mere presence of a contractual term that was/is potentially unfair is likely to lead to an unfair credit relationship unless it had been applied in practice.
With that in mind, it seems unlikely to me that the contract term cited by the PR has led to any unfairness in the credit relationship between Mr L and Ms S and the Lender for the purposes of Section 140A of the CCA. I say this because I cannot currently see that the term was actually operated against Mr L and Ms S, let alone unfairly. And I cannot ignore that the lender wrote off the balance of the loan after Mr L and Ms S could no longer sustain the management charges and the Supplier suspended their membership.

Moreover, as I haven't seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Mr L and Ms S was unfair to them because of an information failing by the Supplier, I'm not persuaded it was.

Liquidation

The point about liquidation is immaterial to this complaint, which is why I am not going to consider it any further. Even if there was merit to the PR's argument, it's not within the Lender's responsibility.

In other words, despite what the PR says, I don't think the Supplier going into liquidation means that Mr L and Ms S won't get what they're entitled to. In other words, this doesn't affect the Supplier fulfilling its contract, and/or the Lender fulfilling its obligations.

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

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr L and Ms S'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 the Mr L and Ms S wishes to provide, I would invite them to do so in response to this provisional decision."

I gave the parties an opportunity to respond to my provisional decision and provide any further submissions they wished me to consider before I considered my final decision, if appropriate to do so.

The Lender responded and said:

"*Thank you for providing a copy of the provisional decision. We confirm that we accept it and have nothing further to add*"

The PR also responded, but didn't accept my provisional decision. In a detailed response dated 31 July 2025 – which I won't repeat in full here – it made the following key points:

- It didn't provide the investigator's view to Mr L and Ms S. This was done so as to not influence their recollections.
- When Mr L and Ms S said they wanted an ombudsman's decision, they meant they didn't agree with the investigator's view. It didn't mean they'd seen the view itself.
- In any case, the above shows that they haven't seen a copy of the investigator's view, and they weren't aware of the Judicial Review.
- When this complaint was filed (initially with the Lender and subsequently with the Ombudsman Service) there was no requirement to provide a Witness Statement accompanying the claim.
- It was only in August 2023, following the Judicial Review, it was requested to provide Witness Statements. This happened after "an avalanche" of complaints were rejected on this basis.
- Despite saying that I was unable to infer Mr L and Ms S's motivation – Mr L and Ms S made their position clear in terms of what they say they were told at the Time of Sale.
- The "*win-win*" situation – in that they'd receive the equivalent or more than what they'd put in – is what motivated them to purchase the Fractional Club membership.
- In other words, it was the benefits that convinced them to purchase the Fractional Club membership.
- Mr L and Ms S were entitled to 3.98% of the sale proceeds of the property when it was supposed to be sold at the end of their membership. The term "unit share" was handwritten at the bottom of the pricing sheet which confirms that investment element played an important part in convincing Mr L and Ms S to make the purchase.
- The "so called sales notes" aren't a transcript of the meeting, the Supplier also didn't provide a copy of all the information held on its database so it's impossible to assess the credibility of the information provided. In any case, the note itself is a recollection and interpretation of a conversation/meeting – and it's highly unlikely that it would record the product was sold as an investment for obvious reasons.
- Mr L and Ms S decided to seek a remedy as well as compensation, when they realised that their purchase wasn't worth the price they paid for it.

- During the Judicial Review it wasn't challenged that the membership was marketed and/or sold as an investment.
- And when people invest in a property, they have an expectation (not just a hope) that the property will increase in value – this was implied by the Supplier salespersons as well as other factors that were demonstrated as benefits.
- There's a contradiction in the documentation. The fractional ownership document suggests that purchase contract is 17 years. However, the Information Statement states 19 years – so which date is correct? And which document takes priority? Under the Section 68 and 69 CRA 2015 any such contradictions make the contract unenforceable.
- Furthermore, a term is unfair if it creates a significant imbalance between the parties – in this case the 19-year clause *could* unfairly delay when the consumer gets their return on the investment, against their expectations of 17 years.
- The above *could* also amount to a misrepresentation – and means that the contract lacks certainty – which would make the contract unenforceable.

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, notwithstanding the latest submissions from the PR my decision not to uphold this complaint remains the same, principally for the same reasons, as set out in my provisional decision.

In other words, despite being given the time and opportunity to respond to my provisional decision, I'm satisfied that no new material points have been made that persuade me I should change my decision.

For the reasons set out in my provisional decision, I still don't uphold this complaint.

I still think that:

- Despite what the PR says (about not providing Mr L and Ms S with a copy of the investigator's view), even if that did happen I still think that in the circumstances, and on balance, given the timing of the Witness Statement, there's still a high risk that Mr L and Ms S were influenced by discussions they had with others.
- In the circumstances, and on balance, it's highly unlikely that Mr L and Ms S wouldn't have discussed the basis upon which their claim was rejected and why they needed at that point to provide a statement in support.
- In these circumstances I still can't put sufficient weight on Mr L and Ms S's account, that would enable me to uphold this complaint.
- Whether or not the PR was *requested* to provide a Witness Statement (when referring the complaint to our service), there was nothing preventing it from doing so at the outset, clearly setting out its client's position to the Lender and/or our service.
- Despite what the PR says, I still think the timing of the current Witness Statement is important, and I can't disregard this simply based on what the PR now says.
- I still think that Mr L and Ms S's acquisition of a share in the Allocated Property did amount to an investment – as it offered them the prospect of a financial return. Presenting the timeshare as an investment would not, therefore, have amounted to a misrepresentation – albeit there are other considerations when it comes to the marketing and selling of a timeshare contract as an investment.
- I appreciate that the sales notes aren't a transcript of the meeting that Mr L and Ms S

had at the Time of Sale. I'm also aware that weighing up what happened in practice is, in my opinion, rarely as simple as looking at the contemporaneous paperwork. But sometimes it can be helpful, as I believe it is in this case.

- In my provisional decision I referred to an entry made at the Time of Sale – recording Mr L and Ms S's feelings towards the purchase they made. I'm satisfied that in the absence of a future complaint being made, or one that wasn't foreseeable at the time, it reflected what they were thinking and feeling at that point. In any case, this wasn't the sole and decisive basis of my decision to reject this complaint.
- Whilst I note what the PR says about why Mr L and Ms S pursued a complaint rather than trying to sell their membership, I thought Mr L and Ms S would at least attempt to get something back from their purchase – if they thought they were losing out on an investment – whilst still pursuing a claim. Doing this would never have prevented them from trying to mitigate their own losses – if that's what they were concerned about.
- I note what the PR says about the contract being unenforceable, because there is ambiguity over how long the agreement was forest to run. But neither the Purchase Agreement nor the Credit Agreement have been active since 2019 and 2020 respectively, with the timeshare membership suspended and the balance of the loan written off. So, enforcement of either contract isn't a concern in this case.
- As I mentioned in my provisional decision to conclude that a term in the Purchase Agreement rendered the credit relationship between Mr L and Ms S and the Lender unfair to them, I'd have to see that the term was unfair under the CRA and operated against Mr L and Ms S in practice – which I'm unable to do in this case. In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mr L and Ms S, have flowed from such a term because those consequences are relevant to an assessment of unfairness under Section 140A.
- The judge in the very case that this aspect of the complaint seems based on (Link Financial v Wilson [2014] EWHC 252 (Ch)) attached importance to the question of how an unfair term had been operated in practice: see [46] which the PR has not commented upon.
- As a result, I don't think the mere presence of a contractual term that was/is potentially unfair – or as the PR puts it *could* be unfair – is likely to lead to an unfair credit relationship unless it had been applied in practice.
- With that in mind, it seems unlikely to me that the contract term cited by the PR has led to any unfairness in the credit relationship between Mr L and Ms S and the Lender for the purposes of Section 140A of the CCA. I say this because I cannot currently see that the term was actually operated against Mr L and Ms S unfairly. In other words, the loan write-off negates any unfairness in this case.
- Moreover, as I still haven't seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Mr L and Ms S was unfair to them because of an information failing by the Supplier, I'm not persuaded it was.
- And I still can't ignore that the Lender wrote off the balance of the loan after a change in circumstances meant Mr L and Ms S could no longer sustain the management charges and the Supplier suspended their membership.

My final decision

For the reasons set out above, and in my provisional decision, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L and Ms S to accept or reject my decision before 10 September 2025.

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."[1]

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

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in *Patel* (which was recently approved by the Supreme Court in the case of *Smith),* that determining whether or not the relationship complained of was unfair had to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"* – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended. The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in *Plevin* (at paragraph 17):

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

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

<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

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

it. It also needs to be shown that the other party understood and relied on the implied factual misrepresentation.

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

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

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

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

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

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

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

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

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

- 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 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').

Dara Islam
Ombudsman