DRN-5759871

The complaint

Mr and Mrs G'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 and Mrs G say that on 7 April 2019 (the "Time of Sale"), whilst on a holiday, they upgraded their existing three-year Trial membership to the Signature Collection (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 850 fractional points at a cost of £8,710.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs G 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 and Mrs G paid for their Fractional Club membership by paying £900 upfront and taking a loan of £7,810 from the Lender in their joint names using a restricted use loan (the "Credit Agreement").

Mr and Mrs G – using a professional representative (the "PR") – initially wrote to the Lender on 4 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.

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

Mr and Mrs G 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 have access to the holiday's apartment at any time around the year.

Mr and Mrs G 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 and Mrs G.

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 and Mrs G 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 Supplier's sales companies went into liquidation, affecting any claim that might be brought against them.
4. Unfair terms in the Purchase Agreement in the event of default

The Lender dealt with Mr and Mrs G's concerns as a complaint and issued its final response letter on 25 March 2022 rejecting it on every ground.

The PR on behalf of Mr and Mrs G 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.

In a view dated 22 January 2024, the investigator said that in the absence of any direct testimony from Mr and Mrs G she was unable to determine (with any certainty) what they were told by the Supplier at the Time of Sale.

In the circumstances she was unable to say that the Supplier marketed and sold Fractional Club membership to Mr and Mrs G as an investment contrary to Regulation 14(3) of the Timeshares Regulations. She was also unable to say that this would've rendered the relationship between Mr and Mrs G, and the Lender, unfair under Section 140A of the CCA.

The investigator also said that 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 was relevant to this complaint about the Lender. In any case, the investigator couldn't see how this could've resulted in unfairness in the relationship between Mr and Mrs G 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 11 March 2024, the PR reiterated that the way the Fractional Club membership was sold created an unfair relationship between Mr and Mrs G 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 supplied a statement (the "Witness Statement") from Mr and Mrs G, in support of its point. The PR also provided a copy of the Fractional Property Owners Club 2 (FPOC2) training manual (which it says must've been used at the Time of Sale) – this was in addition

to the 2011 training manual it had supplied previously – in support of its point that the Fractional Club membership was sold as an investment.

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

On 1 August 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 have considered all the available evidence and arguments to decide what is 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 Mrs G 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 Mrs G were told that they were buying an interest in a specific piece of "real property" when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr and Mrs G's share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.

As for the rest of the Supplier's alleged pre-contractual misrepresentations, while I recognise that Mr and Mrs G 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:

Mr and Mrs G say the Fractional Club membership was an investment which isn't true. But, in my opinion, the membership clearly did have an investment element to it in the form of an Allocated Property and their share in the net proceeds of that property when it was sold at the end of the membership term. So, even if the supplier told Mr and Mrs G this at the Time of Sale (and I make no such finding here on whether that is the case), this would not have been untrue.

The above notwithstanding, I've found nothing within the evidence (other than the assertions in the Witness Statement) that would suggest that the Supplier gave any assurances or guarantees about the future sales values of Mr and Mrs G's Fractional Club membership or the Allocated Property.

Mr and Mrs G say the Supplier told them that they could have access to the holiday apartment at any time around the year but having considered the evidence, I'm unable to say that this allegation is made out.

The Signature Collection provided its members with a luxury accommodation with additional benefits as well as guaranteed usage of the suite during the week they purchased for the duration of their membership. But this doesn't mean that resorts are accessible all year round, come what may. I note the Lender confirmed that all year access was subject to availability. That's said, I've found nothing within the documentation that defines access in the manner suggested by Mr and Mrs G so I'm unable to say that this allegation is made out.

While it's possible that Fractional Club membership was misrepresented at the Time of Sale for one or all of those reasons, I don't think it's probable. They've given little to none of the colour or context necessary to demonstrating that the Supplier made false statements of existing fact and/or opinion. And as there isn't any other evidence on file to support the suggestion that Fractional Club membership was misrepresented for these reasons, I don't think it was.

For these reasons, therefore, I do not think the Lender is liable to pay Mr and Mrs G 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 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 Mrs G 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 Mrs G 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 Mrs G 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 and Mrs G and the Lender.

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

Mr and Mrs G'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.

There 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 and Mrs G 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 and Mrs G 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 and Mrs G suggest 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 – I note they mention the Supplier using "sales techniques", and they've used the term "duress and undue influence". 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. With all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs G 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 and Mrs G's credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above.

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs G'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 and Mrs G'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 and Mrs G 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 and Mrs G 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 and Mrs G as an investment. So, it's possible that Fractional Club membership wasn't marketed or sold to Mr and Mrs G 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 and Mrs G's statement. So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mr and Mrs G 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 and Mrs G 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 and Mrs G 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 11 March 2024, the PR supplied an unsigned and undated Witness Statement from Mr and Mrs G along with its response to the investigator's view. Based on their statement, at the Time of Sale they had a three-year Trial membership with the Supplier which was coming to an end.

Although it's not clear why they took out that membership in the first place (because they don't provide an explanation) they don't express any dissatisfaction with it either.

In respect of the Fractional Club membership, Mr and Mrs G simply say that they initially decided not to go ahead with another purchase but were persuaded to attend a presentation where they were pressured into the sale. They say that the Supplier even tried to use their children by suggesting "how great it would be for them to take their friends on holiday with them".

They go on to explain that their first loan was declined (due to their "credit score") but a loan was subsequently approved by the Lender. They clearly state that they signed the contract because they were led to believe that they were getting "an exceptional deal" with the Supplier.

Whilst I note Mr and Mrs G don't mention the words "investment" (subject to my comments below), "profit" or "gain", based on what they do say, I don't think their motivation can necessarily be inferred. It's arguable that their previous purchase was motivated by holidays, and that this purchase was motivated by an opportunity to have access to more luxurious services.

Mr and Mrs G also say they were told by the Supplier that when they decide to sell the Fractional Club membership – either privately, through the Supplier or the Supplier buying it back – they'd get the market value of the property back, or the investment money back.

That said, I note the Letter or Complaint alleges that Mr and Mrs G were told that they would have a share of a property, and its value would considerably increase, and that they could sell the timeshares back to the resort or easily sell it at a profit. But this doesn't quite accord with what Mr and Mrs G say, neither does it infer that's why they made the purchase in the first place.

Despite what Mr and Mrs G say in their Witness Statement, I've 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 end their relationship with the Supplier and the Lender. So, on balance, I can't say that they suffered any detriment as a consequence of this purchase.

The above 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.

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 and Mrs G stated that the Supplier led them to believe that the Fractional Club membership offered them the prospect of a financial gain.

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. However, I find it difficult to explain why Mr and Mrs G didn't, at the outset, 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 can't put the weight on Mr and Mrs G'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 and Mrs G'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 and Mrs G and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

Other – Liquidation

In my opinion, the point about liquidation, adds little – if anything – of value to the claim that was submitted.

Despite what the PR says, I don't think the Supplier going into liquidation means that Mr and Mrs G 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 and Mrs G 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 and Mrs G 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."

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 response dated 15 August 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 and Mrs G. This was done so as to not influence their recollections.
- When Mr and Mrs G 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 November 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 and Mrs G's motivation – Mr and Mrs G made their position clear in terms of what they say they were told at the Time of Sale.
- It was the benefits that convinced them to make the purchase, which included the gains from selling the apartment at the end. The investment element was an important and motivating factor in their decision making. This is confirmed by the handwritten not on the pricing sheet attached.
- In respect of my definition of investment, the point that the properties would increase in value was implied by the overall behaviour of the salespeople.
- They suggested that these properties were in high demand, and that the purchase was once in a lifetime deal, so Mr and Mrs G had to make a decision there and then.
- Other factors were emphasised, such as location, and improvements made to the property so that investing in a "hotel-style real estate property" in a tourist town can form a reasonable expectation of profit.

The legal and regulatory context

Appendix: The Legal and Regulatory Context

<u>The Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) (the 'CCA')</u>
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.

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

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

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

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

The Law on Misrepresentation

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

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

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

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

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

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

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

- Regulation 12: Key Information

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

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

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

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

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

- Regulation 3: Prohibition of Unfair Commercial Practice
- 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

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

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').

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.

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.

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 and Mrs G 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 and Mrs G were influenced by discussions they had with others.
- In the circumstances, and on balance, it's highly unlikely that Mr and Mrs G 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 and Mrs G'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. Indeed, our Complaint Form which the PR completed on Mr and Mrs G's behalf asks them to tell us 'Tell us about your complaint – what happened?' Here the PR set out information about the claim to the Lender but nothing about what Mr and Mrs G could recall about the sale in dispute.
- 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 and Mrs G'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.
- Whilst I note what the PR says about what Mr and Mrs G say they were told about the Fractional Club membership, as well as the handwritten note(s) on the pricing sheet, for the reasons set out in my provisional decision, I'm still not persuaded that the "investment element" was motivating factor in their decision making.
- And if they felt pressure to make up their minds (there and then) but were unhappy with their decision – they had the opportunity to cancel the agreement within the 14-day recission period but decided not to.

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 G and Mrs G to accept or reject my decision before 17 September 2025.

Dara Islam
Ombudsman