DRN-5765219

The complaint

Mr W's complaint is, in essence, that First Holiday Finance Ltd (the 'Lender') acted unfairly and unreasonably by (1) deciding against paying claims under Section 75 of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) being party to an unfair credit relationship with him under Section 140A of the CCA.

Background to the complaint

Mr and Mrs W purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 6 November 2017 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,040 points fractional points at a cost of £15,530 (the 'Purchase Agreement') which included the first year's annual management charge of £699.

Mr and Mrs W traded their membership in when they purchased another agreement with the Supplier on 24 May 2018. Mr and Mrs W's complaint about this agreement has been considered under a separate complaint.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs W 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 W paid for their Fractional Club membership by making an advance payment of £500 and by Mr W taking finance of £15,030 from the Lender (the 'Credit Agreement'). As the Credit Agreement is in Mr W's name, only he has the right to make a complaint about the Credit Agreement. As such, I will refer to Mr W in my decision, but where I am referring to the parties to the Fractional Club membership, this should be taken to mean Mr and Mrs W.

Mr W – using a professional representative (the 'PR') – wrote to the Lender on 11 October 2022 (the 'Letter of Complaint') to complain about:

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

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

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

1. Told him that he had purchased an investment and that his timeshare would considerably appreciate in value, when this was not true.
2. Told him that he would have a share of a property, and its value would considerably increase, therefore he was promised a considerable return on investment, when this was not true.
3. Told him that he could sell the timeshare back to the resort or easily sell it at a profit, when this was not true.
4. Told him that he would have access to the holiday apartment at any time all year round, when this was not true.

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

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

Mr W says that the Supplier breached the Purchase Agreement because it went into liquidation which means he is no longer able to recover any amounts due to him.

Mr W also says that he found it difficult to book the holidays he wanted, when he wanted.

As a result of the above, Mr W says that he has a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr W.

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

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

1. Fractional Club membership was marketed and sold to him as an investment in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. The contractual terms setting out the Supplier's right to rescind the agreement if Mr W failed to make any payment due within 14 days while forfeiting any previous payments was an unfair contract term under the Consumer Rights Act 2015 ('CRA').
3. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
4. He was pressured into purchasing Fractional Club membership by the Supplier.
5. The Credit Agreement being unenforceable because it was not arranged by a credit broker regulated by the FCA to carry out such an activity.

The Lender dealt with Mr W's concerns as a complaint and issued its final response letter on 19 October 2022, rejecting it on every ground.

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

Mr W disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. At this point a statement setting out Mr W's recollections of their entire relationship with the Supplier was submitted by the PR '(witness statement').

I issued a provisional decision ('PD') dated 6 August 2025, concluding the complaint should not be upheld. The findings from my PD are set out below.

*"**The legal and regulatory context***

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

The legal and regulatory context that I think is relevant to this complaint includes the following:

The Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) (the 'CCA')

The timeshare at the centre of the complaint in question was paid for using restricted-use credit that was regulated by the Consumer Credit Act 1974. As a result, the purchase was 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 are below.

Section 56: Antecedent Negotiations
Section 75: Liability of Creditor for Breaches by a Supplier
Section 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.

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

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')

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

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 elling membership of the Owners Club.

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

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

The Consumer Rights Act 2015 (the 'CRA')

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

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

Relevant Publications

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

My provisional findings

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 and I'll explain why.

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 W 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 because the Supplier told Mr W that he had purchased an investment that would considerably appreciate in value. In addition to being told he would have a

share of a property with its value increasing leading to a considerable return on his investment.

As I explained earlier, Mr W's membership included a share in the net sale proceeds of a property so telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr W'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 him that interest, it did not change the fact that he acquired such an interest.

Also, as Mr W's membership provided him with a share in the Allocated Property with the prospect of a financial return, I do consider that to be an investment. Therefore, if the Supplier told Mr W that the membership was an investment then this would not have been untrue. However, marketing or selling the product as an investment was prohibited but I'll explore this in more detail below.

I am not persuaded that the Supplier would have told Mr W that his investment would considerably appreciate in value. It was impossible to predict the value of what Mr W's asset would be worth in 2033 at the Time of Sale and I don't think it's probable that the Supplier attempted to do so. The amount of money Mr W is due to receive would only be known after the Allocated Property is sold – which only occurs once the membership term ends.

Mr W also alleges that the Supplier told him he could sell his membership back to the resort or easily sell it at a profit. As I understand it, the Supplier does not operate a resale, rental or re-purchase programme. The Lender says this was made clear on the Members Declaration that Mr W would have seen at the Time of Sale. Although I've not received a copy of Mr W's signed Members Declaration, I'm satisfied this would have been provided to Mr W. So, I think it's less probable that the sales representatives told Mr W something that was easily verifiable as being untrue.

Mr W can sell his membership if he wishes so if the Supplier explained this to him, this would not amount to a misrepresentation. However, I find it unlikely that the Supplier would have told Mr W that he would receive a profit as a result of selling his membership himself. I say this as what someone is willing to pay for such a membership may vary significantly and this would not be known to the Supplier at the Time of Sale so I think it's unlikely such a statement was made by the Supplier.

Lastly, in the Letter of Complaint Mr W says he was told he would have access to the holiday apartment at any time of the year. This was simply not the case. Mr W signed the Purchase Agreement which says:

"Fractional Points are personal rights and do not transfer or grant the right of use to any allocated property. We acknowledge that the Property is described below for the sole purposes of identifying it for the purposes of its disposal at the Sale Date…"

Thinking about this, I don't find it likely that the Supplier would have suggested something that was easily verifiable as being untrue, particularly as Mr W hasn't provided anything to support this position other than the bare allegation that has been made.

While I recognise that Mr W has concerns about the way in which his Fractional Club membership was sold, he has not persuaded me that there were any false statements of existing fact made by the Supplier at the Time of Sale.

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

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

I've already summarised how Section 75 of the CCA works and why it gives Mr W a right of recourse against the Lender. So, it isn't necessary to repeat that here.
Mr M, in his witness statement, shares concerns about the availability of holidays and that he's restricted to using his membership across the year - which, on my reading of the complaint, suggests that he considers that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement.

It does not appear like Mr W was restricted to using his membership at certain times of the year but like any holiday accommodation, availability was not unlimited. From what I know about the Supplier's sale process, the paperwork given to Mr W would have made it clear that the availability of holidays was/is subject to demand. This would particularly be the case during peak time, like school holidays, where the demand would be higher. So, I accept that he may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

Mr W also says that the Supplier breached the Purchase Agreement because it went into liquidation in December 2020, meaning that he can no longer recover any amounts expected to be awarded by Spanish courts. I'm not aware of Mr W having made a claim in the Spanish Courts but I don't see how this is relevant to his complaint against the Lender. I say this as his claim under Section 75 is totally separate to any action he so chooses to take in a Spanish Court.

I can however see that certain parts of the Supplier's business were put into administration towards the end of 2020. Mr W's membership was no longer active at this time as he had traded his membership in when he upgraded in May 2018. So, any effect of the liquidation proceedings would not have had a bearing on Mr W's membership.

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

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

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

I have considered the entirety of the credit relationship between Mr W and the Lender along with all of the circumstances of the complaint and I do not think the credit

relationship between them was likely to have been rendered unfair for the purposes of Section 140A.

When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. *The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale; and*
2. *The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*
3. *Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;*
4. *The inherent probabilities of the sale given its circumstances.*

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

<u>The Supplier's sales & marketing practices at the Time of Sale</u>

Mr W'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, on behalf of Mr W, also says the Credit Agreement was arranged by an unauthorised person, They say this because they can see the Supplier was authorised to carry out such activities but believe as sales representatives were self-employed, they didn't have the correct authorisation in place to arrange credit. I'm not persuaded this is the case as the Supplier was authorised by the FCA to broker credit and it's the Supplier that is named as the credit intermediary on the Credit Agreement, not an individual. Furthermore, the Lender has confirmed that the relevant sales representative who arranged Mr W's credit was employed by the Supplier and trained to broker credit agreements. Considering this, I'm not persuaded that the Credit Agreement was arranged by an unauthorised credit broker.

The PR says that the right checks weren't carried out before the Lender lent to Mr W. 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 W was actually unaffordable before also concluding that he lost out as a result and then consider whether the credit relationship with the Lender was unfair to him for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for Mr W. If there is any further information on this (or any other points raised in this provisional decision) that Mr W wishes to provide, I would invite him to do so in response to this provisional decision.

Mr W says that he was pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledge that he may have felt weary after a sales process that went on for a long time and he describes being exhausted and worn down but I'm not persuaded that he had no choice but to purchase Fractional Club membership when he simply did not want to. After all, by his own admission, he refused to purchase the membership in the way it was initially offered and it was only after the Supplier provided a discount and a reduced term that he accepted. Mr W was also given a 14-day cooling off period and he has not provided a credible explanation for why he did not cancel his membership during that time. With being the case, there is insufficient evidence to demonstrate that Mr W made the decision to purchase Fractional Club membership because his ability to exercise that choice was significantly impaired by pressure from the Supplier.

Mr W alleges his deposit payment was taken straightaway which, although he hasn't alleged, would be prohibited under the Timeshare Regulations. The Supplier has said no payments were taken from Mr W within the 14-day withdrawal period. I haven't been provided with any evidence from Mr W to suggest otherwise. Even if payment was taken within 14 days, I can't see Mr W has lost out as a result or something went wrong in the way that meant there was an unfair credit relationship. Afterall, it was held in Plevin that a breach of a duty or regulation did not, in and of itself, lead to an unfair credit relationship. Here, Mr W proceeded with his purchase and like I've mentioned there's no indication he tried to exercise his right of withdrawal within 14 days, so I can't see he lost out as a result of any advance payment made to the Supplier (if it was taken within the 14-day period).

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

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 W's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract." But PR says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

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

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

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr W as an investment in breach of Regulation 14(3), I have to be persuaded that it was more

likely than not that the Supplier marketed and/or sold membership to him as an investment, i.e. told him or led him to believe that Fractional Club membership offered him the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

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

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr W the financial value of his share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. From my understanding, there were disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold as an investment. So, it's possible that Fractional Club membership wasn't marketed or sold to him as an investment in breach of Regulation 14(3).

On the other hand, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mr W as an investment in breach of Regulation 14(3).

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

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

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

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

On my reading of the evidence provided and Mr W's recollections of the sales process at the Time of Sale, I'm not satisfied that any potential breach of Regulation 14(3) had a material impact on his purchasing decision. Mr W says he was told by the Supplier that he would receive 50% or more of his money back. This doesn't suggest to me that Mr W took from the Supplier that the Fractional Club membership was an investment from which he would make a financial gain i.e. a profit.

Mr W's witness statement does not convince me that Mr W's decision to enter into the Purchase Agreement was materially affected by the Supplier's marketing of selling of the Fractional Club membership as an investment (if it did so) as he explains:

"…we would receive 50% or more of our money back, plus we would have enjoyed 23years of amazing holidays in resorts all of the world. We were still not interested…

It was becoming very late in the day now, past 4pm, and though they kept offering us deals, and discounts, we kept saying no.

We were both exhausted and worn down to the point I think we would have agreed to anything to leave that room."

It seems to me that the reason Mr W went ahead with this purchase, based on his own recollections, was because he was exhausted and felt under pressure. Mr W refused to go ahead with the purchase initially after being told about the financial return he could have received (in his own words, 50% or more of the cost) 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 W's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests he would have pressed ahead with his purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr W and the Lender was unfair to him even if the Supplier had breached Regulation 14(3).

<u>The provision of information by the Supplier at the Time of Sale</u>

PR says that there is an unfair term in the contractual documents (Clause D of the Purchase Agreement). On my reading, the effect of this clause would ultimately mean Mr W's Fractional Club membership can be rescinded by the Supplier in the event that Mr W fails to make any payments due with 14 days, forfeiting his membership and any payments made towards his purchase. Therefore, although not cited by PR, the consequence of non- payment was unfair an contract term under the CRA.

To conclude that a term in the Purchase Agreement rendered the credit relationship between Mr W and the Lender unfair to him, I'd have to see that the term was unfair under the CRA and operated against Mr W in practice. In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mr W, has flowed from the term, because those consequences are relevant to assessment of unfairness under Section 140A. For example, the judge attached importance to the question of how an unfair term had been operated in practice: see Link Financial v Wilson [2014] EWHC 252 (Ch) at [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.

Neither PR or Mr W have described how the operation of this term has led to an unfairness to Mr W in particular. During the period Mr W's membership was active, I cannot see that the term was actually operated against Mr W, let alone unfairly.

In summary, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Mr W was unfair to him for the purposes of Section 140A.

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 W was unfair to him for

the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis."

I gave both parties the opportunity of responding and providing any further information or argument before I made my final decision. The Lender responded and said it agreed with my PD and had nothing further to add. The PR also responded on behalf of Mr W and did not accept the PD, providing some further comments and arguments they wish to be considered.

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time. The legal and regulatory context that I think is relevant to this complaint is set out in my PD But I would add that the following regulatory rules/guidance are also relevant:

<u>The Consumer Credit Sourcebook ('CONC') – Found in the Financial Conduct Authority's (the 'FCA') Handbook of Rules and Guidance</u>

Below are the most relevant provisions and/or guidance as they were at the relevant time:

CONC 3.7.3 [R]
CONC 4.5.3 [R]
CONC 4.5.2 [G]

<u>The FCA's Principles</u>

The rules on consumer credit sit alongside the wider obligations of firms, such as the Principles for Businesses ('PRIN'). Set out below are those that are most relevant to this complaint:

• Principle 6
• Principle 7
• Principle 8

What I've decided – and why

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

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

Again, my role as an Ombudsman is not to address every single point which has been made to date, but to decide what is fair and reasonable in the circumstances of this complaint. If I have not commented on, or referred to, something that either party has said, this does not mean I have not considered it. Rather, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision.

The PR's further comments in response to the PD only relate to the issue of whether the credit relationship between Mr W and the Lender was unfair. In particular, the PR has

provided further comments in relation to whether the membership was sold to Mr W as an investment at the Time of Sale.

As outlined in my PD, the PR originally raised various other points of complaint, all of which I addressed at that time. But they did not make any further comments in relation to those in their response to my PD. Indeed, they have not said they disagree with any of my provisional conclusions in relation to those other points. And since I have not been provided with anything more in relation to those other points by either party, I see no reason to change my conclusions in relation to them as set out in my PD. So, I will focus here on the PR's points raised in response.

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

Having considered the entirety of the credit relationships between Mr W and the Lender along with all of the circumstances of the complaint, I do not think the credit relationship between them were 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 standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Time of Sale along with any relevant training material;
2. The provision of information by the Supplier at the Time of Sale in relation to Fractional Club membership, including the contractual documentation and disclaimers made by the Supplier;
3. The commission arrangements between the Lender and the Supplier at the Time of Sale and the disclosure of those arrangements;
4. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;
5. The inherent probabilities of the sale given its circumstances; and, when relevant
6. Any existing unfairness from a related credit agreement.

I have then considered the impact of these on the fairness of the credit relationship between Mr W and the Lender given their circumstances at the Time of Sale.

The Supplier's alleged breach of Regulation 14(3) of the Timeshare regulations

The PR explained in their response to my PD that they had not shared the Investigator's view on this complaint with Mr W, saying "this was done in order not to influence their recollections". The PR said this means Mr W's recollections have not been influenced by either the Investigator's view or the outcome in Shawbrook & BPF v FOS[3]. But I had not said that Mr W's testimony was coloured by the Investigator's view and/or the outcome in Shawbrook & BPF v FOS.

I accepted in my PD that the membership may well have been marketed as an investment to Mr W in breach of the prohibition in Regulation 14(3) of the Timeshare Regulations. I also explained that while the Supplier's sales processes left open the possibility that the sales representative may have positioned Fractional Club membership as an investment, it was not necessary for me to make a finding on this as it is not determinative of the outcome of the complaint. I explained that regulatory breaches do not automatically create unfairness and that such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way. The PR's response to my PD has not changed my view of this, and so whether the Supplier's breach of Regulation 14(3) led Mr W

[3] *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*').

to enter into the Purchase Agreement and the Credit Agreement remains an important consideration.

The PR believes the investment element did play an important part during the sales process in convincing Mr W to purchase and was a motivating factor in his decision making.

And as I already said in my PD, the term "investment" is not defined in the Timeshare Regulations but I will use the same definition as that in the judgment of Shawbrook & BPF v FOS: *"*an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit". In his statement, Mr W had said he was told "we would receive 50% or more of our money back". The simple fact that Mr W recalled that the sales representatives told him that he would receive some money back as a result of this purchase, does not mean that was an important and motivating factor behind his decision to purchase the membership. Rather, Mr W continued to say in his witness statement that "we were still not interested" after hearing about any potential returns so I find it difficult to agree that Mr W's decision to make the purchase was motivated by the prospect of any type of financial gain.

The PR says that as the Supplier's pricing sheet set out the "Unit share" Mr W acquired under his Fractional Club membership, this shows the investment element played "quite an important role" in convincing him to purchase it. I do not agree with that analysis. The pricing sheet was a proforma document that captured a number of details about the purchase in a standardised format. The fact the unit share acquired was recorded indicates the purchase included an investment element. But it follows that the Supplier would have recorded that information irrespective of the customer's motivations for making the purchase. So I do not consider this document offers an insight into Mr W's motivation for making his purchase.

So, ultimately, for the above reasons, along with those I already explained in my PD, I remain unpersuaded that any breach of Regulation 14(3) was material to Mr W's purchasing decision.

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

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

S140A conclusion

Given all of the factors I have looked at in this part of my decision, and having taken all of them into account, I am not persuaded that the credit relationship between Mr W and the Lender under the Credit Agreement and related Purchase Agreement was unfair to him. So, I do not think it is fair or reasonable that I uphold this 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 W's Section 75 claims, and I am not persuaded that the Lender was party to a credit relationship with him under the Credit Agreement that was unfair to him for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate him.

My final decision

I do not uphold this complaint for the reasons I have set out above.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr W to accept or reject my decision before 6 February 2026.

Sameena Ali
Ombudsman