DRN-5777779

The complaint

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

What happened

Mr and Mrs O purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 23 January 2018 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,300 fractional points at a cost of £16,443 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs O 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 O paid for their Fractional Club membership by paying a £500 deposit and taking finance for the remaining amount of £15,943 from the Lender in both of their names (the 'Credit Agreement').

Mr and Mrs O – using a professional representative (the 'PR') – wrote to the Lender on 13 May 2022 (the 'Letter of Complaint') to raise a number of different concerns. As both sides are familiar with the concerns raised, it isn't necessary to repeat them in detail here beyond the summary above.

The Lender dealt with Mr and Mrs O's concerns as a complaint and issued its final response letter on 6 June 2022, rejecting it on every ground.

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

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

I considered the matter and issued a provisional decision (the 'PD') dated 14 August 2025. I've summarised those conclusions below:

- I did not think the Lender acted unreasonably or unfairly when it dealt with Mr and Mrs O's claim for misrepresentations at the Time of Sale under Section 75 of the CCA. I explained this was because I couldn't see that the representations they'd raised concerns about, if made, would have been untrue.
- I also did not think the Lender is liable to pay Mr and Mrs O any compensation for a breach of contract by the Supplier. Mr and Mrs O had said they could not holiday where and when they wanted to. But, I explained that like any holiday

accommodation, availability was not unlimited, and that some of the sales paperwork states that the availability of holidays was/is subject to demand. I also noted that it looks like they made use of their fractional points to holiday on a number of occasions. I accepted that they may not have been able to take certain holidays, but I hadn't seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

- Mr and Mrs O raised a number of reasons why they felt the Lender was party to an unfair credit relationship with them under Section 140A of the CCA. But, none of these struck me as reasons why this complaint should succeed.
- In particular, they suggested that Fractional Club membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way. In relation to this point, I said:

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs O'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 and Mrs O'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[1].

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.

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[1] The PR has argued that Fractional Club membership amounted to an Unregulated Collective Investment Scheme, however this was considered and rejected in the judgment in *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).

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

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

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs O, 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 O as an investment. So, it's possible that Fractional Club membership wasn't marketed or sold to them as an investment in breach of Regulation 14(3).

On the other hand, 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 and Mrs O 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 and Mrs O 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 O and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

I've considered the testimony and evidence provided in this case.

The PR didn't originally provide any testimony from Mr and Mrs O to support the allegation made. However, in January 2024 they did then provide a witness statement from Mr O which the PR says was drafted in 2023, although it's unclear when exactly as the statement isn't signed or dated.

In this statement, Mr O has said:

> *"In the meeting, we were provided drinks, what they said in the seminar made it seem very attractive, and we believed what the representatives said about booking holidays being easy and how we could get a return on the money spent, as we could sell it in the future. We had never purchased timeshares before, and this was the first time we had been made aware of how it works. We purchased the timeshare as how they explained the fractional timeshare made it very cheap."*

While I acknowledge here that Mr O has referred to 'a return' there is nothing to suggest they made the purchase on the basis of a financial gain i.e. a profit. And, the focus of the testimony, both in terms of the description of the sale and why Mr and Mrs O are unhappy with the membership now, is focused on how it functioned as a holiday product – which they've set out in quite some detail, for example issues with availability and quality. And, Mr O's comment regarding purchasing the membership because it was very cheap, in the wider context of the rest of his testimony, appears to be in reference to the cheaper price of holidays:

> *"We were informed that it would be much cheaper for us as a family to sign in [sic] for [Supplier] holiday package because it would provide us the opportunities to book holidays across all their resorts around the world."*

The PR has also provided a handwritten note of the initial telephone conversation they had with Mr O when they first became involved with the complaint. This is dated 6 December 2021. The handwriting is somewhat difficult to read but says:

> *"They explained [unclear] and told this would be a cheaper way to fund holidays*
>
> *Presentation was good and looked like something of interest as they explained all the benefits based on comparison of costs of normal holidays to timeshare holidays the difference was huge in costs and quality of accommodation*
>
> *We could sell in 19 years but also before if our circumstances changed*
>
> *When they tried to book no spaces left*
>
> *Could not get what they wanted*
>
> *When we did book not to the standard expressed*
>
> *Even when we could not book still had to*
>
> *Pay maintenance & loan payment for nothing"*

But there is no mention here of being sold the membership as an investment, or being induced into the purchase on the basis of a financial gain or profit. The focus of what Mr O had to say here seems to align with his later testimony provided above i.e. they purchased the membership due to the cheaper holidays it could provide and their unhappiness with it now is due to issues with availability and the quality of holidays.

The PR also subsequently provided some documentation which appears to be from a third-party timeshare relinquishment firm Mr and Mrs O engaged with prior to the PR's involvement.

Firstly, they provided a copy of an online chat transcript dated April 2020 which is between Mr O and the third-party firm. This said:

[15:07] #4f1cc : i need advice/support on how to get out of time share

[15:08] Sophie : Hi there

[15:08] Sophie : Can I ask what timeshare you own?

[15:08] #4f1cc : CLC world holiday resorts investment time share

[15:09] Sophie : Can I ask are you trying to claim your money back?

[15:09] #4f1cc : I want to end the time share, it's not beneficial to me

[15:10] #4f1cc : I am paying more money compare to the benefits of the time share package and don't think I will get my profit at the end like they said

They've also provided a copy of a questionnaire dated December 2021 completed by Mr and Mrs O for the third party firm and I can see handwritten notes were made which said:

> *"Can't get holidays he wants and can't sell – needs to [unclear] them or will lose holidays & investment return promised at end but will still have to pay finance…bought as way to holiday & get money back at the end. Profit very likely as holiday property value is rising fast."*

I acknowledge what has been said here, but I don't consider I can place much weight on evidence from a third party, with little (if any) information about how this was obtained. In addition, the questionnaire involved various tick-box questions and so has an element of leading to it. The handwritten notes are also not Mr and Mrs O's direct testimony, but rather notes made by the third party firm. So, I don't think this is the best evidence of what happened or what Mr and Mrs O's motivations were in making their purchase.

It's also difficult to explain why none of these comments appear in the later testimony provided directly from Mr O to the PR.

Further, based on notes from the Supplier, Mr and Mrs O contacted them in August 2018 (around eight months following the Time of Sale) to ask how they could sell their membership because 'it's not worth what they're paying' and saying they 'can find better options on the internet'. And in the context of this complaint, it's ultimately difficult to explain why they wanted to sell their membership so soon after purchase if they had bought it as an investment.

The Supplier has also provided notes of a call Mr O had with them in March 2024. Mr O was calling as it seems he couldn't access a member's area of the website, and this complaint was mentioned as the Supplier explained the membership had at that point been suspended. The Supplier asked Mr O why he had complained and what his main motivation was for purchasing. According to the notes made, Mr O said they were unhappy with the lack of availability and said they had purchased the

membership for "holidays every year and cheaper than on the high street". This again appears to align with Mr O's other direct testimony outlined above.

So, on my reading of the evidence before me, the prospect of a financial gain from Fractional Club membership was not an important and motivating factor when Mr and Mrs O decided to go ahead with their purchase. That doesn't mean they weren't interested in a share in the Allocated Property. After all, that wouldn't be surprising given the nature of the product at the centre of this complaint. But as Mr and Mrs O themselves don't persuade me that their purchase was motivated by their share in the Allocated Property and the possibility of a profit, I don't think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decision they ultimately made.

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 O'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 O and the Lender was unfair to them even if the Supplier had breached Regulation 14(3)."

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

The Lender responded to the PD and accepted it, confirming they had nothing further to add. The PR also responded and did not accept the PD, and they provided some further comments they wished to be considered.

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

What I've decided – and why

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

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

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

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

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

Having read the PR's response to the PD in full, the only aspect of the complaint they've disputed further is my conclusions in relation to whether the membership was sold to Mr and Mrs O at the Time of Sale as an investment in breach of Regulation 14(3) of the Timeshare Regulations. And, whether that in turn rendered the credit relationship between them and the Lender unfair under Section 140A of the CCA.

As outlined above, the PR also originally raised some other points of complaint, which I addressed in my PD. But, they didn't make any further comments in relation to those in their response to my PD. Indeed, they haven't said they disagreed with any of my provisional conclusions in relation to those other points. Since I haven't been provided with anything more in relation to those other points by either party, it follows that my conclusions in relation to them remain the same as set out in my PD.

I also note that in their response, the PR haven't said much that's new here nor have they provided any new evidence to support the allegations they've made in relation to the sale of the membership as an investment and the impact of that on the credit relationship. In my view, they are simply repeating the arguments they've made previously. So, I will now address the points they've raised with that in mind.

The Supplier's alleged breach of Regulation 14(3) and whether the credit relationship was rendered unfair as a result

I explained in my PD that part of the evidence I'd considered was some contact notes from the Supplier of a call Mr O had with them in March 2024. The notes state that during this conversation Mr O told the Supplier they were unhappy with the lack of availability and said they had purchased the membership for "*holidays every year and cheaper than on the high street*". The PR has explained that while they '*cannot make any comments on the Supplier information provided*' to our Service, Mr O has said he has no recollection of this call and no record himself of it taking place. And, that he wouldn't have made the call as he hadn't paid the annual management fees since 2021 and wouldn't therefore have been eligible to use the holiday accommodation at that time.

While I acknowledge what's been said here, I don't think the fact that Mr O doesn't remember this conversation or hasn't kept a record of it himself means it didn't happen. I've no reason to doubt the Supplier's records they've provided, particularly since neither Mr O nor the PR have said they dispute the records of the other conversations which took place between him and the Supplier (such as that which took place in August 2018, referred to in my PD). I acknowledge that Mr and Mrs O stopped paying their annual management fees in 2021 but as previously outlined, the phone call in question simply appears to have been Mr O enquiring about accessing a particular members area of the website. And further, the notes indicate that it was explained to Mr O during this conversation that the reason he couldn't access this particular area of the website was due to the suspension of their membership on the basis of non-payment of the annual management fees. And, that they could let the Supplier know if they wanted their membership reinstated.

So, I still think it's more likely than not that this conversation did occur. But even if that wasn't the case, I explained in my PD the other evidence I relied on when reaching my conclusions in relation to this point and I don't think what Mr O has now said in relation to the March 2024 phone call detracts from that other evidence.

The PR repeated the various comments which had been made in this other evidence (outlined in my PD) and said they did not accept my conclusions in relation to it, which I acknowledge. But, they didn't provide any new evidence or arguments to consider here – they simply said they disagree. So, I haven't seen any reason to reach a different conclusion in relation to that evidence to that which I set out in my PD.

The PR went on to say that whether or not a financial gain was the 'sole motivator' for Mr and Mrs O's purchasing decision is, in their view, irrelevant. What they did feel is relevant is that the product was, in their view, marketed as an investment in breach of Regulation 14(3) and this therefore makes the credit relationship unfair.

But I think the PR is mistaken here. As I explained in my PD, even if I agreed that the Supplier did breach Regulation 14(3) at the Time of Sale (which I still make no formal finding on), this is not the end of the matter, nor is the credit relationship in question automatically rendered unfair as a result in the way the PR has suggested.

This is because 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 again, in light of what the courts had to say in *Carney* and *Kerrigan*, it still 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 O and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

The PR has said Mr and Mrs O's purchasing decision was based on a 'combination of factors' including holidays and the expectation of a 'financial return'. And, said that even if a financial gain was one of several motivating factors, it was material to Mr and Mrs O's decision to purchase.

But again, the PR hasn't provided any new evidence here to support this assertion, they're simply repeating their stance.

So again, for all of the reasons I already explained in my PD (as outlined above), on my reading of the evidence before me, the prospect of a financial gain from Fractional Club membership was not an important and motivating factor when Mr and Mrs O decided to go ahead with their purchase. As I explained in my PD, that doesn't mean they weren't interested in a share in the Allocated Property. But as Mr and Mrs O themselves still don't persuade me that their purchase was motivated by their share in the Allocated Property and the possibility of a profit, I don't think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decision they ultimately made.

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 remain unpersuaded that Mr and Mrs O'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). Again, 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 O and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

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 O's Section 75 claims, 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.

Appendix: The Legal and Regulatory Context

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

The timeshare(s) at the centre of the complaint in question was/were paid for using restricted-use credit that was regulated by the Consumer Credit Act 1974. As a result, the purchase(s) was/were covered by certain protections afforded to consumers by the CCA provided the necessary conditions were and are met. The most relevant sections as at the relevant time(s) are below.

Section 56: Antecedent Negotiations
Section 75: Liability of Creditor for Breaches by a Supplier
Sections 140A: Unfair Relationships Between Creditors and Debtors
Section 140B: Powers of Court in Relation to Unfair Relationships
Section 140C: Interpretation of Sections 140A and 140B

Case Law on Section 140A

Of particular relevance to the complaint in question are:

1. The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') remains the leading case.
2. The judgment of the Court of Appeal in the case of *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')* sets out a helpful interpretation of the deemed agency and unfair relationship provisions of the CCA.
3. *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*') – in which the High Court held that determining whether or not the relationship complained of was unfair had to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"*, which was the date of the trial in the case of an existing relationship or otherwise the date the relationship ended.
4. The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*') – which approved the High Court's judgment in *Patel*.
5. *Deutsche Bank (Suisse) SA v Khan and others* [2013] EWHC 482 (Comm) – in Hamblen J summarised – at paragraph 346 – some of the general principles that apply to the application of the unfair relationship test.
6. *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
7. *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
8. *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').

My Understanding of the Law on the Unfair Relationship Provisions

Under Section 140A of the CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as *"a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]"*. And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to *"finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."*

So, the negotiations conducted by the Supplier during the sale of the timeshare(s) in question was/were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140A(1)(c) CCA.

Antecedent negotiations under Section 56 cover both the acts and omissions of the Supplier, as Lord Sumption made clear in *Plevin*, at paragraph 31:

"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.' […] *Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."*

And this was recognised by Mrs Justice Collins Rice in *Shawbrook & BPF v FOS* at paragraph 135:

"*By virtue of the deemed agency provision of s.56, therefore, acts or omissions 'by or on behalf of' the bank within s.140A(1)(c) may include acts or omissions of the timeshare company in 'antecedent negotiations' with the consumer*".

In the case of *Scotland & Reast*, the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that "*negotiations are deemed to have been conducted by*

the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law" before going on to say the following in paragraph 74:

"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[2]

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

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

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

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

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

<u>The Law on Misrepresentation</u>

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

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

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

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.[3]

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

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

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

reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

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

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

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

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

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

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

The Consumer Rights Act 2015 (the 'CRA')

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

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

Relevant Publications

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

My final decision

I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O and Mrs O to accept or reject my decision before 7 October 2025.

Fiona Mallinson
Ombudsman