

The complaint

Mr M and Miss V'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 a claim under section 75 of the CCA.

Background to the complaint

Mr M and Miss V purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 26 June 2013 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,620 fractional points at a cost of £15,425 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr M and Miss V 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 M and Miss V paid for their Fractional Club membership by paying a deposit of £500 and taking finance of £14,925 from the Lender in their joint names (the 'Credit Agreement').

Mr M and Miss V – using a professional representative (the 'PR') – wrote to the Lender on 10 June 2019 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under section 75 of the CCA, which the Lender failed to accept and pay.
2. Breaches of contract by the Supplier giving them a claim against the Lender under section 75 of the CCA, which the Lender failed to accept and pay.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and the related Purchase Agreement for the purposes of section 140A of the CCA.
4. The Lender being in breach of fiduciary duty by failing to disclose how much commission was paid to the Supplier.

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

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

1. told them that Fractional Club membership had a guaranteed end date when that was not true;
2. told them that selling the Allocated Property was guaranteed to be profitable when that was not true because it might never be sold;
3. told them that the Supplier's holiday resorts were exclusive to its members when that was not true.

Mr M and Miss V say that they have a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr M

and Miss V.

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

The PR says on behalf of Mr M and Miss V that the Supplier breached the Purchase Agreement because:

1. there is no guarantee that the Allocated Property will ever be sold;
2. Mr M and Miss V have no control over the annual maintenance fees charged; and
3. neither of the above matters was properly explained to Mr M and Miss V.

As a result of the above, the PR says that Mr M and Miss V have a breach of contract claim against the Supplier, and therefore, under section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr M and Miss V.

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

The Letter of Complaint set out several reasons why Mr M and Miss V say that the credit relationship between them and the Lender was unfair to them under section 140A of the CCA. In summary, they include the following:

1. the Lender (and the Supplier) had failed to disclose how much commission had been paid;
2. the club membership was not worth £15,425; and
3. the decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

(4) Breach of fiduciary duty

The failure to disclose commission was also alleged to amount to a breach of fiduciary duty.

The Lender dealt with Mr M and Miss V's concerns as a complaint and issued its final response letter on 29 June 2019, rejecting it. It denied that it had paid any commission to the Supplier. And it referred all of their other concerns directly to the Supplier, on the ground that the Lender was not responsible for what the Supplier had done or said at the Time of Sale. The Supplier later rejected all of their concerns.

Mr M and Miss V then referred the complaint to the Financial Ombudsman Service, in August 2019. The PR which represented them added a new argument as to why their relationship with the Lender was unfair, namely that they had been pressured into purchasing Fractional Club membership by the Supplier.

Much later on, in March 2024, the PR argued that the Fractional Club membership had been marketed and sold to Mr M and Miss V as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'), and that this had resulted in an unfair credit relationship. And in support of this, the PR provided for the first time a witness statement from Miss V, dated 21 April 2019, alleging that this was how membership had been sold to her. That statement also described the pressure which had been applied by the Supplier in the sales presentation.

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

Mr M and Miss V disagreed with the investigator's assessment and asked for an ombudsman's decision – which is why it was passed to me.

I wrote a provisional decision which read as follows.

The legal and regulatory context

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

The legal and regulatory context that I think is relevant to this complaint is set out in an appendix (the 'Appendix') at the end of my findings – which forms part of this decision. But I think it might be helpful to mention here that section 56 of the CCA makes the Lender responsible for the Supplier's conduct at the Time of Sale. (The Appendix explains this in greater detail.)

What I've provisionally decided – and why

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

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

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

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

As both sides may already know, a claim against the Lender under section 75 essentially mirrors the claim Mr M and Miss V could make against the Supplier. However, I do not think that this section assists them.

I say this because it's my understanding that when Mr M and Miss V entered into the Credit Agreement in 2012, they did so with another lender – First Holiday Finance Ltd based in the British Virgin Islands ('FHFBI') and operating from the Isle of Man, rather than the UK entity of the same name. The UK entity has provided us with evidence that shows it wasn't engaged in regulated lending activity until it applied for permission from the Financial Conduct Authority ('FCA') in 2014. On 1 August 2015, FHFBI assigned its loan book (including Mr M and Miss V's loan) to the UK entity First Holiday Finance.

Section 75 enables a claim to be brought against the creditor. At the time the Credit Agreement was made, the creditor was FHFBI. While FHFBI assigned its loan book to First Holiday Finance, it didn't necessarily follow that its duties or other obligations – such as any potential liability for a section 75 claim – were similarly assigned. Although the definition of creditor in section 189(1) of the CCA includes an assignee, *Goode* indicates that this shouldn't be interpreted as creating a positive liability on the assignee for a monetary claim under (among other things) section 75.¹

That's not to say that a claim can't be made along the lines outlined by Mr M and Miss V. Rather, it highlights the inherent difficulty they might face in succeeding with that claim. And with this in mind, I can't say that First Holiday Finance Ltd acted unfairly or unreasonably

¹ *Goode: Consumer Credit Law and Practice*, paragraph 45A.62.

towards Mr M and Miss V when it declined to pay them compensation for the claim they said it was liable for under section 75.

However, I can still consider allegations of misrepresentation in the context of assessing whether Mr M and Miss V's relationship with the Lender was unfair under section 140A of the CCA.

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

For the same reason I set out above, I do not think that a claim under section 75 for breach of contract would succeed. Furthermore, I think that none of the matters which the PR characterised as breaches of contract are actually capable of being breaches. 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. However, I will instead consider each of those matters as potential grounds of unfairness under section 140A, to which I turn next.

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 M and Miss V 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 M and Miss V also say that the credit relationship between them and the Lender was unfair under section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that they have concerns about. It is those concerns that I explore here.

I have considered the entirety of the credit relationship between Mr M and Miss V 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 M and Miss V and the Lender.

The Supplier's alleged misrepresentations at the Time of Sale

This part of the complaint was made for several reasons that I set out at the start of this decision. They include the suggestion that Fractional Club membership had been misrepresented by the Supplier because Mr M and Miss V were told that it had a guaranteed end date when that was not true. It is true that it is not possible to guarantee when a property will actually be sold. But there was a prescribed date on which the Allocated Property would be put up for sale. I don't think that Mr M and Miss V would have been misled into thinking that the sale of the property would complete on a specific day, only that the property would be put on the market on that day. So I don't think that was a misrepresentation.

For the same reason, I don't think that telling them they would make a profit when the Allocated Property was sold was a misrepresentation just because it might never be sold. I think it is bound to be sold, just not necessarily on the same date that it is put on the market.

I also think that as real property usually appreciates in value, it is actually likely that it will be profitable; certainly it is too soon to say that it will not be, given that the intended sale date is 31 December 2030. But even if Mr M and Miss V do not make a profit when the Allocated Property is eventually sold, that does not mean that telling them in 2012 that it was likely to make a profit was a false statement, because that was the genuine likelihood at the time.

I've seen evidence that the Supplier's holiday resorts were not exclusive to its members. But I've not seen evidence (not even in Miss V's witness statement) that Mr M and Miss V were told that they were exclusive and not open to the public. The Supplier says that its resorts are not exclusive to members, although club members do receive benefits which are exclusive to members. So I am not persuaded that the evidence is enough to find that the resorts were misrepresented as only being available to be booked by members.

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

For these reasons, therefore, I do not think the Lender is liable to pay Mr M and Miss V any compensation for the alleged misrepresentations of the Supplier.

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

Mr M and Miss V'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. And I will also deal with the alleged breaches of contract here.

The PR has argued that there is no guarantee that the Allocated Property will ever be sold, and that this was not explained to Mr M and Miss V. But for the same reasons I gave above when I considered this matter in the context of misrepresentation, I do not think there is anything in this objection.

Although it is true that Mr M and Miss V have no control over the annual maintenance fees they are charged, I don't think that is inherently unfair in itself. In principle it is reasonable for the Supplier, which is responsible for maintaining the Allocated Property, to decide how much to spend on that. Having regard to what the Supreme Court said in the case of *Plevin*, I think that whether this resulted in unfairness to Mr M and Miss V depends on how this actually worked in practice. It is certainly possible for a significant increase in annual fees to become unreasonable, but I have not yet seen evidence of how much they were charged from year to year. I invite them to submit such evidence if they wish to pursue this point further. (Likewise, if how the annual charges worked was not properly explained to them, then whether this resulted in unfairness will also depend on how this operated in practice.)

The PR says that the right checks weren't carried out before the Lender lent to Mr M and Miss V. 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 M and Miss V was actually unaffordable before also concluding that they lost out as a result and then consider whether the credit relationship with the Lender was unfair to them for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for Mr M and Miss V. If there is any further information on

this (or any other points raised in this provisional decision) that Mr M and Miss V wishes to provide, I would invite them to do so in response to this provisional decision.

Mr M and Miss V say that they were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledge that they may have felt weary after a sales process that went on for a long time. But they were given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel their membership during that time. And with that being the case, there is insufficient evidence to demonstrate that Mr M and Miss V made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

If Mr M and Miss V thought that £15,425 was not a fair price for their membership, then it was open to them to decline to purchase it, or try to negotiate a better price (which they have not said they tried to do), or to withdraw from their purchase within the 14-day cooling-off period. So I do not uphold their complaint about that.

I'm not persuaded, therefore, that Mr M and Miss V's credit relationship with the Lender was rendered unfair to them under section 140A for any of the reasons above. But there is another reason why they say their credit relationship with the Lender was unfair to them. And that's the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of the 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 M and Miss V'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 M and Miss V's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr M and Miss V 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 M and Miss V, 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 M and Miss V as an investment.

I've also considered Miss V's testimony. The PR didn't provide any witness statement when they complained to the Lender in June 2019, nor when they referred the complaint to our Service in August 2019. But they subsequently did provide a witness statement in March 2024, which is after the judgment in *Shawbrook & BPF v FOS* was handed down in 2023.

The witness statement is date-stamped 21 April 2019. At the same time, the PR also provided some other documents which they say were sent to them, some of which are also dated. Two of these documents (the copies of the Purchase Agreement and the pre-contract credit information) have a date stamp on them, which says 21 April 2019. But they had sent us those documents before, and this date stamp is not present on the copies sent to us and to the Lender originally. This casts doubt on the provenance of the date stamps – including the stamp on the witness statement. So I think this doesn't convincingly prove when the statement itself was drafted. Given this, and the timing of when the statement was provided, I don't think I can place much weight on what Miss V has had to say. I say this because I think there is a risk that her testimony may have been influenced, even subconsciously, by the outcome of *Shawbrook & BPF v FOS*.

Turning to the testimony itself, Miss V said:

"[The salesman] went on and on showing us figures and telling us what a great investment fractional ownership is what you pay in we get back when we sell if we don't want to invest any further but the more you invest the bet[ter] the return would [be] tand how simple and easy for us to go all around the world as a vey little cost ... after hours and hours i had enough all i wanted is to leave the pressure was so strong and hight he was hot i was tired,, i just agreed not knowing what i let myself in [for] ... it was so intense I felt captive until I did sign but the investment was what made me think its not bad option." [sic]

I'll say more about this in the next section. But for the reasons I've explained above regarding the timing of the statement, I don't think I can place much weight on what she has had to say here overall.

So, on one hand it is *possible* that Fractional Club membership wasn't marketed or sold to Mr M and Miss V 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 M and Miss V 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 M and Miss V 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 M and Miss V and the Lender that was unfair to them and warranted relief as a result, then an important consideration is whether the Supplier's breach of regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement.

As I've already said, there was no indication that they were induced into the purchase on that basis, other than a witness statement of dubious provenance. But even if I accept that the passage I have quoted above is Miss V's authentic evidence, it still seems to me that her and Mr M's purchase decision was motivated primarily by the duration and pressure of the sales presentation and their desire to leave, rather than because they were enthusiastic about the prospect of making a good investment. Overall, it comes across as a tale of a very reluctant purchase.

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 M and Miss V'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 M and Miss V and the Lender was unfair to them even if the Supplier had breached regulation 14(3).

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

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

Commission

The Lender and the Supplier have both denied that any commission was paid in connection with Mr M and Miss V's purchase and loan, and I have seen no evidence to suggest that it was. So I am currently not minded to find that any commission was paid in this case. Accordingly, I do not think there was any resulting unfairness or breach of fiduciary duty. ...

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 M and Miss V's section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

Responses to my provisional decision

The PR did not accept my provisional findings, and provided detailed submissions as to why. In particular:

1. It did not accept my finding that no commission had been paid by the Lender to the Supplier in connection with the loan;
2. It did not accept my finding that section 75 of the CCA does not make First Holiday Finance Ltd liable for the Supplier's conduct, and pointed out that in coming to that conclusion I had relied on academic commentary rather than statute or case law;
3. It described as "*speculative*" my finding that real property usually appreciates in value;
4. It argued that high-pressure sales tactics, such as those employed at the Time of Sale, are designed to overwhelm consumers to the point where they are unable to rationally exercise their right to withdraw within the 14-day cooling-off period;
5. It said that I had improperly introduced a causation test into my findings about the alleged breach of regulation 14(3), contrary to the judgement of the High Court in *Shawbrook & BPF v FOS*;
6. It did not accept my adverse findings about the credibility of Miss V's evidence.
7. I should have shared with them the Supplier's training material, because I had referred to it in my provisional decision, and so failure to share it was a breach of natural justice.

The Lender had nothing to add.

My findings

I will deal with the PR's points in the same order as I listed them above.

1. Commission

I remain satisfied that no commission was paid by the Lender to the Supplier. Aside from the fact that no evidence exists to show the contrary, I also note that the Lender and the Supplier are both members of the same group of companies. The PR said as much in its response to my provisional decision:

“[T]he lender, First Holiday Finance Ltd, was not a genuine finance company but a shell entity, a mere component of the CLC corporate structure, sharing the same ultimate beneficial owners as the supplier. The transaction was, therefore, an internal financial arrangement...”

Given this, it does not seem plausible to me that one of these companies would have paid commission to the other.

2. Section 75

In the PR's submissions about the effect of section 75, it quoted section 189(1) of the CCA, which says that the definition of a creditor includes an assignee. I had already mentioned in my provisional findings that this definition had been analysed in *Goode*, which had concluded that this did not have the effect of extending section 75 liability to the assignee.² So I don't think that section 189 adds anything new which I had not already considered.

Although academic commentary might not seem to the PR to be as convincing as case law, I still think that the analysis set out in *Goode* is persuasive and I accept it.

As the PR acknowledges, I went on to consider the alleged misrepresentations on their merits in the context of section 140A instead, as that section is not affected by the issue raised in *Goode*.³ So it seems to me that the question of whether section 75 applies to them or not is moot.

Section 140A does not apply to breaches of contract, so the only way to consider them is under section 75. Since section 75 doesn't apply, I cannot hold the Lender liable for them. But even if I am wrong about that, I don't think the relevant allegations really amount to allegations of breaches of contract. The alleged breaches were:

1. There is no guarantee that the Allocated Property will ever be sold;
2. Mr M and Miss V have no control over the annual maintenance fees charged; and
3. Neither of the above matters was properly explained to Mr M and Miss V.

I will explain why I think these do not amount to breaches of contract.

1. Leaving aside for the moment the question of whether there is really no guarantee that the Allocated Property will ever be sold, I don't think that a potential or anticipated breach that has not happened yet, and which cannot crystallise until 31 December 2030, is actionable. An action for breach of contract cannot be brought until the breach has occurred.

I have however considered this allegation as one of misrepresentation instead, But I still don't think there is any merit in it. While under Rules 9.1 and 9.2.9 of the relevant Fractional Club Rules, the sale of the Allocated Property could be postponed for up to two years by the 'Vendor'⁴ (or longer than that if there were problems selling and the 'Owners'⁵ agreed, or for

² See paragraph 45A.60, where it says *“In other words, 'creditor' means the original creditor as regards matters arising prior to the assignment and the assignee as regards matters arising after the assignment.”*

³ See paragraph 45A.65.

⁴ Defined in the Rules as “CLC Resort Developments Limited”.

an otherwise specified period provided there was unanimous agreement in writing from the Owners), that does not render the guarantee untrue. So, I am not persuaded that the guarantee constituted a false statement of fact.

2. I cannot see that there was a term of their contract to the effect that Mr M and Miss V would have control over how much they would be charged for their annual maintenance fees.

3. Failing to explain the above matters to Mr M and Miss V would not amount to a breach of contract. I have considered instead whether it might be a breach of the Timeshare Regulations. But even if the Supplier did not give them sufficient information to satisfy the requirements of Regulation 12 (which was concerned with the provision of 'key information'), I cannot see that the ongoing costs of membership were applied unfairly in practice.

3. Appreciation of property value

I think the fact that real property typically appreciates in value over time is notorious and is a reasonable basis for a conclusion that the sale of the Allocated Property would probably be profitable. But in fact, my provisional decision did not quite go as far as saying that. What I actually said was *"But even if Mr M and Miss V do not make a profit when the Allocated Property is eventually sold, that does not mean that telling them in 2012 that it was likely to make a profit was a false statement, because that was the genuine likelihood at the time."* My finding was concerned with whether what was said at the Time of Sale was misleading. I remain of the view that it was not.

4. High pressure sales tactics

I am not convinced that high pressure sales tactics would overwhelm a consumer's judgement for a whole fortnight, such as to destroy the usefulness of the cooling-off period.

5. Causation and breach of regulation 14(3)

In its analysis of the case law concerning regulation 14(3), the PR repeatedly quoted from paragraph 187 of the judgement in *Shawbrook & BPF v FOS*,⁶ in which the learned judge had described the mis-selling of two timeshares as *"a fundamental vitiating of the fairness of the whole arrangement, for which nothing short of unwinding was reasonable and fair to the consumer."* The PR argued that this passage meant that the High Court had concluded that a breach of that regulation will always be such a serious matter that a complaint about mis-selling should always be upheld and should always mean that a timeshare agreement, and any related finance agreement, is unwound.

However, on reading that passage in its proper context, I don't think that is what the court was saying. That passage needs to be read in the light of the whole of Section G of the judgement, and especially paragraphs 181 to 187. Reading all of that makes it clear that the judge was *not* saying that every breach of regulation 14(3) is automatically so unfair that the purchase agreement and the related credit agreement should be unwound.

Although it is necessary to read all of those paragraphs together as one text, I will quote excerpts from a couple of them to explain what I mean.

⁵ Defined in the Rules as "a purchaser who has entered into a Purchase Agreement and has been issued with a Fractional Rights Certificate (which shall include the Vendor for such period of time until the maximum number of Fractional Rights have been acquired)."

⁶ See <https://www.bailii.org/ew/cases/EWHC/Admin/2023/1069.html>

In paragraph 184, the judge said:

“both ombudsmen considered the Reg.14(3) finding alone sufficient to support a conclusion of unfairness within s.140A(1)” (emphasis in original).

And in paragraph 185 she said:

“The ombudsmen held the breach in each case to be serious/substantial and the constituent conduct causative of the legal relations entered into: timeshare and loan.” (Emphasis in original.)

So it was the *ombudsmen*, not the judge, who decided that the breaches had resulted in unfairness. The judge only said that these were conclusions which the ombudsmen were entitled to reach:

“No error of law appears from the ombudsmen's conclusions in any of these respects.”

That is a vindication of my colleagues' approach to considering causation as an element of their analysis of whether a breach of a regulation resulted in unfairness to the consumers. I have followed the same approach in this complaint.

Finally, the passage from paragraph 187 which was quoted by the PR in its submissions can now be seen in its proper context. The judge wasn't saying that every breach results in unfairness. She was only saying that the ombudsmen had been entitled to make a finding of unfairness on the facts of the individual cases before them:

“187. However, I have no hesitation in concluding that the remedies the ombudsmen provided were within the range of decisions a court could properly have made on the facts, as being appropriate to a finding of mis-selling a fractional ownership timeshare contract as an investment. The mis-selling was properly capable of being regarded as a fundamental vitiation of the fairness of the whole arrangement, for which nothing short of unwinding was reasonable and fair to the consumer. The detail of the unwinding was for each ombudsman to evaluate on the facts of the case ... I cannot see any error of law in what the ombudsmen decided in these cases by way of remedy.”

6. Findings about credibility

Although the PR has pointed out (correctly) that in most cases, my colleagues and I have generally accepted the word of a complainant as their honest account, we do not (and are not obliged to) do that in every case; it is only a starting point. We can and do reach adverse conclusions about a complainant's account in cases where there is evidence to undermine it. Such was the case here, and I have not seen anything to change my conclusions about the evidence in this case.

7. The Supplier's training material

I used the training material to reach a conclusion that was favourable to Mr M and Miss V – that the Supplier may indeed have breached regulation 14(3). That material was not however relevant to my subsequent finding that it had not materially influenced their decision to buy. So I cannot see how not disclosing it could be prejudicial to Mr M and Miss V's case.

Conclusion

For all of these reasons, I have not found it necessary to depart from my provisional findings, and I confirm them here.

My decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M and Miss V to accept or reject my decision before 8 January 2026.

Richard Wood
Ombudsman

Appendix: The Legal and Regulatory Context

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

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

Section 56: Antecedent negotiations

Section 75: Liability of creditor for breaches by a supplier

Sections 140A: Unfair relationships between creditors and debtors

Section 140B: Powers of court in relation to unfair relationships

Section 140C: Interpretation of sections 140A and 140B

Case law on section 140A

Of particular relevance to the complaint in question are:

1. The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*'), which 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*') 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 which 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*').
9. *Link Financial v Wilson* [2014] EWHC 252 (Ch) ('*Wilson*').
10. The Supreme Court's judgment in *Johnson v FirstRand Bank Ltd, Wrench v FirstRand Bank Ltd and Hopcraft v Close Brothers Ltd* [2025] UKSC 33 ('*Johnson, Wrench and Hopcraft*') – the leading case on undisclosed commission.

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) 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).

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*, the Court of Appeal said, at paragraph 56, that the effect of section 56(2) 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."*⁷

So, the Supplier is deemed to be the 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.

The law on misrepresentation

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

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

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

⁷ The Court of Appeal's decision in *Scotland* was recently followed in *Smith*.

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 7: Timeshare contracts
- 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.⁸

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

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

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

- Regulation 3: Prohibition of unfair commercial practices

⁸ See Recital 9 in the Preamble to the 2008 Timeshare Directive.

- 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, after which 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 Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (the 'Collective Investment Schemes Order')

The Collective Investment Schemes Order sets out several exceptions to the general definition of a CIS. It says (in paragraph 13 of the Schedule), "*Arrangements do not amount to a collective investment scheme if the rights or interests of the participants are rights under a timeshare contract...*"

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 UTCCR.

Part 2 of the CRA is the most relevant part 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').

Richard Wood
Ombudsman