DRN-4433372

The complaint

Mr S's complaint is, in essence, that Mitsubishi HC Capital UK Plc (the 'Lender') acted unfairly and unreasonably under the Consumer Credit Act 1974 (as amended) (the 'CCA').

Although the purchase in question was bought in the joint names of Mr and Mrs S, the associated credit agreement was in Mr S's name only. As such he is the only eligible complainant here. I will, however, refer to both Mr and Mrs S where applicable in this decision.

Background to the complaint

Mr S purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 19 September 2013 (the 'Time of Sale'). He and his partner, Mrs S, entered into an agreement with the Supplier to buy 1,500 fractional points at a cost of £9,884 (the 'Purchase Agreement'), which could be used to book holiday accommodation every even-numbered year beginning in 2014.

On 10 March 2014, Mr S purchased 1,010 additional fractional points which could be used every year. That purchase was made using other means and does not form part of the complaint.

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

Mr and Mrs S paid for the Fractional Club membership by taking finance of £10,694 from the Lender (the 'Credit Agreement') in Mr S's sole name. The finance covered the cost of the Fractional Club membership and the first maintenance fee of £810.

Mr S – using a professional representative (the 'PR') – wrote to the Lender on 12 December 2018 (the 'Letter of Complaint') to complain about the events that happened at the Time of Sale, referring to sections 75 and 75A of the CCA. The PR says:

"Our clients were on holiday in Tenerife and on arrival at Tenerife Airport they were approached by a person who asked them details of where they were staying etc. She also gave them an invitation to "look round a far superior place to stay at very little extra cost".

They decided to take up her offer and were taken to the premises of [the Supplier] where they were shown around and then faced several hours of a hard sell to join this club. The salesman made it sound very attractive. So they agreed to go ahead and bought one week at a nett cost of £10,694 as they were told that the deal involved their ability to take their children with them to the Resort. They later discovered that they could take them but they had to pay an extra fee. Not what they were told by the salesman. We emphasise that the purchase was Fractional Points which are sold under the premis (sic) that all fractional points would be sold in the future and holders of points would share in the profits accruing from such a sale.

Our clients have since discovered that firstly, it is illegal to buy Timeshare under the new Timeshare Act of 2012 as an investment and, looking at the paperwork, it states in the

contract that they will only sell Fractions if the client buys into a Freehold Property with [the Supplier.]

[The Supplier] deny selling this Fractional as an investment … and say the clients only bought for their holidays.

So why would a client spend £10694 on a weeks holiday (extra for children) at the same place every year when they could go anywhere in the world for that amount of money. They are very angry and believe they have been totally mis-sold.

Also, in trying to use their holidays, they are finding it extremely difficult to book holidays now as there is hardly any availability due to [the Supplier] being advertised on the internet e.g [third-party website] at a much reduced rate than [the Supplier] members are paying in maintenance fees. They also feel that this situation will only worsen, in view of the very extensive television advertising from [the Supplier]. They feel very badly let down by the lies which they were subjected to and are, therefore, claiming full refund under Section 75/ section 75A of the Consumer Credit Act of 1974 as this product was definitely mis-sold to them.

We enclose all relevant documents and signed Letter of Authorisation".

The Lender dealt with Mr S's concerns as a complaint and issued its final response letter on 14 February 2019, rejecting it on every ground.

Mr S 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.

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

I agreed with the outcome reached by our Investigator but wished to expand the reasoning for doing so. Therefore, I issued a provisional decision (the 'PD') setting out why I thought the complaint ought to be rejected.

In the PD, I first set out the legal and regulatory context for the complaint, as well as what I thought was representative of good industry practice at the Time of Sale:

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. I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:

- *The CCA (including Section 75, 75A and Sections 140A-140C).*
- *The law on misrepresentation.*
- *The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').*
- *Case law on Section 140A of the CCA – including, in particular:*

- *The Supreme Court's judgment in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 ('Plevin') (which remains the leading case in this area).*
- *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
- *Patel v Patel [2009] EWHC 3264 (QB) ('Patel').*
- *The Supreme Court's judgment in Smith v Royal Bank of Scotland Plc [2023] UKSC 34 ('Smith').*
- *Carney v NM Rothschild & Sons Ltd [2018] EWHC 958 ('Carney').*
- *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm) ('Kerrigan').*
- *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').*

Good industry practice – the RDO Code

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').

I then gave my provisional findings, which were as follows:

My provisional findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

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

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.

What is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

I would also like to set out my thoughts on the witness statement provided during the course of this complaint, as well as the contents of the Letter of Complaint.

The Investigator asked the PR for a copy of any written testimony from Mr S, to better understand what he thinks went wrong at the Time of Sale. The PR provided what it says is the "main witness statement for our client derived from the home interview that took place". It is unclear when this "home interview" took place, and it is also unclear whether this was conducted in person or over the telephone, but I think it is a fair assumption to make that it was prior to the Letter of Complaint being formulated, so occurred before 12 December 2018.

The statement begins in red text, saying "Witness Statement Testimonial True and Confirmed by Signature of our Client". But the statement does not contain Mr S's name or signature, so I am unable to say with any degree of confidence that it reflects what Mr S has

actually said. It is also not dated.

I also note from reading the statement, that the description of events as set out differ significantly from evidence I have seen elsewhere relating to the Time of Sale. For example, the statement says the following:

"I was enticed into an investment scheme asset-backed Timeshare property called "Fractional Ownership" This was for us to exchange from our current weeks/Points held at the resort which originally we were sold…"

This extract, which is at the start of the statement, clearly relates to a timeshare purchase which took place when Mr and Mrs S were already timeshare owners, so cannot relate to the Time of Sale. I think this because it refers to exchanging their current weeks/points that they already held. So, looking at Mr and Mrs S's purchase history, I think this most likely relates to their purchase on 10 March 2014, and not the sale being considered in this complaint. Indeed, there are several other references in the statement which make it clear that Mr S is referring to further meetings and making a further purchase. There is simply no evidence in the statement which refers to what happened at the Time of Sale and the purchase of the Fractional Club that I am considering here.

I also note that the witness statement says: "with the current judicial review coming to a conclusion, I see a resolution that is both fair and just". So, I think this shows that the statement was written much more recently than the Letter of Complaint and it is likely to have been influenced by the judgment in Shawbrook & BPF v FOS. As such, I cannot see how it can possibly reflect what was said by Mr S during any home interview the PR says it conducted prior to the date of the Letter of Complaint, as the judicial review it refers to occurred in 2023.

So, as the statement contains little, if any, evidence of what happened at the Time of Sale, and due to my doubts as to its contents and provenance, I don't think I can place much weight on the contents of the witness statement, if any at all.

In addition to the statement, I have considered what was said in the Letter of Complaint. I appreciate that the Letter of Complaint was probably prepared by the PR following a conversation with Mr S and Mrs S. After all, it contains personal information that only they would know. However, a letter of complaint (or claim) is not evidence – especially when, as here, it contains bare allegations or a mere summary of the consumer's allegations.

Direct testimony from the consumer, in full and in their own words, is important in a case like this. It allows the decision-maker to assess credibility and consistency, to know precisely what was supposedly said, and to understand the context in which it was supposedly said. Here, that simply isn't possible – I see little reference to anything which could reflect what is said to have happened at the Time of Sale. It's also important that the decision-maker can see that the Letter of Complaint genuinely reflects the consumer's testimony. Again, that simply isn't possible in this case.

With all this considered, I'm unable to place much evidentiary weight on the Letter of Complaint or the witness statement provided to me. So, I have relied on the paperwork that's been provided, and the particular circumstances of the case.

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

The CCA introduced a regime of connected lender liability under Section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that

there is an actionable misrepresentation and/or breach of contract by the supplier.

In short, a claim against the Lender under Section 75 essentially mirrors the claim Mr S could make against the Supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender does not dispute that the relevant conditions are met in this complaint. And as I'm satisfied that Section 75 applies, if I find that the Supplier is liable for having misrepresented something to Mr S at the Time of Sale, the Lender is also liable.

This part of the complaint was made by the PR exactly as I set out at the start of this decision. While I recognise that Mr S has concerns about the way in which the Timeshare membership was sold to him and Mrs S, he hasn't persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for any of the reasons he alleges. That is because there simply isn't the evidence to support what has been alleged.

As I've said, the statement provided does not offer any evidence of what happened at the Time of Sale. It provides no colour or context to support the alleged misrepresentations, and indeed the evidence provided by the Supplier directly contradicts what is set out in the Letter of Complaint.

For example, Mr S hasn't provided me with any evidence to support his allegation that he and Mrs S had difficulty using their membership to book holidays. The Supplier has given me a list of the reservations they made using their memberships, showing that they made a total of 17 bookings across eight different locations over the course of several years. I appreciate Mr S and Mrs S may not have always been able to secure their first choice of dates or locations, but I'm not persuaded the Supplier would have told them they were guaranteed availability at any time or any location.

And the same goes when regarding the PR's point that third parties were able to book accommodation at the Supplier's resorts too. There is no evidence to show that the Supplier told Mr and Mrs S at the Time of Sale that only members would be able to access the resorts, and there is nothing in the contractual documentation which would suggest this is the case. Indeed, the Supplier says that they first stayed in its accommodation on a promotional holiday before they became members, so I think it's likely that they knew that non-members could stay at the resorts as they had done so themselves.

There is also no evidence to support the allegation that Mr and Mrs S found they had to pay extra to take their children with them on holiday. They've provided no evidence of when this happened, or how much extra they had to pay and for what reason.

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

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

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

I've already summarised how Section 75 of the CCA works and why it gives Mr S a right of

recourse against the Lender. So, it isn't necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, the Lender is also liable.

The PR says in the Letter of Complaint that Mr S found it "extremely difficult" to book holidays using the Fractional Club membership. The PR has also referred to Section 75A of the Consumer Credit Act. By this, I understand the PR is alleging that there was a breach of the Purchase Agreement by the Supplier as a result of something it has done or not done.

Section 75A CCA makes further provision for a creditor to be liable for breaches by the Supplier, in the event that certain conditions are met. One of these conditions is that the cost of the goods or service is over £30,000. As Mr S's Purchase Agreement was valued at less than that amount, I think the PR has made an error here. The relevant provision is s.75 of the CCA, and I have considered if there has been a breach of contract with this in mind.

But, given the lack of evidence to support this allegation, I am not persuaded that there has been a breach of contract here which warrants compensation. In think this because Mr S has provided no evidence to show when he was unable to book the accommodation he wanted, when he wanted.

Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork signed by Mr and Mrs S states that the availability of holidays was/is subject to demand. It also looks like they made use of their fractional points to holiday on 12 occasions in the five years up to 2019. I accept that they may not have been able to take certain holidays, but I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

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

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

I have already explained why I am not persuaded that Mr S had a successful claim under Section 75 of the CCA. But, the PR also says the Fractional Club membership was sold to Mr S as an investment when it was not supposed to be. It says:

"We emphasise that the purchase was Fractional Points which are sold under the premis (sic) that all fractional points would be sold in the future and holders of points would share in the profits accruing from such a sale".

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

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

But the PR says that the Supplier did exactly that at the Time of Sale. So, for completeness, that is what I have considered here.

The PR has suggested in its response to our Investigator that the contract is not a "timeshare contract" as its terms instead fell within the definition of a Collective Investment

Scheme. But I don't agree. The Lender does not dispute, and I am satisfied that Mr and Mrs S's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations, because Mr and Mrs S acquired holiday rights when purchasing the membership. And as such, the Fractional Club membership was exempt from giving rise to a Collective Investment Scheme (see paragraphs 39-54 in Shawbrook & BPF v FOS).

However, as a possible breach of Regulation 14(3) does not fall neatly into a claim under Sections 75 or 75A of the CCA, I must turn to another provision of the CCA if I am to consider this aspect of the complaint and arrive at a fair and reasonable outcome. And that provision is Section 140A.

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."

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr and Mrs S's membership of the Fractional Club 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.140(1)(c) CCA.

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

"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the

negotiator whether or not he was the creditor's agent.' […] Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."

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

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

In the case of Scotland & Reast, the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that "negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law" before going on to say the following in paragraph 74:

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

So, the Supplier is deemed to be 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.

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

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

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 all the evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale.

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

As I have already said, although the PR has not correctly identified the Timeshare Regulations, or what these say, in effect it alleges that the Supplier breached Regulation 14(3) of the Timeshare Regulations. 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 S's share in the Allocated Property clearly, in my view, constituted an investment as it offered him and Mrs S the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

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

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

From the information presented to me, I can see the Supplier did make efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr S and Mrs S, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. For example, the Member's Declaration document says:

"We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that [the Supplier] makes no representation as to the future price or value of the Fraction."

With that said, I accept that it's possible that Fractional Club membership was marketed and sold to Mr S as an investment in breach of Regulation 14(3) given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Club membership without breaching the relevant prohibition.

However, I don't think it's necessary to make a finding on this point because, as I'll go on to explain, I'm not currently persuaded that would make a difference to Mr S's complaint anyway.

<u>Was the credit relationship between the Lender and Mr S rendered unfair?</u>

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.

I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in Carney and Kerrigan (respectively) on causation.

In Carney, HHJ Waksman QC said the following in paragraph 51:

"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"

And in Kerrigan, HHJ Worster said this in paragraphs 213 and 214:

"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court may make an order if it determines that the relationship is unfair to the debtor. […]

[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr S and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) which, having taken place during its antecedent negotiations with them, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender) led them to enter into the Purchase Agreement and him into the Credit Agreement is an important consideration.

On my reading of the evidence provided, I'm not persuaded that was what is more likely than not to have happened at the Time of Sale. I think this because, as I've said before, there is simply no evidence about what happened at the Time of Sale which supports this allegation. It is set out in the Letter of Complaint, but this is not evidence. There is little evidence which makes me think Mr and Mrs S were motivated to purchase their Fractional Club membership at the Time of Sale due to the potential profit it could bring. I just don't think, on the balance of probabilities, that this was likely. Given that they were at the Supplier's resort on a promotional holiday, I think they were interested in taking holidays, and specifically the type of holidays the Supplier could give them.

Mr S and Mrs S used their memberships to book holidays in the UK, Tenerife, Costa del Sol and Austria, so I don't agree that they were limited, as the PR says, to staying in the same place. So, based on everything I've seen, I think those holiday rights were the reason they ultimately decided to purchase the membership.

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 S's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests that he and Mrs S would have pressed ahead with the purchase for the holidays it offered, 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 S and the Lender was unfair to him even if the Supplier had breached Regulation 14(3).

In conclusion, therefore, given all the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Mr S was unfair to him for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of his complaint on that basis.

Responses to the PD

The Lender agreed with the findings in my PD.

The PR responded after the deadline had passed, saying it would ask for Mr S's opinion. It then produced a "signed personal statement" which I can see was signed by Mr S. I'll give my thoughts on exactly what he's said below where I set out my findings, but I've summarised what I think are the key points:

- Mr S purchased the Fractional Club membership in the understanding that it was a financial investment.
- He and Mrs S were led to believe that they were purchasing a share in property ownership.
- Once he and Mrs S became members of the Fractional Club, they found it difficult to make bookings and were constrained by availability and the number of points they held.
- He and Mrs S could rarely book holidays outside of Spain and these trips were of a lower standard than they expected.
- They were told the resort was exclusive to members and their families, but later found out that non-members could stay at the resort.
- The sale was considerably pressured.

The statement concludes by saying that:

"We genuinely believed we were investing in property with the expectation of future profit, justified by annual fees for maintenance and exclusivity."

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.

And having done so, and having considered everything that has been submitted in response to my PD, I remain satisfied that this complaint ought not to be upheld, for broadly the same reasons I set out in the PD.

I will address the new information provided by the PR, but in doing so, I note again that my role as an Ombudsman is not to address every single point that has been made in response. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So,

while I have read the PR's response in full, I will confine my findings to what I think are the salient points.

Firstly, I'll consider Mr S's witness testimony. In order to do this, I need to first think about when it was written and how this might affect what was written. The testimony is dated 12 June 2025. By that stage, Mr S – and their PR – had read what I've had to say about the complaint in some detail, and my reasons for saying it. So, for the reasons I'll go on to explain, it's difficult for me to place much weight on it.

I'm mindful that Mr S – or at least his PR – will have read, or been made aware of, the outcome of *Shawbrook & BPF v FOS*. And reading the testimony, I think it is influenced by the focus of that case on the selling of fractional timeshares as investments. Yet there is very little detail about exactly what the Supplier's sales agents said during the sales meetings to persuade him and Mrs S that the fractional product should be seen as an investment opportunity. I am also conscious that Mr S's testimony was produced after I sent my PD, in which I highlighted the lack of evidence on this very point, so there is a real risk the evidence has been influenced by being involved in the complaint process. That is not to say Mr S has not given his honest recollections, rather it is my view that his memories are likely affected by what was written in my PD.

With that said, Mr S's testimony doesn't persuade me to reach a different outcome than the one I reached in my PD in any event. I'll explain why.

Regarding what the Supplier's sales agents told Mr and Mrs S at the Time of Sale, Mr S says:

"When I initially purchased a fractional ownership in the property, I did so on the understanding that it was a sound investment, promising both flexibility for holidays and a prospect of [a] financial return. This belief was reinforced when I acquired an additional 1,010 fractional points on 10 March 2014. The sales process was marked by considerable pressure and hard selling, with repeated assurances that our investment would yield substantial returns once the property was sold after a set period".

But this doesn't tell me much, if anything, about what was said by the Supplier to Mr S to persuade him that Fractional Club membership was an investment from which he could expect to receive a profit.

Mr S says that he was told the purchase was a "*fractional ownership investment*", not a timeshare, and that "*[the] assertion that we understood the Fractional Club Membership to be a timeshare contract is incorrect*". But this statement is undermined, in my opinion, by what Mr S said elsewhere in his testimony about the holiday rights, and by his actions as a member of the Fractional Club. For example, he clearly knew that he could take holidays using the membership as he says he was promised exclusive access to the resorts. And as I've said above, I am mindful that Mr S and the PR are likely to have been influenced by the focus of *Shawbrook & BPF v FOS* on the selling of fractional timeshares as investments.

Mr S says in his testimony that he became aware of "*recent advertising*" which revealed that non-members could use the resort. He says that the exclusive use of the resort was a "key selling point". I'm aware that Mr and Mrs S were attending a promotional holiday with the Supplier as non-members at the Time of Sale, so I think they knew from the outset that non-members could also stay at the Supplier's resorts.

I'm not surprised that the bookings Mr and Mrs S made were constrained by both the availability of accommodation and the number of points they owned as this is how the membership worked. But in any case, I can't see that Mr and Mrs S have lost out as a result

as they made 17 bookings using their two memberships. Indeed, they did this despite there being an additional constraint on the first Fractional Club membership, in that those points could only be used in even-numbered years.

Regarding the allegation that the sale was pressured, I acknowledge that Mr and Mrs S may have felt weary after a sales process that went on for a long time. But they say very little about what was said and/or done by the Supplier during the sales presentation that made them feel as if they had no choice but to purchase the Fractional Club membership when they simply didn't want to. They were also given a 14-day cooling off period which they could have used and have not provided any explanation as to why they didn't cancel the Purchase Agreement within that period. Further, they went on to make a second purchase with the Supplier the following year, which I find difficult to understand if they were pressured into making the first purchase. With all that being the case, I find there to be insufficient evidence to demonstrate that Mr and Mrs S decided to purchase the Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

In summary, Mr S's witness testimony doesn't persuade me that any breach of the prohibition under Regulation 14(3) by the Supplier was material to his and Mrs S's decision to enter the Purchase Agreement and to his decision to enter the related Credit Agreement. As I said in my PD, I think Mr and Mrs S ultimately decided to purchase the Fractional Club membership because they were interested in the holiday accommodation it could provide them.

Other matters

I have also reconsidered everything else that I said in the PD in response to the other aspects of Mr and Mrs S's complaint. The PR hasn't provided any further evidence or arguments in relation to these other points, so I see no reason to depart from my findings on these as set out in the PD.

Conclusion

Given the facts and circumstances of this complaint, I don't think the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs S's Section 75 claims, and I'm not persuaded that the Lender was party to a credit relationship with them 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.

My final decision

For the reasons I've given above, I do not uphold Mr and Mrs S's complaint against Mitsubishi HC Capital UK Plc.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 14 July 2025.

Andrew Anderson
Ombudsman