DRN-4953848

The complaint

Mrs P's complaint is, in essence, that Mitsubishi HC Capital UK PLC trading as Novuna Personal Finance (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with her 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.

The complaint is only in Mrs P's name as only she was named on the credit agreement. But I'll refer to both Mrs P and Mr B throughout where appropriate as the product in question was in both of their names.

What happened

Mrs P and Mr B purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 1 October 2013 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,500 fractional points at a cost of £9,900 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which means it gave Mrs P and Mr B 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.

Mrs P and Mr B paid for their Fractional Club membership by taking finance of £10,694 from the Lender in Mrs P's name only (the 'Credit Agreement'). The loan was for slightly more than the cost of Fractional Club membership as Mrs P also borrowed more to pay for the first year of maintenance fees.

Mrs P – using a professional representative (the 'PR') – wrote to the Lender on 30 May 2018 (the 'Letter of Complaint') to complain about misrepresentations by the Supplier at the Time of Sale giving her a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.

They said:

- Mrs P and Mr B were told on several occasions that the Resort would be sold in 19 years and that they would make a substantial profit when it was sold
- They were told that they could book holidays in the UK using their points, but although they tried on several occasions, they were told there was no availability.
- They were given a catalogue of various resorts worldwide and told that the Supplier owned them and holidays were freely available, but this was not true.

They also made the following point:

- The maintenance fees were also climbing steading every year and by 2018 they had risen to 1,200 Euros per year.

Mrs P says that she has a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, she has a

like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mrs P.

The Lender dealt with Mrs P's concerns as a complaint and issued its final response letter on 13 August 2018, rejecting it on every ground.

Mrs P 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. In their findings, the Investigator addressed both Mrs P's Section 75 claim for misrepresentations and whether they felt there was an unfair credit relationship between Mrs P and the Lender under Section 140A of the CCA.

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

In their response, PR said they felt there was an unfair relationship between Mrs P and the Lender as they felt the product was not a timeshare contract but rather, a collective investment scheme (CIS), which the Supplier was not qualified nor authorised to advise on or sell to Mrs P.

I issued a provisional decision on this case dated 10 July 2024, in which I set out my reasoning as to why I didn't think the complaint should be upheld. The deadline for both parties to respond to this has now passed and so I'm finalising my findings within this final decision.

I have summarised my provisional decision below:

- In relation to the alleged misrepresentations at the Time of Sale, I hadn't seen sufficient evidence to say that, on the balance of probabilities, there were any false statements of fact made to them by the Supplier as alleged. So, as I didn't think there was an actionable misrepresentation by the Supplier, I didn't think the Lender acted unfairly or unreasonably when it declined Mrs P's Section 75 claim.
- Mrs P (and Mr B) said they were unable to holiday where and when they wanted to which on my reading of the complaint, suggested they felt there was a breach of contract in relation to the Purchase Agreement which could also be considered under Section 75. While I accepted that they may not have been able to take certain holidays, I hadn't seen enough to suggest that the Supplier had breached the terms of the Purchase Agreement.
- Mrs P suggested the product was sold to them as an investment. I provisionally concluded that while it was *possible* it was marketed and sold to them as an investment, I didn't think it was likely in this case that the Supplier breached the prohibition on selling timeshares as investments, based on the lack of evidence provided to support that allegation and the fact that the judgment in the Judicial Review didn't find that FPOC memberships, like Mrs P and Mr B's, were inevitably sold as investments.
- I also said that even if I was wrong about the membership being sold as an investment, I wasn't currently persuaded that the investment element(s) of the membership were important enough to Mrs P and Mr B's purchasing decision to render her credit relationship with the Lender unfair to her if the membership had, in fact, been sold as an investment.
- Lastly, Mrs P also said the maintenance fees are climbing steadily every year. I explained I was unclear what exactly their complaint was in relation to this point. But, in any event, I explained I could see from the sales paperwork they were provided with at the Time of Sale that they were made aware of these fees and that these could increase. I also said Mrs P hadn't provided details of all the fees they have had

to pay under the Purchase Agreement and how much these were each year. So, I couldn't see that this point would cause any unfairness in the credit relationship which requires a remedy.

- So, overall, I intended to reject the complaint because I didn't think that the Lender acted unfairly or unreasonably when it declined Mrs P's Section 75 claim, and I wasn't persuaded that the Lender was party to a credit relationship with Mrs P under the Credit Agreement that was unfair to her.

The Lender did not respond to my provisional decision. The PR did respond on Mrs P's behalf and provided a witness statement with her and Mr B's comments regarding the sale, which I've considered along with everything else which has been provided previously. I should note here that I've focused on the comments provided by Mrs P and Mr B in relation to the 2013 purchase which is the subject of this complaint. They've also provided comments in relation to a further purchase made in 2014, but that isn't part of this complaint as it was funded by a different lender.

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4 R 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 and Sections 140A-140C).
- The law on misrepresentation.
- The Timeshare Regulations.
- The Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR')
- The CPUT 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).
    - *Patel v Patel* [2009] EWHC 3264 (QB).
    - 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 they represented a minimum standard. And as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time – which, in this complaint, includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code').

What I've decided – and why

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

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

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.

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

As I outlined in my provisional decision, 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 Mrs P 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 Mrs P at the Time of Sale, the Lender is also liable.

This part of the complaint was made for several reasons that I set out at the start of this decision. The PR didn't specifically respond to my conclusions on this element of the complaint, but provided some further comments from Mrs P and Mr B, which I've considered.

I recognise that Mrs P and Mr B have concerns about the way in which their Fractional Club membership was sold, but I remain unpersuaded that there was an actionable misrepresentation by the Supplier at the Time of Sale for the reasons they allege. And I say that because:

While they've said they were told the Resort would be sold in 19 years and that they would make a substantial profit when it was sold, they haven't explained how this statement was made to them, why they consider it to be an untrue statement or provided any evidence to support it. This appears to relate to the allegation that the product was sold as an investment, which I address further below. For the reasons I'll explain, had Mrs P and Mr B been told Fractional Club membership was an investment (and I make no finding on that point here), that would not have been untrue.

Regarding the allegations about being told holidays were freely available and that they could book holidays in the UK, but then weren't able to, this was presented as a misrepresentation

by the PR. But, since this allegation relates to not being able to holiday where and when they wanted to, I still think this is better dealt with as a claim for breach of contract. I've therefore addressed this point separately below.

Mrs P and Mr B initially said they were given a catalogue of various resorts worldwide and told that the Supplier owned them, but this wasn't true. However, I explained in my provisional decision that it wasn't clear what catalogue they're referring to or why they say this statement was untrue.

In their further comments, they've clarified that they were told that only members could stay at the resorts the Supplier offered. They've said the resorts were in the Supplier's catalogue which they were able to view when they accessed their personal login, and this gave the impression that the Supplier owned all of them. However, they discovered that other timeshare suppliers owned other apartments within the different resorts and so members of other timeshare suppliers could also use the resorts. They said this also meant they weren't given the same standard of accommodation as that which was shown in the catalogue and during the sales process. They said on one particular holiday, they had inadequate directions to find the accommodation and again, the communal areas were used by those who were not members with the Supplier.

However, I remain unpersuaded any false statement of fact was made regarding this point. I say this because Mrs P and Mr B still provide little to no detail as to what exactly they were told at the Time of Sale, by whom and in what context. What they've had to say also suggests that it was logging in to view the resorts later which gave them the impression they refer to, as opposed to a false statement of fact at the Time of Sale. And, what they've said doesn't suggest there were any false statements of existing fact made at the Time of Sale regarding the accommodation being easy to find (which is rather open to interpretation anyway) or the communal areas not being used by other non-members.

What's more, as there's nothing else on file that persuades there were any false statements of existing fact made to Mrs P and Mr B 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 Mrs P 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 Mrs P 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.

As I explained in my provisional decision, although the PR didn't make an explicit claim that there was a breach of Mrs P's contract, I still think parts of the complaint can only properly be considered by considering this issue – namely, whether Mrs P and Mr B were able to get the holidays they were entitled to from the Fractional Club.

Again, the PR didn't respond specifically to my conclusions on this part of the complaint, but provided some further comments from Mrs P and Mr B.

Mrs P and Mr B say that they could not holiday where and when they wanted to – which, on my reading of the complaint, suggests that they considered that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement. 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 Mrs P and Mr B explains that the availability of holidays was subject to demand.

Further, Mrs P and Mr B have said they were interested in canal holidays but were told there was no availability for non-members. Since they were members by virtue of purchasing the product, I'm unclear what is meant by this. But, in any event, the Supplier has confirmed a canal holiday has been offered to Mrs P and Mr B previously when they enquired about this (as well as other dates and destinations), but they never responded to confirm this booking.

Mrs P and Mr B have also said they were interested in visiting Edinburgh but were informed there was no availability for the next five years. The Supplier has acknowledged that Edinburgh is not one of the destinations they offer as part of the membership. But they've explained that hotel nights can be booked through their Travel Department on a part points and part cash basis. The Supplier has confirmed that Mrs P and Mr B did request a reservation for Edinburgh and a quotation was sent to them but again, they did not respond to confirm this booking.

In their further comments in response to my provisional decision, Mrs P and Mr B said that it was some places being already booked which was the issue when they tried to access the holidays they wanted. For example, they were unable to book a canal boat holiday due to high demand. They've said they therefore had to compromise and choose other places which did have space. This suggests to me that they were ultimately able to take some holidays and therefore the Supplier did provide accommodation under the membership, albeit not necessarily Mrs P and Mr B's first choices.

So, whilst I accept that they may not have been able to take certain holidays, 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, I do not think the Lender is liable to pay Mrs P any compensation for a breach of contract by the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

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

I have already explained why I am not persuaded that the contract entered into by Mrs P 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 Mrs P also says that the credit relationship between her 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 she has concerns about. It is those concerns that I explore here.

As I explained in my provisional decision, Section 140A of the CCA is relevant law in the context of this complaint, I do have to consider it. So, in arriving at a fair and reasonable outcome to this complaint, it will be helpful to consider whether an unfair credit relationship is likely to have come into existence between Mrs P and the Lender.

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 Mrs P'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 v British Credit Trust Limited* [2014], the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that "*negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law"* before going on to say the following in paragraph 74:

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

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

What's more, the scope of that responsibility extends to both acts and omissions by the Supplier as the Supreme Court in *Plevin* made clear when it referred to 'acts or omissions' when discussing Section 56. And as Section 56(3)(b) says that an applicable agreement can't try to relieve a person from liability for 'acts or omissions' of any person acting as, or on behalf of, a negotiator, it must follow that the reference to 'omissions' would only be necessary because they can be attributed to the creditor under Section 56.

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 v Patel* [2009] EWHC 3264 (QB) (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 Mrs P 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. I will explain why. When coming to that conclusion, and in carrying out my analysis, I have looked at all the evidence provided to me from both parties, including the Supplier's sales and marketing practices at the Time of Sale. I've also considered the training material that I

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

think is likely to be relevant to the sale, along with the further information provided by the PR and Mrs P in response to my provisional decision.

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

The main reason why Mrs P says her credit relationship with the Lender was unfair to her is the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

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

The Lender does not dispute, and I am satisfied, that Mrs P's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations. I've noted that PR has said that in their view, the product was a CIS. However, that is a matter of law and was decided in the aforementioned Judicial Review (*Shawbrook & BPF v FOS*), when such a finding was rejected by the judge (at 39 to 54). It follows, as Mrs P and Mr B acquired timeshare rights under the purchase, it did not amount to a CIS.

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.

Mrs P and Mr B'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 the sale of 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 Mrs P and Mr B 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 or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered [him/her/them] the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mrs P and Mr B, 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 Mrs P and Mr B as an investment.

With that said, 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 *possible* that Fractional Club membership was marketed and sold to them 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.

So, I have taken all of that into account. However, there is no substance to the allegation made here. Mrs P hasn't described in any detail what was said to her, by whom and in what circumstances, including in their response to my provisional decision. Apart from making the bare allegation that she was told she could sell the membership and make a profit; Mrs P has only said she was told 'the Resort' (presumably meaning the Allocated Property) would be sold after 19 years which in my view seems only to represent a factually accurate description of how the membership worked.

In response to my provisional decision, Mrs P said that the Supplier told her that she could easily sell her membership, making a profit as the prices went up. But this is a different allegation to what PR initially said – that a profit could be made when the membership ended after 19 years and the Allocated Property was sold. Having reviewed all of the evidence and what I know about how the Supplier sold memberships, I can't see anything that said, or gave the impression that, Fractional Club membership could be sold to another for a profit. I am aware that the Supplier did agree to transfer memberships if its customers were able to sell them on the open market, but I don't think that amounted to a representation that Mrs P would be able to sell her membership at a profit. Further, such a statement would place the Supplier in a difficult position as, if Mrs P tried to sell her membership shortly after taking it out, it's likely she would blame the Supplier if she wasn't able to make a profit. Given that, I think it's inherently implausible that such a statement was made. And, with that being the case, I don't think there is sufficient evidence to say on the balance of probabilities that it's likely the Supplier breached the prohibition on selling timeshares as investments.

But even if I am wrong to conclude that, on this occasion, membership was unlikely to have been sold in that way given what I have already said about Mrs P's recollections of the sales process at the Time of Sale, I am not persuaded that would make a difference to the outcome in this complaint anyway.

Was there an unfair relationship between the Lender and Mrs P?

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 still seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mrs P and the Lender that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) (which, having taken place during its antecedent negotiations with Mrs P, 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) lead her to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

But as I've already said, beyond making the bare allegation, there hasn't been any description or further supporting evidence provided in Mrs P's initial recollections of the sales process at the Time of Sale which makes me think it's likely that the Supplier led them to believe that the Fractional Club membership was an investment from which they would make a financial gain nor was there any evidence to support that they were induced into the purchase on that basis. I acknowledge that at the end of the comments provided in response to my provisional decision, Mrs P said the main reason they bought membership was because they would make a financial profit once they no longer wished to make use of the holidays. But, the evidence doesn't point to that being the case and this has been said at a late stage. The majority of the comments from Mrs P relate to quality and other issues with the holidays. So, I think that is the main reason behind the complaint.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mrs P and Mr B'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, given what they've said regarding their interest in certain holidays and that this is what the majority of their testimony, including the comments provided in response to my provisional decision, relates to, 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 Mrs P and the Lender was unfair to her even if the Supplier had breached Regulation 14(3).

Other concerns

PR also mentioned in their Letter of Complaint that maintenance fees are climbing steadily every year and last year they had risen to 1,200 Euros per year.

Mrs P and Mr B have clarified their point here is that they say they weren't told the fees would rise over time, in line with inflation.

But as I explained in my provisional decision, I can see from Mrs P and Mr B's signed Information Statement that it explained that a management fee is charged each year, is budgeted annually and is subject to increase or decrease as determined by the costs of managing the scheme and are payable annually in advance each year. Mrs P and Mr B's further comments also suggest that maintenance fees were discussed and in some detail. For example, they mention being given an example to help them understand the reason for the fees. But, importantly, they've not said they were told explicitly, or were led to believe, that the fees wouldn't rise. So, I can't see they were misled about the fees nor that the information they were given led to an unfair debtor-creditor relationship.

Mrs P and Mr B also haven't provided details of all the annual management fees they have had to pay under the purchase agreement and how much these were each year.

So, for these reasons, I don't think this caused any unfairness in the credit relationship between Mrs P and the Lender which requires a remedy.

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

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mrs P's Section 75 claim, and I don't think that the Lender was party to a credit relationship with her under the Credit Agreement that was unfair to her 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 her.

My final decision

For the reasons set out above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs P to accept or reject my decision before 13 September 2024.

Fiona Mallinson
Ombudsman