DRN-5025696

The Complaint

Ms D'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') in relation to a loan taken to purchase a timeshare.

Background to the Complaint

Ms D purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 10 July 2012 (the 'Time of Sale'). She entered into an agreement with the Supplier to buy 1,050 fractional points at a cost of £13,899[1] (the 'Purchase Agreement').

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

Ms D paid for her Fractional Club membership by taking finance of £13,899 from the Lender (the 'Credit Agreement').

Ms D – using a professional representative (the 'PR') – wrote to the Lender on 6 September 2018 (the 'Letter of Complaint') to complain about the sale of her membership of the Fractional Club.

In the Letter of Complaint, Ms D said that she was told by the Supplier at the Time of Sale that she could take a variety of sports holidays were she to become a Fractional Club member – which she said was untrue.

As a result, Ms D said that she had a claim against the Supplier, and therefore, under Section 75 of the CCA, she had a like claim against the Lender, who, with the Supplier, is jointly and severally liable to her.

The Lender appears to have passed Ms D's complaint to the Supplier. It shared its thoughts on the matter in September 2018. It said that she got in contact with it in 2016 because she thought she had sold her Fractional Club membership to a third party. And it was during that conversation that the Supplier says she informed it that it was her personal circumstances stopping her from holidaying at that time.

The Supplier then went on to say that Ms D confirmed on a 'Holiday Planner', at the Time of Sale, that she was purchasing Fractional Club membership for "value for money", "[flexibility]" and to visit places she would not normally go to. The Supplier said that Ms D had been on 6 holidays in the 5 years that her membership was active, after which it was suspended for non-payment of the 2017 annual management charge.

[1] Including £798 for the first year's annual management charge.

The Supplier also said that it did offer sports-based holidays to Fractional Club members as it had its own ski resort, resorts with golf courses, tennis courts as well as access to a variety of other sports facilities.

On 19 September 2018, the Lender dealt with Ms D's concerns as a complaint and issued its final response letter, rejecting them.

Ms D then referred the complaint to the Financial Ombudsman Service. Having asked the Lender for its file on the complaint, it restated its position, saying that it still thought that Ms D's concerns had little merit. But in addition to that, it also thought that it had a defence to her Section 75 claim under the Limitation Act 1980 (the 'LA').

The complaint was then assessed by an Investigator who concluded that it was fair and reasonable to reject Ms D's complaint about the Lender's handling of her Section 75 claim given the timing of it and what the LA says about the applicable limitation period. But the Investigator did not stop there. He went on to consider whether the credit relationship between the Lender and Ms D was unfair to her for the purposes of Section 140A of the CCA given the nature of her concerns. But the Investigator was not persuaded that it was.

The PR, on Ms D's behalf, disagreed with the Investigator's assessment, submitted what it says are notes from a meeting with Ms D about the sale of her Fractional Club membership and asked for an Ombudsman's decision – which is why it was passed to me.

It is not necessary to set out, in detail, the reasons why an informal resolution could not be reached following the Investigator's assessment. But, in summary, they included the following:

1. Ms D was held in a high-pressured sales meeting for hours. And due to high demand, she had to make a decision then and there.
2. Ms D was not sold a timeshare but an attractive investment because her share in the Allocated Property would make her a healthy profit.
3. Ms D was told by the Supplier at the Time of Sale that her annual management charges would always be around £900.

I issued a Provisional Decision ('PD') rejecting Ms D's complaint. I was not persuaded that it was unfair or unreasonable of the Lender to reject her claim under Section 75 of the CCA. I recognised that she had a number of other concerns about the way in which her Fractional Club membership was sold, and as most of those concerns do not fall neatly into a claim under Section 75 of the CCA, I thought that they had to be considered with another provision of the CCA in mind (Section 140A) if I was to arrive at a fair and reasonable outcome. And having done that, I was not persuaded that Ms D's credit relationship with the Lender under the Credit Agreement and related Purchase Agreement was unfair for the purposes of that particular provision.

The Lender had nothing new to add in response to my PD. The PR, on Ms D's behalf, disagreed and asked me to consider the suggestion that the Supplier had overvalued her share in the Allocated Property and misled her in relation to the return she might get when the Allocated Property is sold.

The Legal and Regulatory Context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under rule 3.6.4 of the Financial Conduct Authority's (the 'FCA') Dispute Resolution Rules ('DISP') to take into account: relevant (i) law and regulations; (ii) regulators' rules,

guidance and standards; and (iii) codes of practice; and (when appropriate), what I consider to have been good industry practice at the relevant time.

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

- The CCA (including Section 75 and Sections 140A-140C).
- The law on misrepresentation – including the Misrepresentation Act 1967.
- The LA.
- 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 & Reast v British Credit Trust Limited* [2014] EWCA Civ 790 (*'Scotland and Reast'*)
    - *Deutsche Bank (Suisse) SA v Khan and others* [2013] EWCA Civ 1149
    - *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').

My Findings

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 still do not think this complaint should be upheld. I realise that will be disappointing for Ms D. But I hope she understands why.

Before I get on to my findings, I want to make it clear, as I did in my PD, 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 alleged misrepresentation(s) 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.

Liability under Section 75, therefore, is not based on anything the lender does wrong, but upon the misrepresentation and/or breach of contract by the supplier, for which Section 75 imposes on the lender a "like claim" to that which the borrower enjoys against the supplier. If the lender is notified of a valid Section 75 claim, it should pay its liability. And if it fails or refuses to do so, that failure or refusal can give rise to a complaint to the Financial Ombudsman Service.

So, when a complaint is referred to the Financial Ombudsman Service on the back of an unsuccessful attempt to advance a Section 75 claim, the act or omission that engages the Service's jurisdiction is the creditor's refusal to accept and pay the debtor's claim – rather than anything that occurs before the claim was put to the creditor, such as the supplier's alleged misrepresentation(s) and/or breach(es) of contract.

As a result, the 6 and 3 year time limit (under rule 2.8.2 (2) of the Dispute Resolution Rules ('DISP') in the Financial Conduct Authority's (the 'FCA') Handbook of Rules and Guidance) to complain about an unsuccessful attempt to initiate a Section 75 claim does not usually start until the respondent firm answers and refuses the claim.

In this case, as the Lender refused to accept and pay Ms D's claim on 19 September 2018, her primary time limit (of 6 years) only started at that time. And as this complaint about the Lender's handling of that claim was referred to the Financial Ombudsman Service on 5 November 2018, it was made in time for the purpose of the relevant rules on the Service's jurisdiction.

However, as I said in my PD, I do not think it would be fair or reasonable to uphold this complaint for reasons relating to Ms D's Section 75 claim. As a general rule, creditors can reasonably reject Section 75 claims that they are first informed about after the claim has become time-barred under the LA, as it would not be fair to expect creditors to look into such claims so long after the liability arose and after a limitation defence would be available in court. So, it is relevant to consider whether Ms D's Section 75 claim was time-barred under the LA before she put it to the Lender.

A claim under Section 75 is a "like" claim against the creditor. It essentially mirrors the claim the consumer could make against the Supplier.

A claim for misrepresentation against the Supplier would ordinarily be made under Section 2(1) of the Misrepresentation Act 1967. And the limitation period to make such a claim expires six years from the date on which the cause of action accrued (see Section 2 of the LA).

But a claim, like the one in question here, under Section 75 is also "an action to recover any sum by virtue of any enactment" under Section 9 of the LA. And the limitation period under that provision is also six years from the date on which the cause of action accrued.

The date on which the cause of action accrued was the Time of Sale. I say this because

Ms D entered into the purchase of Fractional Club membership at that time based on the alleged misrepresentation(s) of the Supplier – which she says she relied on. And as the loan from the Lender was used to help finance the purchase, it was when she entered into the Credit Agreement that she suffered a loss.

Ms D first notified the Lender of her Section 75 claim on 6 September 2018. And as more than six years had passed between the Time of Sale and when she first put her claim to the Lender, I still do not think it was unfair or unreasonable of the Lender to reject Ms D's claim.

Section 140A of the CCA: did the Lender participate in an Unfair Credit Relationship?

I have already explained why I am not persuaded that Ms D's complaint about the Lender's handling of her Section 75 claim should succeed. But as I've said before, she has a number of other concerns about the way in which her Fractional Club membership was sold, and as most of those concerns do not fall neatly into a claim under Section 75 of the CCA and must be considered with another provision of the CCA (Section 140A) in mind if I am to arrive at a fair and reasonable outcome, I have considered all of her concerns here – which, in summary, include the following:

1. She was told by the Supplier at the Time of Sale that she could take a variety of sports holidays were she to become a Fractional Club member – which was untrue.
2. She was pressured into purchasing Fractional Club membership.
3. The Supplier marketed and sold Fractional Club membership to her at the Time of Sale as an investment – which, in response to my PD, the PR says was misleading because the Supplier overvalued the Allocated Property.
4. She was told by the Supplier at the Time of Sale that her annual management charges would always be around £900 – the upshot of which seems to me to be that that was not the case.

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) (Section 140A(1) of the 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 Lender's behalf before the making of the Credit and Purchase Agreements.

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 does not dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Ms D'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."[2]

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

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

However, an assessment of unfairness under Section 140A is not 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 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 is not 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 Ms D 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 to Ms D 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;
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; and
4. The inherent probabilities of the sale given its circumstances.

I have then considered the impact of (1) to (4) on the fairness of the credit relationship between Ms D and the Lender.

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

As I have said above, Ms D has a number of concerns about the way in which her Fractional Club membership was sold – which I have set out above.

They include the suggestion that the Supplier misrepresented Ms D's Fractional Club membership at the Time of Sale by telling her that she could take a variety of sports holidays as a member – which she said, in the Letter of Complaint, was untrue.

The questions I have considered, therefore, are:

(1) Did the Supplier make the representation in question?

(2) If the answer to Question 1 is Yes, did the representation amount to a false statement of existing fact or a statement of opinion that - having amounted to a false statement of existing fact - can be shown to be an opinion that the Supplier did not hold or could not reasonably have held?

And

(3) If the answer to Question 2 is Yes, did the false statement induce Ms D into purchasing membership of the Fractional Club?

The Supplier says that it did offer sports-based holidays to Fractional Club members as it had its own ski resort, resorts with golf courses, tennis courts as well as access to a variety of other sports. And I remain persuaded that was likely to have been the case.

I say that because, under Regulation 12 of the Timeshare Regulations, the Supplier was required to give Ms D "key information" in relation to the Purchase Agreement, ensuring that such information met the requirements of that particular provision. 'Key information' was a defined term in the Timeshare Regulations and means the information required by parts 1, 2 and 3 of a "standard information form" – which was set out in Schedule 1 of those Regulations for the purposes of "timeshare contracts".

The standard information form given to and signed by Ms D at the Time of Sale referred her to the "Owners Guide" if she wanted more information on the facilities (sports related or otherwise) available to her as a Fractional Club member at the Supplier's resorts. And having looked at the Owners Guide that's likely to have been in circulation at the Time of Sale, I can see that it referred to sports facilities at some of the Supplier's resorts.

What's more, having looked through Ms D's booking history, I can see that she booked a holiday (that was later cancelled) at one of the Supplier's **golf** and spa resorts (my emphasis added). And with that being the case, I am not persuaded that the Supplier is likely to have misrepresented Fractional Club membership for the reason the Letter of Complaint gave.

In response to the Investigator's assessment, it was said that Ms D was told by the Supplier at the Time of Sale that her annual management charges would always be around £900 – the upshot of which seems to me to be that that was not the case.

However, there was little to nothing about what was said, by who and in what circumstances in the response to the Investigator's assessment to give this particular assertion the colour and context it needs to succeed. That has not changed since my PD. And as the standard information form I have referred to above indicated on page 7 that Ms D's annual management charges were "*subject to increase or decrease as determined by the costs of managing the Project […]",* which is at odds with the allegation in question, I am not persuaded by what I have seen that the Supplier misrepresented Fractional Club membership for this reason either.

It was also said in response to the Investigator's assessment that Ms D was pressured into purchasing Fractional Club membership at the Time of Sale. I acknowledge that she may have felt weary after a sales process that went on for a long time. But, despite the PR submitting what it says are the notes of a meeting between it and Ms D in relation to the sale of her Fractional Club membership, she says little about what was said and/or done by the Supplier during her sales presentation that made her feel as if she had no choice but to purchase Fractional Club membership when she simply did not want to.

Ms D was also given a 14-day cooling off period and she has not provided a credible explanation for why she did not cancel her membership during that time. Indeed, as she appears to have used her Fractional Club membership to holiday 6 times in 5 years, I find that difficult to understand if the reason she went ahead with the purchase in the first place was because she was pressured into it. And with all of that being the case, I do not think Ms D made the decision to purchase Fractional Club membership because her ability to exercise choice was significantly impaired by pressure from the Supplier.

Overall, therefore, I am not persuaded that Ms D's credit relationship with the Lender was rendered unfair to her under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why she says that her credit relationship with the Lender was unfair to her. And that is the suggestion that Fractional Club membership was marketed and sold to her as an investment.

Was Fractional Club membership marketed and sold at the Time of Sale as an investment?

It is not in dispute, and I am satisfied, that Ms D's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations. And under Regulation 14(3) of those Regulations, the Supplier was prohibited from marketing or selling membership of the Fractional Club as an investment. Yet Ms D says that the Supplier did just that.

This is what the provision in question 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."

However, 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 used that definition in my PD and I will continue to do so in this Final Decision.

Ms D's share in the Allocated Property clearly constituted an investment, in my view, as it offered her the prospect of a financial return – whether or not, like all investments, that was more than what she 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 does not 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 Ms D in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier told her or led her to believe that Fractional Club membership offered her the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

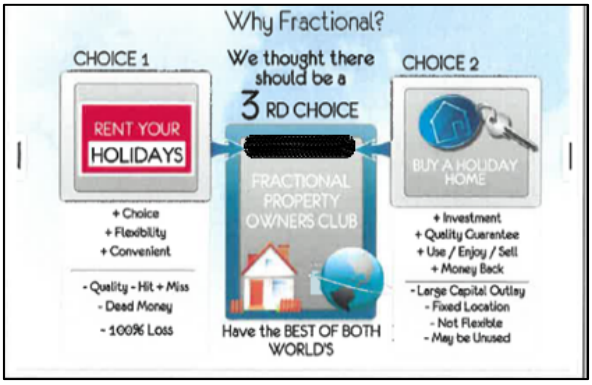
From the limited information I have seen on file, the Supplier did make efforts in some of its paperwork to avoid describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Ms D, the financial value of her share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them.

But with that said, during the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier provided training material used to prepare its sales representatives – including a document called "2011 Spain PTM FPOC 1 Practice Slides Manual" (the '2011 Fractional Training Manual').

As I understand it, the 2011 Fractional Training Manual was used throughout the sale of the Supplier's first version of the Fractional Property Owners Club - which it sold towards the end of 2013. It is not entirely clear whether Ms D would have been shown the slides included in the Manual. But it seems to me to be reasonably indicative of:

(1) the training the Supplier's sales representatives would have got before selling Ms D's Fractional Club membership; and
(2) how the sales representatives would have framed the sale of Fractional Club membership to Ms D.

Having looked through the manual, my attention is drawn to page 6 (of 41) – which includes the following slide on it:



This slide titled "*Why Fractional?*" indicates that sales representatives would have taken Ms D through three holidaying options along with their positives and negatives:

"Rent Your Holidays"
"Buy a Holiday Home"
The "Best of Both Worlds"

It was the first slide in the 2011 Fractional Training Manual to set out any information about Fractional Club membership and it suggests that sales representatives were likely to have made the point to Ms D that membership combined the best of (1) and (2) – which included choice, flexibility, convenience and an investment they could use, enjoy and sell before getting money back.

I accept that there was no comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, when the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that *'[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).'*[3] And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.

Indeed, if I'm wrong about that, I find it difficult to explain why, in paragraphs 77 and 78 followed by 99 and 100 of *Shawbrook & BPF v FOS*, Mrs Justice Collins Rice said the following:

"[…] I endorse the observation made by Mr Jaffey KC, Counsel for BPF, that, whatever the position in principle, it is apparently a major challenge in practice for timeshare companies to market fractional ownership timeshares consistently with Reg.14(3). […] Getting the governance principles and paperwork right may not be quite enough.

The problem comes back to the difficulty in articulating the intrinsic benefit of fractional ownership over any other timeshare from an individual consumer perspective. […] If it is not a prospect of getting more back from the ultimate proceeds of sale than the fractional ownership cost in the first place, what exactly is the benefit? […] What the interim use or value to a consumer is of a prospective share in the proceeds of a postponed sale of a property owned by a timeshare company – one they have no right to stay in meanwhile – is persistently elusive."

"[...] although the point is more latent in the first decision than in the second, it is clear that both ombudsmen viewed fractional ownership timeshares – simply by virtue of the interest they confer in the sale proceeds of real property unattached to any right to stay in it, and the prospect they undoubtedly hold out of at least 'something back' – as products which are inherently dangerous for consumers. It is a concern that, however scrupulously a fractional ownership timeshare is marketed otherwise, its offer of a 'bonus' property right and a 'return' of (if not on) cash at the end of a moderate term of years may well taste and feel like an investment to consumers who are putting money, loyalty, hope and desire into their purchase anyway. Any timeshare contract is a promise, or at the very least a prospect, of long-term delight. [...] A timeshare-plus contract suggests a prospect of happiness-plus. And a timeshare plus 'property rights' and 'money back' suggests adding the gold of solidity and lasting value to the silver of transient holiday joy."

So, if a supplier *implied* to consumers that future financial returns (in the sense of possible profits) from a timeshare were a good reason to purchase it, I think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment.

I recognise that, in response to the Investigator's assessment, the PR – on Ms D's behalf and with reference to notes that it says are from a meeting they had to discuss the sale of her Fractional Club membership – explained why the Supplier marketed and sold membership of the Fractional Club to her at the Time of Sale as an investment.

It is not clear to me from that response that the notes in question were taken before this complaint was first made. It was only after the Investigator issued his view rejecting this

[3] The Department for Business Innovation & Skills *"Consultation on Implementation of EU Directive 2008/122/EC on Timeshare, Long-Term Holiday Products, Resale and Exchange Contracts (July 2010)".* https://assets.publishing.service.gov.uk/media/5a78d54ded915d0422065b2a/10-500-consultation-directive-timeshare-holiday.pdf

complaint, and after the judgment in *Shawbrook & BPF v FOS* was handed down, that the notes were provided. So, there seems to me to be a risk here that the very recent submission of those notes reflects more recent recollections that were coloured by the judgment in *Shawbrook & BPF v FOS*. After all, given the extent to which the notes focus on how the Supplier marketed and sold Fractional Club membership as an investment, it is difficult to understand why the Letter of Complaint does nothing to reflect that focus if, in fact, that was what happened at the Time of Sale.

However, with all of that said, the slides I have referred to above are likely to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the membership to prospective members – including Ms D. And as the slides clearly indicate that the Supplier's sales representative was likely to have led prospective members to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e., a profit) in the future, I accept that it is *possible* that Fractional Club membership was marketed and sold to Ms D as an investment in breach of Regulation 14(3).

Nonetheless, it is not necessary to make a formal finding on whether the Supplier breached Regulation 14(3) because, even if the Supplier transgressed the prohibition at the Time of Sale, I am not persuaded that makes a difference to the outcome in this complaint anyway.

Was the credit relationship between the Lender and Ms D rendered unfair to her as a result of any potential breach of Regulation 14(3)?

Even if the Supplier had breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, that is not where the assessment of unfairness ends.

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. […]"

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 Ms D and the Lender that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3)[4] led her to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

And this strikes me as common sense, because if Ms D would have pressed ahead with her purchase whether or not there had been a breach of Regulation 14(3), it would be hard to argue that the breach was important to her purchasing decision when deciding whether the Lender was party to a credit relationship that was unfair to her and whether a remedy is appropriate.

Yet, on my reading of the Letter of Complaint, which is the best evidence I have of why Ms D purchased Fractional Club membership and why she subsequently decided to complain about it, it is clear, in my view, that her decision to purchase membership was motivated by the prospect of being able to take sports related holidays – which, for the reasons I have set out above, was not something that the Supplier had misrepresented or misled her over in my view.

Indeed, I find the absence of any reference to the investment potential of Fractional Club membership in the Letter of Complaint surprising and difficult to understand if, in fact, Ms D's share in the Allocated Property was an important and motivating factor when she decided to go ahead with her purchase at the Time of Sale. And with that being the case, I am not persuaded that the investment potential of Fractional Club membership was important enough to her to render a breach of Regulation 14(3) of the Timeshare Regulations by the Supplier material to the purchasing decision she ultimately made.

In other words, given the facts and circumstances of this complaint, including PR's submissions in response to my PD, I am not persuaded on the balance of probabilities that Ms D would have made a different purchasing decision to the one she made at the Time of Sale whether or not the Supplier breached Regulation 14(3) of the Timeshare Regulations. And for that reason, I do not think the credit relationship between Ms D and the Lender was unfair to her even if the Supplier had transgressed the relevant prohibition.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I do not think the credit relationship between the Lender and Ms D was unfair to her for the purposes of Section 140A. And taking everything into account, I think it is fair and reasonable to reject this aspect of the complaint on that basis.

My Final Decision

For the reasons set out above, I do not uphold this complaint.

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[4] Which, having taken place during the Supplier's antecedent negotiations with Ms D, 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 Section 140(1)(c) of the CCA and deemed to be something done by the Lender.

Under the rules of the Financial Ombudsman Service, I am required to ask Ms D to accept or reject my decision before 8 January 2025.

Morgan Rees
Ombudsman