DRN-5055163

The complaint

Mr and Mrs B's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

What happened

Mr and Mrs B purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 9 June 2013 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,050 fractional points at a cost of £13,951 (the 'Purchase Agreement').

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

Mr and Mrs B paid for their Fractional Club membership and first year of membership fees by taking finance of £14,749 from the Lender in both of their names (the 'Credit Agreement').

Mr and Mrs B – using a professional representative (the 'PR') – wrote to the Lender on 11 December 2017 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

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

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

1. told them that Fractional Club membership had a guaranteed end date when that was not true.
2. told them that they were buying an interest in a specific piece of "real property" when that was not true.
3. told them that Fractional Club membership was an "investment" when that was not true.

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

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

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

1. Mr and Mrs B were not given adequate time to review the standard Information Statement[1] before entering into the Purchase Agreement.
2. No adequate or transparent explanation was given to Mr and Mrs B as to the features of the agreement which may have made the credit unsuitable for them, or have a significant adverse effect which they would be unlikely to foresee, especially given the length of the term, their age and high interest rate and total charge for credit.
3. The contractual terms setting out (i) the duration of their Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of their membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
4. They were pressured into purchasing Fractional Club membership by the Supplier.
5. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as prohibited practices under Schedule 1 of those Regulations.
6. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

They also raised the following, more general, concerns in their letter:

1. There was a lack of availability.
2. The standard of accommodation when they went to a particular resort – it was very quiet and was 'in the middle of nowhere'.
3. There was a lack of exclusivity as they found that non-members had been able to book the same holidays online.
4. They were constantly pestered while on holiday by the sales representatives.
5. The rate of increase in annual charges.

The Lender dealt with Mr and Mrs B's concerns as a complaint and issued its final response letter on 12 March 2018, rejecting it on every ground.

Mr and Mrs B 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.

[1] Required as per the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010.

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

I considered the complaint and issued a provisional decision on 16 September 2024. In that decision, I said:

"***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 and Mrs B 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 and Mrs B 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. They include the suggestion that Fractional Club membership had been misrepresented by the Supplier because Mr and Mrs B were told that they were buying an interest in a specific piece of "real property" when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr and Mrs B's share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.

Mr and Mrs B also make an allegation that the product was sold as an investment, which I address further below. For the reasons I'll explain, had they been told Fractional Club membership was an investment (and I make no finding on that point here), that would not have been untrue.

Mr and Mrs B also say that they were told the Fractional Club had a guaranteed end date when that wasn't true.

Looking at the Fractional Club Rules and other available documentation, I can see it explains the steps of the sales process, the duties that there are on the Trustees (such as using reasonable endeavours to obtain the most advantageous selling price) and that 'sale date' means the date on which the sale process for an Allocated Property begins.

There is nothing that makes me think that Mr and Mrs B were given a guarantee that their Fractional Club membership would end and that they would be given their share of the net sales proceeds at a set date in the future. From what I know about the Supplier's sale process, I think it was more likely that Mr and Mrs B were told that the Allocated Property would be placed for sale at a set time and that the proceeds of sale would then be divided up, not that there was a guaranteed date on which the Allocated Property would sell. And I think that fits with common sense because it would be impossible to guarantee that the Allocated Property would be sold at a specific date – making such a promise, in my view, unlikely. I think it is more likely that Mr and Mrs B were simply told that the Allocated Property would be sold at the end of the contract period, and that they would be given their share of the net sale proceeds, which is a factual description of how Fractional Club membership worked.

So, on balance, I don't think this allegation of misrepresentation is made out.

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

Although the PR didn't make an explicit claim that there was a breach of Mr and Mrs B's Purchase Agreement by the Supplier, on my reading of this complaint, some of the alleged difficulties they say they had with their Fractional Club membership strike me as an allegation that the Supplier didn't live up to its end of the bargain – thus breaching the Purchase Agreement. So, that's how I've dealt with them.

Mr and Mrs B say that they could not holiday where and when they wanted to and that they were concerned about the standard of accommodation, the lack of exclusivity at the Supplier's resorts and the rate at which their annual management charges were increasing.

Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. And some of the sales paperwork signed by Mr and Mrs B explains that the availability of holidays was subject to demand.

Mr and Mrs B say that, when they tried to book a holiday at the Supplier's Sunningdale Village Resort, they were told that there was no room before having to pay extra to secure a holiday at another resort called Hollywood Mirage.

However, the Supplier says that Mr and Mrs B contacted the reservations team and requested one week at the Supplier's Monterey Resort (not Sunningdale Village) in Tenerife for anytime in October 2016. They were offered a holiday at the Supplier's Paradise Resort, also in Tenerife but that was declined by Mr and Mrs B. As that was one of the resorts included in the Supplier's resort directory, there wasn't an additional fee associated with booking holidays at it.

Shortly afterwards, Mr and Mrs B did book a holiday at the Hollywood Mirage Resort, but as it was not one of the Supplier's resorts, there was an additional fee to book the holiday at it.

What's more, from what the Supplier says, there were a number of other holidays Mr and Mrs B took using their Fractional Club. And, Mr and Mrs B haven't provided any other examples of difficulties they had booking the holidays they wanted.

So, whilst I accept that they may not have been able to take certain holidays, given everything I've seen so far, I have not seen enough to persuade me that the Supplier is likely to have breached the terms of the Purchase Agreement.

Mr and Mrs B also say they were unhappy with the standard of accommodation and a lack of exclusivity given the fact that the Supplier's resorts were open to people who weren't members. They say that they went to a particular resort in Turkey that was 'very quiet' and 'in the middle of nowhere'. But in my view, the standard of accommodation is rather open to personal interpretation and opinion, and I can't see that, as part of the Purchase Agreement, the Supplier's resorts would always be in close proximity to urban or built-up areas for instance. And while those who weren't Fractional Club members might have been able to holiday at the Supplier's resorts, I can't see that this meant Mr and Mrs B didn't receive what they were entitled to as members under the Purchase Agreement.

Mr and Mrs B also say they were constantly pestered when taking holidays using their membership by sales representatives trying to sell them further products. However, this is neither a misrepresentation nor a breach of contract, so it isn't something that's covered by Section 75. It also can't be considered as relevant to an assessment of unfairness under Section 140A of the CCA as it isn't something the Supplier said or did during the antecedent negotiations. For these reasons, I therefore don't address this point any further.

Lastly, Mr and Mrs B say that one of the other difficulties they had with their membership was the rate of increase in their annual management charges. But I can see that their signed Information Statement did explain that the charges are budgeted annually and are subject to increase or decrease as determined by the costs of managing the scheme. And, it explains in Rule 4.5 of the Fractional Club rules that Mr and Mrs B would be required to pay an initial management charge and in each subsequent year would pay a management charge which included not only a fixed sum but also an increase on this. And, that in exceptional circumstances, this increase may be greater than usual where there has been an extraordinary increase in costs directly related to the Resort.

So, I haven't seen anything to suggest that the Supplier wasn't entitled to increase the fees in the way they'd set out in the agreement. And in any event, Mr and Mrs B haven't provided details of all the charges they have had to pay under the agreement and how much these have increased by since they purchased their membership.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mr and Mrs B 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 Mr and Mrs B was misrepresented (or breached) by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Mr and Mrs B also say that the credit relationship between them and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that they have concerns about. It is those concerns that I explore here.

As 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 Mr and Mrs B 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 Mr and Mrs B'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."[2]

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):

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

"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 and Mrs B 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 process – which includes:

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 Mr and Mrs B and the Lender.

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

Mr and Mrs B's complaint about the Lender being party to an unfair credit relationship was also made for several reasons, all of which I set out at the start of this decision.

They include the allegation that the Supplier misled Mr and Mrs B and carried on unfair commercial practices which were prohibited under the CPUT Regulations for the same reasons they gave for their Section 75 claim for misrepresentation. They also raised concerns about:

- *The sales presentation being disguised as a holiday*
- *Falsely stating that a product will only be available for a very limited time, or only available on particular terms for a limited time, in order to elicit an immediate decision and depriving the consumer of sufficient opportunity or time to make an informed choice.*
- *Creating the impression that Mr and Mrs B couldn't leave the premises until they purchased Fractional Club membership.*

But given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.

The PR says that the right checks weren't carried out before the Lender lent to Mr and Mrs B. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I have to be satisfied that the money lent to Mr and Mrs B was actually unaffordable before also concluding that, having lost out, the credit relationship with the Lender was unfair to them for this reason. From the information provided, I am not persuaded that the lending was unaffordable for them. But if

there is any further information on this that Mr and Mrs B wish to provide, I would invite them to do so in response to this provisional decision.

Mr and Mrs B say that they were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledge that they may have felt weary after a sales process that went on for a long time. But, beyond saying that the sales presentation was long and that the sales area was busy with other people, they say little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to. They were also given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel their membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs B made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

I'm not persuaded, therefore, that Mr and Mrs B's credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why they say their credit relationship with the Lender was unfair to them. And that's the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

<u>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?</u>

The Lender does not dispute, and I am satisfied, that Mr and Mrs B's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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

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

But Mr and Mrs B say that the Supplier did exactly that at the Time of Sale – saying the following during the course of this complaint:

In their first witness statement, signed by them and dated 12 January 2017, they said:

> *"It was a one to one presentation all about buying property and we would own part of a building. We were told it would be an investment and we could sell it on if we wanted to but it would end in 2030.*
>
> *[…]*
>
> *The sales person did show us the apartment we would be buying. We thought this was a good idea, owning property and getting 5 star holidays all over the world.*
>
> *[…]*
>
> *We have now found out that our investment is worth nothing and we would not be able to sell it. This was not an investment in bricks and mortar like we were promised."*

In their second witness statement, provided in response to the Investigator's view, they said:

> *"We were told that Fractional Property Ownership involved buying a share, or 'Fraction' in a property. We were told that we would be buying property, and we would own part of a building. The sales person showed us the apartment we would be buying a share of, which looked great. We were told it would be an investment, which would end in 2030, after which the property would be sold, and we would share in the proceeds of sale. However, we could sell it on before that if we wanted to. We were also told that our children would benefit from our investment in the future, and we would be able to sell at any time with profit."*

The term "investment" is not defined in the Timeshare Regulations. In Shawbrook & BPF v FOS, the parties agreed that, by reference to the decided authorities, "an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit" at [56]. I will use the same definition.

Mr and Mrs B's share in the Allocated Property clearly 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 Mr and Mrs 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 told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

There is 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 Mr and Mrs 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 Mr and Mrs B as an investment.

For example, in the Member's Declaration document it states:

> *"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."*

And, in the Information Statement it states:

> *"The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for the direct purposes of a trade in nor as an investment in real estate. [The Supplier] makes no representation as to the future price or value of the Allocated Property or any Fractional Rights."*

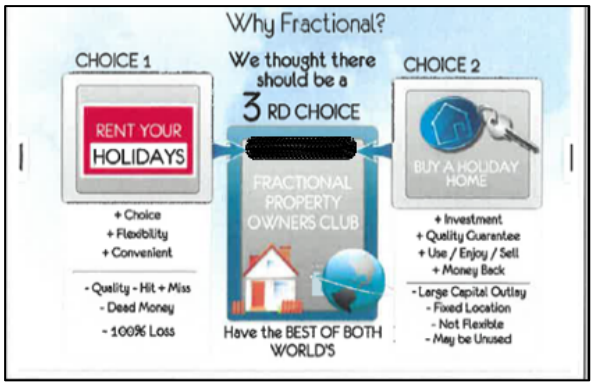
However, during the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives – including a document called "2011 Spain PTM FPOC 1 Practice Slides Manual" (the '2011 Fractional Training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

As I understand it, the 2011 Fractional Training Manual was used throughout the sale of the Supplier's first version of a product called the Fractional Property Owners Club – which I've referred to and will continue to refer to as the Fractional Club. It isn't entirely clear whether Mr and Mrs B 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 Mr and Mrs B Fractional Club membership; and*

(2) *how the sales representatives would have framed the sale of Fractional Club membership to Mr and Mrs B.*

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 Mr and Mrs B through three holidaying options along with their positives and negatives:

(1) *"Rent Your Holidays"*

(2) *"Buy a Holiday Home"*

(3) *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 I think it suggests that sales representatives were likely to have made the point to Mr and Mrs B that membership combined the best of (1) and (2) – which included choice, flexibility, convenience and, significantly, an investment they could use, enjoy and sell before getting money back.

I acknowledge that there was no comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mr and Mrs B the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

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.

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.

Mr and Mrs B say, in their own words, that the Supplier positioned membership of the Fractional Club as an investment to them. And as I've said before, the slides I've referred to above seem to me 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 Fractional Club to prospective members – including Mr and Mrs B. 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 Mr and Mrs B as an investment in breach of Regulation 14(3).

Nonetheless, it is not necessary to make a formal finding on that particular issue because, even if the Supplier did breach Regulation 14(3) 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 Mr and Mrs B rendered unfair?

I've considered what impact any potential breach had on the fairness of the credit relationship between Mr and Mrs B and the Lender under the Credit Agreement and related Purchase Agreement.

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. […]"

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[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

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 and Mrs B and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) (deemed to be something done by the Lender under section 140(1)(c) of the CCA) lead them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

It's possible that Mr and Mrs B were interested in both holidays and the investment element, which wouldn't be surprising given the nature of the product at the centre of this complaint.

But, even if they were, having taken the opportunity to set out what affected their enjoyment of their Fractional Club membership and set out their reasons for wanting to relinquish their membership, Mr and Mrs B did not mention the investment potential of the membership. Instead, in their initial testimony, they said: "we go on about five holidays per year so the Fractional seemed like a good idea, but after about 12 months of trying to get what we wanted and not getting it we soon realised we had done the wrong thing". They also said that the main reasons they wanted to relinquish their timeshare was due to alleged issues with availability and quality of holidays, and the increase in maintenance fees. So, in my view, their purchase was largely motivated by the prospect of holidays, rather than the investment element.

On balance, therefore, even if the Supplier likely had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Mrs 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, I think the evidence suggests they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr and Mrs B and the Lender was unfair to them.

The provision of information by the Supplier at the Time of Sale

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mr and Mrs B when they purchased membership of the Fractional Club at the Time of Sale. But they and PR say that the Supplier failed to provide them with all of the information they needed under regulation 12 of the Timeshare Regulations to make an informed decision.

PR also says that the contractual terms governing the duration of the membership of and the obligation to pay the annual management charges for that duration were unfair contract terms under the UTCCR.

One of the main aims of the Timeshare Regulations and the UTCCR was to enable consumers to understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. And if a supplier's disclosure and/or the terms of a contract did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, that may lead to the Timeshare Regulations and the UTCCR being breached, and, potentially the credit agreement being found to be unfair under Section 140A of the CCA.

However, as I've said before, the Supreme Court made it clear in Plevin that it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A of the CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

Regarding the duration of the membership, the Information Statement made clear to Mr and Mrs B that the membership lasted for 19 years. I acknowledge that the sale of the Allocated Property could be postponed at the Supplier's discretion, but it could only be postponed for up to two years in limited circumstances which don't seem unusual or unreasonable. So, I don't think the term in relation to the mere duration of the membership is likely to be unfair for the purpose of the UTCCR.

Similarly, I don't think the term relating to the mere obligation to pay an annual management charge is likely to be unfair for the purpose of the UTCCR. As I've explained previously, the Information Statement explains that the charges are budgeted annually and are subject to increase or decrease as determined by the costs of managing the scheme, which doesn't seem unreasonable. And, while I acknowledge that such an increase could be greater than what had been set out, this would be in exceptional circumstances, where there had been an extraordinary increase in costs directly related to the Resort which could not previously have been foreseen.

And therefore, I don't think either of these terms created an unfairness in the relationship between Mr and Mrs B and the Lender.

Mr and Mrs B also say that they weren't given adequate time to review the standard Information Statement before entering into the Purchase Agreement. But, from what I've seen, they were given this document to review at the same time as all of the other sales documentation. And, from what Mr and Mrs B say, they made the decision not to read the paperwork fully because they "just wanted to get it over with, and try to enjoy the rest of our holiday".

The letter of complaint also says Mr and Mrs B weren't given a transparent explanation as to the features of the agreements which may have made them unsuitable for them or have a significant adverse effect which they would be unlikely to foresee, especially given the length of the term, their age and high interest and total charge for the credit provided.

But they haven't explained what the particular risks or features are that they're referring to here, or why these would have had an adverse effect on Mr and Mrs B. They also haven't described what they feel should have been explained or what information should have given about these points that wasn't. They've mentioned the length of the loan, their age and the interest rate but haven't given any reason as to why these are unfair in this particular case or why these cause the credit relationship to be unfair.

So, while I acknowledge the possibility that there was information failings on the part of the Supplier, for the above reasons, I can't see that there's been any detriment to Mr and Mrs B

or that any of these points are likely to have prejudiced their purchasing decision at the Time of Sale and rendered their credit relationship with the Lender unfair to them for the purposes of Section 140A of the CCA.

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

Section 140A: Conclusion

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

I provisionally decided not to uphold the complaint as, for the above reasons, I did not think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs B's Section 75 claim, and I was not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I could see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

Neither party responded to my provisional decision, nor did they provide any further comments or evidence they wished to be considered.

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.

As neither party has provided any new evidence or arguments, I don't believe there is any reason for me to reach a different conclusion from that which I reached in my provisional decision (outlined above). I do wish to stress that I have considered all the evidence and arguments afresh before reaching that conclusion.

My final decision

For these reasons, I do not uphold Mr and Mrs B's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Mrs B to accept or reject my decision before 30 October 2024.

Fiona Mallinson
Ombudsman