DRN-5080395

The complaint

Mr W'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 him 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 W (and his partner, Mrs T) purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 9 March 2016 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,040 fractional points at a cost of £13,021 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr W and Mrs T 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 W paid for their Fractional Club membership by taking finance of £13,021 from the Lender in his sole name (the 'Credit Agreement').

Mr W – using a professional representative (the 'PR') – wrote to the Lender on 4 January 2024 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him 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 W says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. told them that membership would ensure that their holiday accommodation would be secured for the term of the contract when that was not true.
2. told them that membership was an 'investment' and could be sold at a later date for a profit.

Mr W says that he 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, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr W.

(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 W says that the credit relationship

between him and the Lender was unfair to him under Section 140A of the CCA. In summary, they include the following:

1. Fractional Club membership was marketed and sold to him as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. The contractual terms setting out the obligation to pay annual management charges for the duration of their membership and the terms that set out that if they didn't make payment of these fees, their membership could be forfeited, were unfair contract terms under the Consumer Rights Act 2015 (the 'CRA').[1]
3. They were pressured into purchasing Fractional Club membership by the Supplier.
4. 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 a prohibited practice under Schedule 1 of those Regulations.
5. The Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs, investment element and availability of holidays.

The Lender dealt with Mr W's concerns as a complaint and issued its final response letter on 25 April 2024, rejecting it on every ground.

Mr W 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.

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

At this stage, the PR added a new point of complaint which had not been raised before. They have said that the Supplier was not authorised or permitted to sell investments by the Office of Fair Trading ('OFT') or the Financial Conduct Authority ('FCA'). The PR has argued that meant the Supplier acted outside the scope of its regulation and has breached the general prohibition and, as such, the agreement is unenforceable (I take this to mean section 19 of the Financial Service and Markets Act 2000 ('FSMA')). The PR has said this also led to an unfair relationship between Mr W and the Lender.

I considered the matter and issued a provisional decision on 27 September 2024. I've summarised that decision below:

- In relation to Mr W's complaint about the Lender's handling of his Section 75 claim for misrepresentations at the Time of Sale, I thought it was likely the Lender would have a defence to the claim under the Limitation Act 1980 (the 'LA'). The Lender rejected Mr W's claim for other reasons, but since his claim was made more than six years after the Time of Sale, I didn't think it was unfair or unreasonable for the Lender to reject Mr W's concerns about the Supplier's alleged misrepresentations at the Time of Sale. For these reasons, therefore, I did not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.
- Mr W's complaint about the Lender being party to an unfair credit relationship under Section 140A of the CCA was made for several reasons, which included the

[1] The PR only made reference here to the Unfair Terms in Consumer Contracts Regulations 1999, but these only applied to contracts entered into before 30 September 2015. As this contract was entered into in March 2016, it is the Consumer Rights Act 2015 that applies in this case.

allegation that the Supplier misled Mr W and carried on unfair commercial practices which were prohibited under the CPUT Regulations for various reasons. But given the limited evidence in this complaint, I was not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.

- Mr W also said that they were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledged in my provisional decision that they may have felt weary after a sales process that went on for a long time. But they had said 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. I also noted that they were given a 14-day cooling off period and they had not provided a credible explanation for why they did not cancel their membership during that time. And with all of that being the case, I felt that there was insufficient evidence to demonstrate that Mr W (and Mrs T) made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.
- The misrepresentations Mr W had complained about could also be something that led to an unfair debtor-creditor relationship[2], so I considered what Mr W had said with this in mind.
- In the letter of complaint, the PR said that Mr W and Mrs T were told that membership would ensure that their holiday accommodation would be secured for the term of the contract when that was not true. But, they hadn't provided any evidence to support this, such as what exactly they were told, by whom and in what context. And, I noted this also wasn't mentioned in Mr W's recollections of the Time of Sale, so I was not persuaded such a statement was made.
- The PR also said in the letter of complaint that the Supplier told them that membership was an 'investment' and could be sold at a later date for a profit when that was not true. Again, little evidence had been provided to support this. And, in my view, Mr W and Mrs T's membership plainly did have an investment element to it.
- So, I was not persuaded that Mr W's credit relationship with the Lender was rendered unfair to him under Section 140A for any of the reasons above.
- The PR also alleged that at the Time of Sale, the Supplier marketed and sold Fractional Club membership to Mr W and Mrs T as an investment in breach of Regulation 14(3) of the Timeshare Regulations and this was also something which rendered the credit relationship between Mr W and the Lender unfair to him under Section 140A.
- Overall, based on the evidence available, I provisionally concluded that 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 was not persuaded that Mr W'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 thought the evidence suggested he and Mrs T would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I did not think the credit relationship between Mr W and the Lender was unfair to him even if the Supplier had breached Regulation 14(3).
- I also explained in my provisional decision that it seemed unlikely to me that the contract term(s) cited by Mr W have led to any unfairness in the credit relationship between him and the Lender for the purposes of Section 140A of the CCA. I said this because I could not currently see that terms relating to failing to make a payment under the Purchase Agreement were actually operated against Mr W, let alone unfairly. Similarly, in relation to the obligation to pay management charges for the duration of the Agreement, the PR hadn't explained why exactly they felt this caused an unfairness and I couldn't see that these term(s) had been operated in an unfair

[2] See Scotland & Reast v. British Credit Trust Limited [2014] EWCA Civ 790

way against Mr W.

- Mr W also said he and Mrs T weren't given sufficient information about the investment element of their membership, the ongoing costs of the membership and the availability of holidays.
- But, they hadn't expanded on this point with any further detail such as what they were told about the above elements at the Time of Sale, or what information they felt they should have been given that they weren't. It also wasn't explained further how exactly they felt this caused an unfairness in the relationship between Mr W and the Lender.
- I also explained that it seemed likely to me that Mr W and Mrs T were told by the Supplier at the Time of Sale that the annual maintenance fees were payable each year and that they may increase. I explained that, for example, I could see in their signed Information Statement it explained owners will be required to contribute to the charges for management, repair and maintenance of the property by means of an annual management charge, payable whether weeks are used or not. And, that the charges will be budgeted annually and will be subject to increase or decrease as determined by the costs of managing the project and are payable in advance each year. It also explained that the first year of fees was €999. And, I noted that their signed Information Statement also explained that all bookings are subject to availability and are handled on a first-come, first-served basis as well as how the sale process of the Allocated Property would work.
- So, while I acknowledged it's possible the Supplier didn't give Mr W and Mrs T sufficient information, in good time, on the above elements of their membership, in order to satisfy its regulatory responsibilities at the Time of Sale, I said I hadn't currently seen enough to persuade me that this, alone, rendered Mr W's credit relationship with the Lender unfair to him.
- As outlined above, in response to the Investigator's view, the PR had added a new point of complaint which had not been raised before. They had said that the Supplier was not authorised or permitted to sell investments by the Office of Fair Trading ('OFT') or the Financial Conduct Authority ('FCA'). The PR had argued that meant the Supplier acted outside the scope if its regulation and had breached the general prohibition and, as such, the agreement is unenforceable (I explained I took this to mean section 19 of the Financial Service and Markets Act 2000 ('FSMA')). The PR had also said this led to an unfair relationship between Mr W and the Lender.
- Although the Lender had not had the opportunity to deal with this new allegation (as the Investigator explained to the PR), I dealt with it briefly in my provisional decision as I thought it was misconceived and was also already dealt with in *Shawbrook & BPF v FOS*.
- I said that buying an interest in the sale proceeds of real property, such as was provided by Mr W's Fractional Club membership, would amount to a collective investment scheme ('CIS'), unless it fell into a particular, defined category of arrangement (section 235 FSMA). But Mr W's Fractional Club membership did not amount to a CIS (Paragraph 13 of the Schedule to The Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001, as inserted by the Timeshare Regulations). So, the regulation of Mr W's Fractional Club membership was governed by the Timeshare Regulations and not FSMA. I said that it follows that the Supplier did not need the authorisation or permission the PR had argued it needed and I didn't therefore think this made the credit relationship unfair as a result.
- So, overall, I provisionally decided not to uphold the complaint as I did not think that the Lender acted unfairly or unreasonably when it dealt with Mr W's Section 75 claim, and I was not persuaded that the Lender was party to a credit relationship with him under the Credit Agreement that was unfair to him 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 him.

The Lender did not respond to my provisional decision. The PR did respond and provided some further comments that they wished to be considered in relation to the alleged breach of Regulation 14(3) of the Timeshare Regulations.

The legal and regulatory context

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

I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I remain 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 CRA.
- 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).
    - *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
    - *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*').
    - The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*').
    - *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
    - *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
    - *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But 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.

I want to reiterate 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.

As mentioned above, the further comments the PR has provided relate to whether membership was sold and/or marketed to Mr W as an investment at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And, whether any such breach rendered the credit relationship between Mr W and the Lender unfair under Section 140A of the CCA. So, I will focus here on those points.

Neither party has provided any new evidence or arguments in relation to the other complaint points I addressed in my provisional decision. So, I don't believe there is any reason for me to reach a different conclusion on those other points 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 in relation to those other points.

In their further comments in response to my provisional decision, the PR has referred to various training and sales materials used by this Supplier, and they say, in summary, that they think this means the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale. They also said they think the investment element of the membership was important to Mr W's purchasing decision and therefore the credit relationship was rendered unfair to him as a result.

I've considered what the PR has said, but it hasn't persuaded me that this complaint should now be upheld. I'll explain why.

As I explained in my provisional decision, 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 W and Mrs T'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."[3]

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

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

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* (which was recently approved by the Supreme Court in the case of *Smith),* that determining whether or not the relationship complained of was unfair had to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"* – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in *Plevin* (at paragraph 17):

"Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with […] whether the creditor's relationship with the debtor was unfair."

Instead, it was said by the Supreme Court in *Plevin* that the protection afforded to debtors by Section 140A is the consequence of all of the relevant facts.

The Lender does not dispute, and I am satisfied, that Mr W'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.*"

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]. As I explained in my provisional decision, I will use the same definition.

Mr W and Mrs T's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr W and

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

There is 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 W and Mrs T, 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 W (and Mrs T) as an investment.

But with that said, I recognised in my provisional decision, and continue to do so, that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. And, as I did in my provisional decision, I accept that it's *possible* that Fractional Club membership was marketed and sold to Mr W and Mrs T 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.

Nonetheless, it is not necessary to make a formal finding on that particular issue because, as I said in my provisional decision, even if the Supplier did breach Regulation 14(3) at the Time of Sale, I remain unpersuaded that makes a difference to the outcome in this complaint anyway.

This is because even if the Supplier had breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, this is not the end of the matter or where the assessment of unfairness ends. And, I must stress here that it is for me to determine this complaint on its individual facts and circumstances – making a decision as to what is, in my opinion, fair and reasonable in light of them.

Was the credit relationship between the Lender and Mr W rendered unfair?

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 Mr W and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) which, having taken place during its antecedent negotiations with Mr W, 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 him to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

The PR hasn't provided any new evidence to support their argument here. And, they seem to refer in what they've said to comments made by another consumer, in another similar case.

As I explained in my provisional decision, in Mr W's witness statement (which, in my view, is the best evidence I have of what he remembers of the sales process), he said (my emphasis):

> "*We were shown many examples of how we could save lots of money on future holidays and also save up points and travel the world as there were CLC apartments everywhere. This was a huge factor in deciding as the savings would be huge*."

As I also explained in my provisional decision, in that witness statement, Mr W also took the opportunity to set out why he's now unhappy with their membership. And in doing so, Mr W didn't refer to the investment element. Instead, he said:

> *Since then we have never been abroad and only visited Scotland 3 times. We also found out that nowhere accepts pets.*
>
> *[…]*
>
> *One year ago [Mr W] had to quit work as [Mrs T] developed cancer. This has been a very stressful time and both of us are on benefits. We are unable to afford these payments and feel trapped.*

So, Mr W and Mrs T have explained that the reasons they are now unhappy with their membership are a lack of availability and accommodation options which accepted pets. And the maintenance fees, which have become difficult for them to afford due to the aforementioned change in personal circumstances.

Based on this evidence, given in Mr W and Mrs T's own words, I don't think the share in the Allocated Property was an important and motivating factor when they decided to go ahead

with their purchase at the Time of Sale. And with that being the case, having weighed up everything that has been said and/or provided by both sides throughout this complaint, I am not persuaded that the investment potential of Fractional Club membership was material to the purchasing decision Mr W ultimately made.

In other words, given the facts and circumstances of this complaint, I am not persuaded on the balance of probabilities that Mr W (and Mrs T) would have made a different purchasing decision to the one they 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 Mr W and the Lender was unfair to him even if the Supplier had breached the relevant prohibition.

My final decision

Given the facts and circumstances of this complaint, and for the reasons I set out above, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr W's Section 75 claim. And, I am not persuaded that the Lender was party to a credit relationship with him under the Credit Agreement and related Fractional Club Purchase Agreement that was unfair to him 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 him. So, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 11 November 2024.

Fiona Mallinson
Ombudsman