DRN-5085448

The complaint

Mr and Mrs C'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 claims under Section 75 of the CCA.

What happened

In November 2010, Mr and Mrs C took a trial timeshare membership with a timeshare provider (the 'Supplier'). In May 2011, they purchased full timeshare membership including 1,200 annual points to spend on holidays at the Supplier's resorts. In October 2011, Mr and Mrs C changed their membership, trading in their existing membership and points to purchase 'Fractional Club' membership including 1,716 annual points.

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

On 22 October 2012 (the 'Time of Sale'), Mr and Mrs C upgraded their Fractional Club membership by purchasing additional points and changing their Allocated Property to one at a different resort. They entered into an agreement with the Supplier (the 'Purchase Agreement'), paying £6,599. As a result, they had a total of 2,070 fractional points (an increase of 354 points or about 20%). This complaint and decision only concerns this transaction.

Mr and Mrs C funded the purchase agreement with finance of £6,599 from the Lender (the 'Credit Agreement'). They paid off the loan on 8 July 2013, which is when their relationship with the Lender ended.

Mr and Mrs C – using a professional representative (the 'PR') – wrote to the Lender on 23 February 2018 (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. A breach of contract by the Supplier giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay

3. 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, due to:

    a. The Lender failing to assess whether Mr and Mrs C could afford the loan.

    b. Unfair terms in the contract in relation to the consequences of non-payment of annual maintenance fees.

The letter also mentioned Mr and Mrs C being pressured into agreeing to the purchase of

the upgraded Fractional Club membership and the loan agreement.

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

Mr and Mrs C say that the Supplier made pre-contractual misrepresentations at the Time of Sale – namely that the Supplier told them that:

1. The only way to exit their previous timeshare membership was to purchase Fractional Club membership.

2. Fractional Club membership had a guaranteed end date when that was not true.

3. They were buying an interest in a specific piece of "real property" when that was not true.

Mr and Mrs C say 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 C.

(2) Section 75 of the CCA: the Supplier's breach of contract

Mr and Mrs C also say that the Supplier breached the purchase agreement because:

1. They found it difficult to book the holidays they wanted when they wanted. This point was first made in the PR's email to the Financial Ombudsman Service on 14 December 2023.

2. There is no guarantee that they will receive their share of the net sale proceeds of the Allocated Property.

As a result of the above, Mr and Mrs C say that they have a breach of contract claim against the Supplier, 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 C.

(3) 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 C 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. The Lender failing to assess whether Mr and Mrs C could afford the loan.

2. The contractual terms setting out 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').

The Lender dealt with Mr and Mrs C's concerns as a complaint and issued its final response letter on 10 October 2018, rejecting it on every ground.

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

When responding to the Investigator on 4 January 2021, the PR provided an attachment to its email which it said set out why it disagreed with the Investigator. However, the attachment referred only to "the client", rather than Mr and Mrs C by name, and seemed to cover many complaint points that were not mentioned in the Investigator's assessment, nor in the Letter of Complaint (despite purporting to be a response to the assessment). As such, while I have read the attachment and thought about what it says, I have taken into account the parts that could relate to Mr and Mrs C's complaint, while giving little evidential weight to those parts that do not appear to be relevant to their specific complaint.

The PR introduced two new complaint points on 18 August 2023, in relation to misrepresentations made by the Supplier, being that the Supplier:

1. Told Mr and Mrs C that Fractional Club membership was an "investment" when that was not true because it is worthless.

2. Told Mr and Mrs C that the Supplier's holiday resorts were exclusive to its members when that was not true.

This was further supported by a signed "witness statement" dated 18 January 2024, which confirmed what the PR had said was Mr and Mrs C's recollection of the sale in an email dated 14 December 2023. The most relevant points made in the witness statement were that:

1. In October 2011 Mr and Mrs C were told that:

    a. Fractional Club membership was a good investment opportunity and would fix any problems with availability in their existing timeshare club membership.

    b. This could well mean that all their holidays over the membership term may be completely free with a profit at the end, or they may just get an amount of money back that did not cover all their costs but at least they would get something.

2. In October 2012, the Time of Sale, Mr and Mrs C were told that changing the property they were a fractional owner of to one at a more popular destination with better weather all year round presented a better opportunity for higher prices and faster sales when the property was sold.

3. At the Time of Sale Mr and Mrs C did not need the extra points and purchased the upgraded membership solely for the better investment opportunity.

4. In the following years they generally took one holiday per year (sometimes two) and carried over points each year. They had to be flexible on dates and destinations due to problems with availability.

5. Mr and Mrs C ceased paying membership fees in 2018, because they had realised that non-timeshare club guests at resorts they stayed in had paid less for their holidays than Mr and Mrs C were paying in annual maintenance fees – so they would be better off booking holidays independently.

I issued a provisional decision explaining why I was not planning to uphold this complaint. The Lender responded to say it had nothing further to add, and neither Mr and Mrs C nor the PR responded by the deadline I gave. So, this final decision is in line with my provisional

one.

The legal and regulatory context

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

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

- The CCA (including Section 75 and Sections 140A-140C).
- The law on misrepresentation.
- The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
- The UTCCR.
- The Consumer Protection from Unfair Trading Regulations 2008 (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 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.

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

But before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

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

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 C 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 C at the Time of Sale, the Lender is also liable.

While I recognise that Mr and Mrs C have concerns about the way in which their Fractional Club membership was sold, they have not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the reasons they allege. I say that for the reasons below.

On balance, I'm not persuaded by the allegation that the Supplier told Mr and Mrs C that the only way to exit their previous timeshare membership was to purchase Fractional Club membership. This is because at the Time of Sale Mr and Mrs C were already Fractional Club members. This complaint is in relation to an upgrade of their membership where they acquired fractions in a different property and additional annual points – so they were not looking to exit their pre-existing membership, merely amend it.

On balance, I'm not persuaded that Mr and Mrs C being told that their Fractional Club membership had a guaranteed end date was untrue at the Time of Sale. This is because I

think that is a reasonably accurate description of the main thrust of the agreement they had entered into – that after a set period of time, the Allocated Property would be marketed and when sold, the proceeds divided amongst the 'Owners' whose memberships related to that property.

As I understand it, under the relevant Fractional Club Rules, the sale of the Allocated Property could be postponed for up to two years by the 'Vendor', longer than that if there were problems selling and all of the 'Owners' agreed, or for an otherwise specified period provided there was unanimous agreement in writing from the Owners. That meant there was not a set date in the future at which the Supplier could guarantee membership would end as plainly nobody could predict with certainty when the Allocated Property would sell. But I do not think it is alleged by Mr and Mrs C that they were told the membership would end on a set date – rather their description of what they were told sets out a basic description of Fractional Club membership. So, I do not think this allegation is made out.

On balance, I am not persuaded the representation that Mr and Mrs C were buying an interest in a specific piece of "real property" was not true. This is because telling prospective members (like Mr and Mrs C) that they were buying a fraction or share of one of the Supplier's properties was not untrue – nor was it untrue to tell Mr and Mrs C that they would receive some money when the Allocated Property is sold.

Mr and Mrs C'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, that does not change the fact that they acquired such an interest.

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 C 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 C 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 C 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.

Mr and Mrs C say that they could not holiday where and when they wanted to - although this was not a point made in the Letter of Complaint, but later. I think Mr and Mrs C consider that because of this the Supplier was not living up to its end of the bargain and had breached the Purchase Agreement.

Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays for instance. Some of the sales paperwork signed by Mr and Mrs C states that the availability of holidays was/is subject to demand. By their own account they made use of their fractional points to holiday at least once per year between 2012 and 2017, before stopping paying the maintenance fees in 2018. I accept that they may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

Mr and Mrs C also say that the Supplier breached the Purchase Agreement because there is no guarantee that they will receive their share of the net sale proceeds of the Allocated Property. I understand that Mr and Mrs C are saying that they fear that, when the time comes for the Allocated Property to be sold, they will not receive their share of the sale proceeds. However, it would seem that any breach of contract (if that occurs) lies in the future and is currently uncertain.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mr and Mrs C 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 C was misrepresented (or breached) by the Supplier in a way that makes for a successful claim under Section 75 of the CCA. But Mr and Mrs C 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, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between Mr and Mrs C and the Lender was unfair.

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 C's membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section

12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

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

"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.' […] *Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."*

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

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

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

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

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

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

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

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

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

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

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

I have considered the entirety of the credit relationship between Mr and Mrs C 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. 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.

4. The inherent probabilities of the sale given its circumstances.

I have then considered the impact of the above on the fairness of the credit relationship between Mr and Mrs C and the Lender.

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

Mr and Mrs C'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 C 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. 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 C. 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 would have to be satisfied that the money lent to Mr and Mrs C was actually unaffordable before also concluding that they lost out as a result and then consider whether the credit relationship with the Lender was unfair to them for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for the Mr and Mrs C. The original loan term was 180 months

(15 years), but Mr and Mrs C paid off the loan in full after just over 18 months. However, if there is any further information on this (or any other points raised in this provisional decision) that Mr and Mrs C wish to provide, I would invite them to do so in response to this provisional decision.

Mr and Mrs C 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 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 an upgraded 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 C made the decision to upgrade their Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

Mr and Mrs C say that they were told that the Supplier's holiday resorts were exclusive to its members when that was not true. But if that happened, and I'm not persuaded that it did, I don't think this would make for an unfair relationship. The Supplier's sales brochures do not suggest the resorts would be for the exclusive use of members – as you might expect them to if they were sold in that way. And in addition to this, when Mr and Mrs C realised there were non-members at the resort they were staying in, their issue with this was not a lack of exclusive access, but that the non-members were able to have a similar holiday for less than Mr and Mrs C were paying.

I'm not persuaded, therefore, that Mr and Mrs C'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 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. This point was not included in the Letter of Complaint, but first made to the Financial Ombudsman Service on 18 August 2023.

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs C 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 the PR says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

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

Mr and Mrs C'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 financial return was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr and Mrs C 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.

However, while I acknowledge the *possibility* that Fractional Club membership was marketed or sold to Mr and Mrs C as an investment in breach of Regulation 14(3), in this case I do not think it is necessary to make a finding on that point. This is because I am not persuaded that the investment potential of Fractional Club membership was a driving factor in Mr and Mrs C's decision to go ahead with the purchase.

At the Time of Sale, Mr and Mrs C already had Fractional Club membership. The investment element of this was not a factor mentioned in the Letter of Complaint as being something that had contributed to the creation of an unfair relationship. I would've expected this to have been mentioned in the Letter of Complaint if that had been important to Mr and Mrs C at the Time off Sale and when they made their complaint. But instead, the investment element was only raised as part of the complaint after the outcome of *Shawbrook & BPF v FOS* – five years after the complaint was made.

The PR says the witness statement reflects Mr and Mrs C's recollections of the sale from the time they made the complaint. But no witness statement is available from that time and, as mentioned above, the witness statement provided (which was written over five years later) does not match up to the points of complaint made in the Letter of Complaint. This makes it more difficult for me to accept what the PR has said in this regard.

Nevertheless, I have considered what is said in the witness statement and what it indicates about what has caused Mr and Mrs C's dissatisfaction such that they chose to make a complaint. From the witness statement, it seems that the main cause of Mr and Mrs C's dissatisfaction with Fractional Club ownership was that:

1. They were told that Fractional Club membership would fix any problems they had with availability, and this didn't happen – meaning they had to take holidays at less convenient times and locations to ensure they made use of their membership.

2. They were told the resorts were exclusive to the Supplier's Timeshare and Fractional Club members, but this was not the case.

3. They realised that they were paying more for their holidays (through maintenance fees) than other guests who had booked their holidays independently of the Supplier.

I'm mindful that Mr and Mrs C's dissatisfaction on these points led to them ceasing payment

of the maintenance fee in 2018 – around the time they complained. This meant they would no longer be able to benefit from taking holidays through the Supplier and that they may ultimately forfeit their right to their share of the sale proceeds when the Allocated Property is sold. This suggests their main concern at that point was paying less for their holidays, rather than any potential return on their investment. I think it is likely that, if the investment aspect was of great importance to Mr and Mrs C at the time of sale and when they made the complaint, they would not have been so willing to risk giving up on the potential returns in this way.

Was the credit relationship between the Lender and Mr and Mrs C 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 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 C and the Lender that was unfair to them 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 and Mrs C, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

There was no suggestion in Mr and Mrs C's Letter of Complaint that the Supplier led them to believe that the Fractional Club membership was an investment from which they would make a financial gain, nor was there any indication that they were induced into the purchase on

that basis. Overall, the evidence suggests to me that the driving factors that led them to complain were mainly around how much they were paying for their holidays through Fractional Club membership.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Mrs C'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 C and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

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 C when they purchased membership of the Fractional Club at the Time of Sale. But the PR says that the contractual terms governing the ongoing costs of Fractional Club membership and the consequences of not meeting those costs 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.

Given the facts and circumstances of this complaint, I am not persuaded that the Supplier's alleged breaches of the UTCCR are likely to have prejudiced Mr and Mrs C's 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. I say this because Mr and Mrs C's membership term was for a fixed duration. And it looks like the sale of the Allocated Property could only be postponed for two years in limited circumstances that were not unusual or unreasonable. So, I am not currently persuaded that the membership term would be found unfair by a court for the purposes of the UTCCR, such that it would play a part in rendering the credit relationship between the Lender and Mr and Mrs C unfair to them under Section 140A.

It is possible that some of the terms governing the Fractional Club membership's ongoing costs go against the requirements of the UTCCR. But given the particular circumstances of this complaint, even if some of the terms in question did constitute unfair contract terms under the UTCCR, it seems unlikely to me that they led to any actual unfairness in the credit relationship between Mr and Mrs C and the Lender for the purposes of Section 140A. I say this because I cannot see that the potentially offending terms were operated against Mr and Mrs C during the short time that Mr and Mrs C were party to the Credit Agreement – nor can I see that there were any ongoing effects of unfairness because of the terms in question. And with that being the case, I cannot see that the potential unfairness of those terms

eventuated in practice.

It is also possible that the Supplier did not give Mr and Mrs C sufficient information, in good time, on the various charges they could have been subject to as Fractional Club members in order to satisfy the requirements of Regulation 12 of the Timeshare Regulations which was concerned with the provision of 'key information'. But even if that was the case, I cannot see that the ongoing costs of membership were unfair in practice.

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 C 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 C 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.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs C's Section 75 claims, and I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to Mr and Mrs C for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

If there is any further information on this complaint that the Mr and Mrs C wishes to provide, I would invite them to do so in response to this provisional decision.

My final decision

For the reasons I've explained, I do not uphold this complaint.

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

Phillip Lai-Fang
Ombudsman