DRN-5087432

The complaint

Mr D complaint is, in essence, that Mitsubishi HC Capital UK Plc trading as Hitachi 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 claims under Section 75 of the CCA.

What happened

The 2013 sale

Mr and Mrs D purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 5 May 2013 (the '2013 Time of Sale'). They entered into an agreement with the Supplier to buy 1,050 fractional points at a cost of £13,153.00 plus first-year membership dues of £1,596.00, giving a total payable of £14,749.00 (the '2013 Purchase Agreement').

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

Mr D paid for his Fractional Club membership by taking finance of £14,749.00 from the Lender (the '2013 Credit Agreement'). Since only he has the right to make claims in relation to the credit agreement, I will just refer to Mr D in this decision. This loan was paid off in April 2015.

The 2017 sale

Mr and Mrs D upgraded their membership of the Fractional Club with the Supplier on 13 March 2017 (the '2017 Time of Sale'). They entered into two agreements with the Supplier to buy additional fractional points at a cost of £25,5057 (the 'Purchase Agreement'). But after trading in their existing timeshare, they ended up paying £11,401.00 for the two memberships of the Fractional Club.

Mr D paid for his Fractional Club memberships by taking finance of £11,401.00 from the Lender (the '2017 Credit Agreement'). Since only he has the right to make claims in relations to the credit agreement, I will just refer to Mr D in this decision. This loan was paid off in October 2019.

The 2023 claim and complaint

Mr D – using a professional representative (the 'PR') – wrote to the Lender on 27 July 2023 (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 D says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. Told him that Fractional Club membership had a guaranteed end date when that was not true.
2. Told him that they were buying an interest in a specific piece of "real property" when that was not true.
3. Told him that Fractional Club membership was an "investment" when that was not true.
4. Told him that the Supplier's holiday resorts were exclusive to its members when that was not true.

Mr D 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 D.

(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 D 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. The contractual terms setting out (i) the duration of his Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of his membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR') and/or Consumer Rights Act 2015.
2. He was pressured into purchasing Fractional Club membership by the Supplier.
3. 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 those Regulations.
4. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
5. The way the Lender sold the Fractional Club membership breached the Office for Fair Trading ('OFT') Guidance.

The Lender didn't respond to the claim and complaint within a reasonable time so Mr D 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 on 28 March 2024.

The Lender eventually issued its final response to the complaint on 10 April 2024, rejecting it on every ground.

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

I issued a provisional decision on 16 October 2024, explaining why I was not planning to uphold the complaint. Neither Mr D, his PR, nor the Lender responded to this by the deadline I gave. So, my 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 Limitation Act 1980
- The CCA (including Section 75 and Sections 140A-140C).
- The law on misrepresentation.
- The Timeshare Regulations.
- The Consumer Rights Act 2015 ('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 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.

And 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 D 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 D at the Time of Sale, the Lender is also liable.

Our service normally thinks it would be fair and reasonable for a creditor to rely on the Limitation Act 1980 ("LA") as an answer to a claim under s.75 CCA. This is because it would not normally be fair to expect lenders to look into a claim that has been made outside of the limitation periods, so long after the liability arose and after a limitation defence would have become available in court.

So, I think it is relevant to consider whether the Lender has a limitation defence under the LA When thinking about a fair answer to Mr D's complaint.

It was held in *Green v. Eadie & Ors* [2011] EWHC B24 (Ch) that a claim under s.2(1) of the Misrepresentation Act 1967 is an action founded on tort for the purposes of the LA; therefore, the limitation period expires six years from the date on which the cause of action accrued (s.2 LA).

Here Mr D brought a like claim against the Lender under s.75 CCA. The limitation period for the corresponding like claim would be the same as the underlying misrepresentation claim.

As noted at para. 5.145 of Goode: Consumer Credit Law and Practice (Issue 68 (April 2022)) the creditor may adopt any defence which would be open to the supplier, including that of limitation:

"There is no difficulty in treating the debtor's rights under sub-s (1) as a "like claim" against the creditor. Since the creditor's liability mirrors the supplier's it follows that, to the extent that the supplier has successfully excluded or limited her liability, the creditor may shelter behind that exclusion or limitation. Conversely, the creditor's right to repayment is so closely connected with the supply contract, and the debtor's statutory rights under sub-s (1), that the debtor may assert a right of set-off in

diminution or extinguishment of her liability to the creditor, and as a defence in proceedings brought by the creditor (with or without a counter-claim). Any attempt to exclude the right of set-off will fall foul of CCA 1974, s 173(1) (and would in any case fall within [section 13(1)(b) of the Unfair Contract Terms Act 1977])"

Therefore, the limitation period for the s.75 CCA claim expires six years from the date on which the cause of action accrued.

The date on which a 'cause of action' accrued is the point at which Mr D entered into the Purchase Agreements. It was at that time that he entered into agreements based, he says, on the misrepresentations of the Supplier and suffered a loss. He says, had the misrepresentations not been made, he would not have bought the timeshare. And it was on that day that he suffered a loss, as he took out the loan agreement with the Lender that he was bound to and would have never taken out but for the misrepresentations.

The 2013 sale

Six years from the 2013 Time of Sale was 5 May 2019. But Mr D didn't make his claim until 27 July 2023. This means that the claim was made outside of the limitation period and the Lender would have a defence to any claim, even if there was a misrepresentation.

As such, I do not uphold this part of the complaint.

The 2017 sale

Likewise, six years from the 2017 Time of Sale was 13 March 2023. But Mr D didn't make the claim until 27 July 2023, which again means the Lender has a defence to any claim. As such I do not uphold this part of the complaint either.

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

Mr D also says that the credit relationship between him 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 he has 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 the Mr D 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 D’s membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were “any other thing done (or not done) by, or on behalf of, the creditor” under s.140(1)(c) CCA.

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

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

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

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

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

“[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator

and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[1]

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

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

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in *Patel* (which was recently approved by the Supreme Court in the case of *Smith),* that determining whether or not the relationship complained of was unfair had to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"* – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

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

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

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

I have considered the entirety of the credit relationship between Mr D and the Lender along with all of the circumstances of the complaint and I do not think the credit relationship between them was likely to have been rendered unfair 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; and
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 these on the fairness of the credit relationship between Mr D and the Lender.

The 2013 sale

I have explained in a separate decision why the Financial Ombudsman Service is unable to consider this part of the complaint.

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

The 2017 sale

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

They include the allegation that the Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the CPUT Regulations as well as a prohibited practice under those Regulations. The suggestion appears to be that the Supplier misled Mr and Mrs D about:

- The nature of the presentation they were attending.
- The end date of the Fractional Club membership.
- How their interest in the Allocated Property worked.
- That the Fractional Club membership was an investment.
- One of the Supplier's salespeople being presented as an independent "Compliance Officer" when they were not independent.
- That the product was only available at that price on that day.

While the Supplier could've been clearer about the nature of the presentation, what happens at the end of membership in terms of the sale of the Allocated Property, how their interest in the net sale proceeds of the Allocated Property worked and that the Compliance Officer was independent of the sales team (rather than able to provide them with truly independent advice on the purchase), I don't think that would be sufficient to create an unfair relationship, even if the CPUT Regulations were breached.

In respect of being told the offer was only available at that price on that day, I note that Mr and Mrs D responded to this by declining to agree to the purchase unless they were given time to think about it overnight. They were provided this time so, even if the deal was initially presented in that way, in practice they were given more time to think about it, so it doesn't appear this caused any unfairness in practice.

If the Supplier did do so, I don't think describing the Fractional Club membership was an investment was unreasonable, given one of the benefits was that Mr D could expect to receive some money back when the Allocated Property was sold. I will later deal in more detail with the matter of the Fractional Club membership being described as an investment, since the Timeshare Regulations are relevant to this allegation as well.

The PR says that the right checks weren't carried out before the Lender lent to Mr D. 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 D was actually unaffordable before also concluding that he lost out as a result and then consider whether the credit relationship with the Lender was unfair to him for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for the Mr D, particularly given he paid off the loan after around only two years, rather than over the full ten-year loan term, and it doesn't appear that he missed any repayments. But if there is any further information on this (or any other points raised in this provisional decision) that the Mr D wishes to provide, I would invite him to do so in response to this provisional decision.

Mr D says that he was pressured by the Supplier into purchasing Fractional Club membership at the 2017 Time of Sale. I acknowledge that he may have felt weary after a sales process that went on for a long time. But he says little about what was said and/or

done by the Supplier during his sales presentation that made him feel as if he had no choice but to purchase Fractional Club membership when he simply did not want to.

I also note that Mr D declined to make the purchase at the end of the presentation, waiting until the next day before agreeing, which gave him the opportunity to think about it and discuss it with Mrs D without the pressure of the Supplier's representative being present.

Mr D was also given a 14-day cooling off period and he has not provided a credible explanation for why he did not cancel his membership during that time. With all of that being the case, there is insufficient evidence to demonstrate that Mr D made the decision to purchase Fractional Club membership because his ability to exercise that choice was significantly impaired by pressure from the Supplier.

One of the main aims of 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 UTCCR being breached, and, potentially the credit agreement being found to be unfair under Section 140A of the CCA.

However, 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 the UTCCR are likely to have prejudiced Mr D's purchasing decision at the Time of Sale and rendered his credit relationship with the Lender unfair to him for the purposes of section 140A of the CCA. And I say this because:

Mr D'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 D unfair to them under Section 140A.

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 D was unfair to him because of an information failing by the Supplier, I'm not persuaded it was.

I'm not persuaded, therefore, that Mr D's credit relationship with the Lender was rendered unfair to him under Section 140A for any of the reasons above. But there is another reason why Mr D's credit relationship with the Lender may have been unfair to him. And that's because, if the Fractional Club membership was marketed and sold to him as an investment that would be in breach of the prohibition against selling timeshares in that way.

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

The Lender does not dispute, and I am satisfied, that Mr D 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 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 D's share in the Allocated Property clearly, in my view, constituted an investment as it offered him the prospect of a financial return – whether or not, like all investments, that was more than what he 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 D 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 him as an investment, i.e. told him or led him to believe that Fractional Club membership offered him 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 D 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 D's decision to go ahead with the purchase

Was the credit relationship between the Lender and Mr D 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 D 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 D, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 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.

<u>Why Mr D upgraded his Fractional Club membership</u>

At the time of sale Mr D already had Fractional Club membership. He describes being shown a new more luxurious part of a resort during the sales meeting and that the upgrade to his membership would mean he would have enough points to stay in that more luxurious accommodation.

The Rights Certificates provided show that in 2013 Mr D purchased Fractional Club membership with the Allocated Property being a studio apartment. Whereas in 2017, at least on the one certificate that has been provided, the Allocated Property was a two-bedroom apartment in the new part of the resort he was shown. Further, the 2017 Purchase Agreement provided preferential rights to stay in 'luxurious' accommodation. So, by upgrading his Fractional Club membership Mr D increased his holiday rights. It seems likely that was a significant factor in his decision to purchase.

We asked PR if it had a statement or any other direct evidence from Mr D beyond what was set out in the Letter of Complaint. But PR says no such document was obtained, and that the Letter of Complaint incorporated Mr D's recollections of the sale. That being the case, and with no further elaboration having been provided, I've thought about what was said in the Letter of Complaint about the Fractional Club membership being sold as an investment.

The letter of complaint says:

- *… the scheme was an "investment", in that they would get money back at the end of the term.*

It seems to me that this does no more than describe how the Fractional Club membership worked, in that Mr D obtained an interest in a share of the net sale proceeds of the Allocated Property when it was sold at the end of the membership term. There is no suggestion that his share would be as much or more than what he had paid to acquire his Fractional Rights in the first place. The Letter of Complaint went on to say this was important because the PR didn't consider the Fractional Club membership to be an investment, because Mr D had no real interest in the property which may or may not be sold in the future at an unknown price and date. So, it doesn't seem from this that the Supplier's sales representative is likely to have given Mr D the expectation or hope of financial gain or profit.

In the description of what happened during the sale, the Letter of Complaint said this:

- *Our clients were in [the Supplier]'s [Resort 1 in] Spain, in March 2017, using their Fractional Points Rights. While there, they were invited to another presentation, again starting with a free breakfast. They were told that this was to update our clients as to developments, within [the Supplier], and also to discuss how their membership was being used.*

- *On the 12 March 2017, at approximately 9:30-10:00am, Our clients were collected from their apartment, by one of [The Supplier]'s male sales representatives, and taken for breakfast.*

- *After breakfast, our clients were taken to see the nearby resort of [Resort 2], and the boardwalk along the beach. They were also taken to see [The Supplier]'s new [Luxurious Section of Resort 2] part of the complex. It was a gated community, overlooking the sea, with amazing views. They were told that they would need more Points if they wanted to stay there.*

- *After that our clients were taken back to the same sales suite, where another presentation began, very similar to the previous one.*

- *This time, our clients were urged to "upgrade" their membership, by trading in their previous fractional ownership for Fractional Product 2. They were told that this would provide better holidays, in [The Supplier]'s [more luxurious] Collection, in the best part of the resort, such as [Luxurious Section of Resort 2].*

- *Our clients did not think they could afford the upgrade, but [the Supplier] then made an offer for trading in Fractional Product 1, which made it seem more affordable.*

- *Our clients said that they would have to think about it, and when the Sales representatives pressed them for a decision there and then, our clients indicted that if that was the case their answer would be "no". So reluctantly, the [Supplier's] representatives agreed to hold the deal over until the following morning.*

- *The following day, our clients informed [the Supplier] that they would go ahead, and a lady was sent to collect them, and take them back at the sales suite to sign the documents.*

- *We are instructed that our clients agreed to the "upgrade" based on what they had been shown and told, the previous day.*

This seems to be a fairly detailed description of what happened at the time of sale. But at no point is there mention of the upgraded Fractional Club membership being an investment, that would lead to a return or a potential profit. Further to this, it seems clear from this that what attracted Mr D to the upgrade was the opportunity to stay in more luxurious accommodation when holidaying using his Fractional Points.

There is no mention here of how the property was described as or inferred to be an investment, nor what benefit this would confer on Mr D, or what returns he expected as a result. This being the case I do not think there is sufficiently plausible and persuasive evidence that would make it reasonable for me to conclude that the investment aspect of the Fractional Club membership was pivotal in Mr D's decision to upgrade his membership in 2017. Based on the evidence, it seems more likely that the increased holiday rights he was purchasing was his main motivation.

It follows, Mr D's recollections of the sale in the Letter of Complaint do not lead me to think the investment aspect of the Fractional Club membership was pivotal in his decision to go ahead with the 2017 upgrade. 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 D'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 he would have pressed ahead with his 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 D and the Lender was unfair to him even if the Supplier had breached Regulation 14(3).

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 D was unfair to him 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 D Section 75 claim(s) and the unfair relationship complaint in relation to the 2013 sale, and I am not persuaded that the Lender was party to a credit relationship with Mr D under the 2017 Credit 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.

If there is any further information on this complaint that the Mr D wishes to provide, I would invite him 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 D to accept or

reject my decision before 28 November 2024.

Phillip Lai-Fang
Ombudsman