DRN-5104729

The complaint

Mrs T and the estate of Mr T's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

Mrs T made the purchase in question with her now late husband, Mr T. The related credit agreement was in both of their names, so I'll refer to both throughout.

What happened

Mrs T and the late Mr T purchased a membership from a timeshare provider ('the Supplier') in January 2011, funded by a different Lender. That purchase is not the subject of this complaint and is included for background information only.

They then purchased a new membership of a timeshare (the 'Fractional Club') from the Supplier on 27 September 2012 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 2,070 fractional points at a cost of £44,899 (the 'Purchase Agreement'). But after trading in their existing timeshare, they ended up paying £8,129 for membership of the Fractional Club.

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

They paid for their Fractional Club membership by taking finance of £25,749 from the Lender in both of their names (the 'Credit Agreement'), consolidating previous lending. This loan was settled on 19 December 2012.

Mrs T and the late Mr T wrote to the Lender themselves to complain. This letter was not dated but the Lender have confirmed they received this letter on 13 July 2017. In this letter, (the 'Letter of Complaint') they complained about:

1. High pressure and aggressive sales techniques were used.
2. They were originally happy with their purchase, but the quality of the product and customer service quickly decreased and was considerably lower than what was promised at the Time of Sale.
3. For many years, they've not been receiving what they were promised when the purchase was made.
4. They were misled, as they were told the product they had bought before was now of no use to them, and to allow them to have all the benefits they wanted they needed to upgrade to the new product the Supplier was selling.
5. They were led to believe that it was an exclusive club for members, that they could get additional benefits such as 2 for 1 weeks and free upgrades, and when they tried

to book several different resorts at different times, they'd been told every single time that there is no availability.

6. They were not expressly informed of the 14-day cooling off period

The Lender dealt with Mr and Mrs T's concerns as a complaint and issued its final response letter on 29 July 2017, rejecting it on every ground.

They then referred that complaint to the Financial Ombudsman Service. Mr T then sadly passed away in June 2021. Around the time of Mr T's death, Mrs T appointed a representative ('the PR'). Seemingly unaware a previous complaint had already been made and already referred to our Service, after Mrs T obtained the relevant documentation, such as a death certificate for the late Mr T, the PR got in touch with the Lender to make what they thought was a new complaint on 16 March 2023 and referred it to our Service on 18 May 2023.

The original complaint made by Mrs T and the late Mr T was then assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits in October 2023.

Our Service did not initially receive a response to this and so the original complaint was closed at that stage.

After clarifying with the Lender, we explained to the PR in January 2024 that Mrs T and the late Mr T had already complained, and an outcome had already been sent on that original complaint to the late Mr T by an Investigator previously. Our Service remained unaware at that stage of the late Mr T's death.

The PR replied in February 2024 and explained that Mr T had sadly passed away in June 2021 and that Mr T had been dealing with the matter prior to his death, which was why no response to the Investigator's findings had been provided originally.

We explained to both parties that we were therefore closing down the new complaint made by the PR as a duplicate of the original one, and that we were re-opening the original complaint as Mrs T on behalf of herself and the late Mr T's estate didn't agree with the Investigator's findings, and we considered there was a valid reason as to why no response had been received by the deadline originally set.

The PR added a new point of complaint at this stage and said that the product was sold to Mrs T and the late Mr T as an investment. They provided lengthy further comments around this relating to previous decisions issued by this Service, and relating to the judgment in a Judicial Review of one of the lead decisions previously issued by this Service (*R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd; R. (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) (the 'Judicial Review')).

Within these comments, they referred to a witness statement Mrs T and the late Mr T had provided, but this Service had not yet seen a copy of.

We asked them to send this to us on 13 June 2024, which they did. It would seem this was sent to us previously on 18 October 2023, but using the wrong case reference. The statement is not signed but is dated as 30 October 2020.

In this statement, the following new points were raised:

- The annual fees have increased over the years and Mrs T and the late Mr T were not informed of this.
- Mrs T and the late Mr T noticed there are many additional fees, such as booking fees, that they were not informed of at the Time of Sale.

As noted above, Mrs T disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

My provisional decision

I considered the matter and issued a provisional decision on 10 October 2024. In that decision I said:

"***Section 75 of the CCA***

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 Mrs T and Mr T (and now the estate of Mr T) could make against the Supplier. And although not expressed in those exact terms, it is clear that that is what Mrs T and the late Mr T were doing as part of their Letter of Complaint.

But certain conditions must be met if the protection afforded to consumers is engaged. One of these is the price of the goods or service. The purchase price must be more than £100 but no more than £30,000.

In this case, I can see that the purchase price prior to the trade-in was £44,899 i.e. over £30,000. As it is the purchase price of the product or service that needs to be taken into account, and this purchase price was in excess of £30,000, a claim under Section 75 relating to the purchase cannot succeed.

But where the purchase price is in excess of £30,000, a claim can be considered under Section 75A of the CCA. But a claim under Section 75A can only relate to a 'breach of contract' – misrepresentation isn't included. Looking at Mrs T and Mr T's Letter of Complaint, I am satisfied it includes some elements which are alleged breaches of contract, so these could be considered under Section 75A.

There are other criteria in order for Section 75A to apply, but I don't consider that I need to make a finding on that because, as I go on to explain below, whether it be under Section 75 or 75A, I do not think that the Lender was unfair or unreasonable when it rejected their claim.

Mrs T and the late Mr T said the quality of the product and customer service decreased to lower than promised at the Time of Sale. And, that they could not holiday where and when they wanted to due to issues with availability. On my reading of the complaint, this suggests that they considered that 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 Mrs T and the late Mr T states that the availability of holidays was/is subject to demand. It also looks like they made use of their fractional points to holiday on around thirteen occasions both prior to and following the original complaint in 2017. I acknowledge that some of these were cruise holidays, but this was only two out of the overall number of holidays taken.

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. Similarly, regarding the alleged decline in quality and customer service, without

any evidence or explanation as to how exactly this was different to what was promised at the Time of Sale, it's difficult for me to say the Supplier had breached the terms of the Purchase Agreement in relation to this either.

Mrs T and the late Mr T also said the Supplier charged many additional fees and also increased the annual management fees over the years, and this hadn't been explained to them at the Time of Sale. But beyond making the bare allegation, Mrs T has not provided any evidence to support it, such as what they were told during the sales process about how much they were likely to pay in ongoing management charges. In short therefore, I have not seen enough evidence to say, on balance, that the Supplier wasn't entitled to charge these sums under the membership.

For these reasons, therefore, I do not think the Lender is liable to pay Mrs T and the estate of Mr T 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'm not persuaded that it was unfair or unreasonable for the Lender to reject Mrs T and Mr T's claim under Section 75 of the CCA. But Mrs T and Mr T, in the original letter of complaint, and now their representative, say that the credit relationship between them and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that they have concerns about. It is those concerns that I explore here.

As Section 140A of the CCA is relevant law in the context of this complaint, I do have to consider it. So, in arriving at a fair and reasonable outcome to this complaint, it will be helpful to consider whether an unfair credit relationship is likely to have come into existence between Mrs T and the late Mr T and the Lender.

Under Section 140A of the CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as "a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]". And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to "finance a transaction between the

debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mrs T and the late Mr 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 v British Credit Trust Limited [2014], the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that "negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law" before going on to say the following in paragraph 74:

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

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

---

[1] 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 v Patel [2009] EWHC 3264 (QB) (which was recently approved by the Supreme Court in the case of Smith), that determining whether or not the relationship complained of was unfair had to be made "having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination" – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

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

"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 Mrs T and the late Mr T and the Lender along with all of the circumstances of the complaint and I do not think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. I will explain why.

When coming to that conclusion, and in carrying out my analysis, I have looked at all the evidence provided to me from both parties, including the Supplier's sales process – which includes:

1. *The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale; 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; and*
4. *The inherent probabilities of the sale given its circumstances.*

I have then considered the impact of (1) to (4) on the fairness of the credit relationship between Mrs T and the late Mr T and the Lender.

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

Mrs T and Mr T's (and now the estate of Mr T's) complaint about the Lender being party to an unfair credit relationship was made for a few reasons, which I set out at the start of this decision.

They include the allegation 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 Fractional Club membership when they simply did not want to. They were also given a 14-day cooling off period[2] and they haven't 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 Mrs T and the late Mr T made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

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

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 Mrs T and the late Mr T's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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

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

But Mrs T and the estate of Mr T's representative 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.

Mrs T and Mr 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 the sale of products such as the Fractional Club. They just regulated how such products were marketed and sold.

To conclude, therefore, that Fractional Club membership was marketed or sold to Mrs T and the late Mr 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 or sold membership to them as an

---

[2] I note that Mrs T and the late Mr T said this wasn't something they were informed about, and I've addressed this allegation further below.

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 Mrs T and the late Mr 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 Mrs T and the late Mr T as an investment.

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

> *"We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that [the Supplier] makes no representation as to the future price or value of the Fraction."*

And, in the Information Statement it states:

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

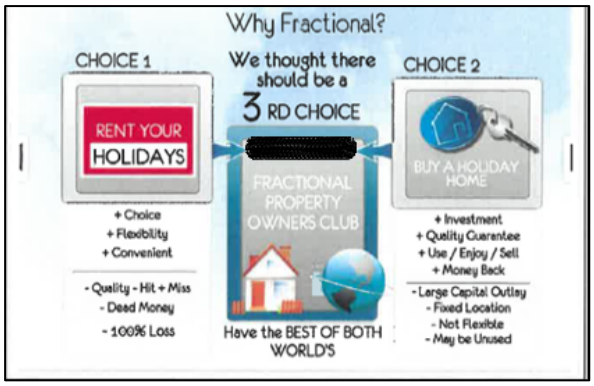
However, during the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives – including a document called "2011 Spain PTM FPOC 1 Practice Slides Manual" (the '2011 Fractional Training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

As I understand it, the 2011 Fractional Training Manual was used throughout the sale of the Supplier's first version of a product called the Fractional Property Owners Club – which I've referred to and will continue to refer to as the Fractional Club. It isn't entirely clear whether Mrs T and the late Mr T would have been shown the slides included in the Manual. But it seems to me to be reasonably indicative of:

(1) *the training the Supplier's sales representatives would have got before selling Mrs T and the late Mr T Fractional Club membership; and*

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

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



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

(1) *"Rent Your Holidays"*

(2) *"Buy a Holiday Home"*

(3) *The "Best of Both Worlds"*

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

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

When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that '[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).'[3] *And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.*

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

Mrs T and the late Mr T suggested in their witness statement that the Supplier positioned membership of the Fractional Club as an investment to them. And as I've said before, the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members – including Mrs T and the late Mr T. And as the slides clearly indicate that the Supplier's sales representative was likely to have led prospective members to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e., a profit) in the future, I accept that it is possible that Fractional Club membership was marketed and sold to Mrs T and the late Mr T as an investment in breach of Regulation 14(3).

---

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

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

Was the credit relationship between the Lender and Mrs T and the late Mr T rendered unfair?

I've considered what impact any potential breach had on the fairness of the credit relationship between Mrs T and the late Mr T and the Lender under the Credit Agreement and related Purchase Agreement.

As the Supreme Court's judgment in Plevin makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in Carney and Kerrigan (respectively) on causation.

In Carney, HHJ Waksman QC said the following in paragraph 51:

"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"

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 Mrs T and the late Mr T and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) (deemed to be something done by the Lender under section 140(1)(c) of the CCA) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

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

But, even if they were, having taken the opportunity to set out what affected their enjoyment of their Fractional Club membership, and having set out their reasons for being unhappy with it, Mr and Mrs B did not mention the investment potential of the membership.

Looking at Mrs T and the late Mr T's original Letter of Complaint, they haven't said anything about the investment element of the membership. Instead, in this letter, they said they were initially happy with their purchase "but later on the problems started as the quality of the product and customer service started quickly decreasing…the quality of the product and customer service was considerably lower from what we were promised".

They also suggested that the main reasons they were unhappy were due to alleged issues with availability, exclusivity and quality of holidays. So, in my view, their purchase was largely motivated by the prospect of holidays, rather than the investment element.

This Letter of Complaint was written in Mrs T and the late Mrs T's own words much closer to the Time of Sale and so I think is the best evidence available of why they made their complaint and why they were unhappy with their membership.

I have also taken into account the witness statement provided which is dated as 30 October 2020, although is not signed. This statement was therefore taken over three years after the original complaint was made, so I'm unable to place as much weight on it as Mrs T and the late Mr T's original Letter of Complaint. I acknowledge that their witness statement says "We were told that we had the option of purchasing the Fractional system and therefore we would be able to make some money from doing so. We had at least expected to get our money back form [sic] this".

However, on my reading of what they've had to say, this only relates to a description of what they remembered at that stage of the sales process, rather than why they're unhappy with their membership now. Mrs T and the late Mr T went on to repeat that the reasons they are now unhappy with their membership are again, alleged difficulties with accessing holidays, a lack of exclusivity and also an increase in fees associated with the 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 Mrs T and the late Mr T'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 Mrs T and the late Mr T 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 Mrs T and the late Mr T when they purchased membership of the Fractional Club at the Time of Sale. But they said that the Supplier failed to provide them with all of the information they needed to make an informed decision.

Firstly, Mrs T and the late Mr T said they weren't informed of their 14 day cooling off period at the Time of Sale.

But, this is, in my view, clearly explained on the credit agreement and the covering letter that was sent to Mrs T and the late Mr T. And, I can also see Mrs T and the late Mr T signed a one-page 'right of withdrawal' form at the Time of Sale which also explained the 14 day cooling off period.

Mrs T and the late Mr T also said the annual fees have increased over the years and they weren't informed of this.

But, I can see in the Information Statement Mrs T and the late Mr T signed at the Time of Sale, it explains that the charges are budgeted annually and will be subject to increase or decrease as determined by the costs of managing the Project.

Lastly, Mrs T and the late Mr T said they had now noticed there are many additional fees, such as booking fees, that they weren't informed about. But, beyond making the bare allegation, no further evidence has been provided to support the allegation in question. For example, it hasn't been explained in any detail all the exact fees they were referring to and what information regarding the fees they felt they should have been told that they weren't. Mrs T and the late Mr T also didn't provide any information about the fees they actually paid to date.

Moreover, as I haven't seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Mrs T and the late Mr T 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 Mrs T and the late Mr T was unfair to them for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis."

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

Neither party responded to my provisional decision or provided any new evidence or arguments they wished to be considered.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

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

My final decision

I do not uphold Mrs T and the estate of Mr T's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs T and the estate of Mr T to accept or reject my decision before 22 November 2024.

Fiona Mallinson
Ombudsman