DRN-5117611

The complaint

Miss B and Mr R'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

Miss B and Mr R were existing members of a points-based timeshare product provided by a timeshare provider (the 'Supplier').

On 15 July 2012, they purchased membership of a new type of timeshare product (the 'Fractional Club') from the Supplier. They entered into an agreement with the Supplier to buy 2,766 fractional points at a cost of £46,599. But after trading in their existing timeshare, they ended up paying £10,982 for membership of the Fractional Club.

They paid for their Fractional Club membership by taking finance of £10,982 from the Lender in Miss B's name only. This purchase is not part of this complaint and is included for background information only. I'm dealing with the merits of that other complaint in a separate decision.

On 27 July 2014 (the 'Time of Sale 1'), Miss B and Mr R made a further Fractional Club purchase and entered into an agreement with the Supplier to buy 2,690 fractional points at a cost of £53,497 (the 'Purchase Agreement 1'). After trading in their existing timeshare, they ended up paying £6,898 for this membership.

They paid for this membership by taking finance of £6,898 from the Lender in Miss B and Mr R's joint names (the 'Credit Agreement 1'). That loan was settled on 22 January 2015.

On 27 July 2015 (the 'Time of Sale 2'), Miss B and Mr R made a further Fractional Club purchase and entered into an agreement with the Supplier to buy 3,290 fractional points at a cost of £44,866 (the 'Purchase Agreement 2'). But after trading in their existing timeshare, they ended up paying £6,386 for this membership.

They paid for this membership by taking finance of £6,386 from the Lender in Miss B and Mr R's joint names (the 'Credit Agreement 2'). That loan was ongoing and had not yet been settled at the time this complaint was made.

Fractional Club membership was asset backed – which meant it gave Miss B and Mr R 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.

Miss B and Mr R – using a professional representative (the 'PR') – wrote to the Lender on 12 June 2018 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time(s) of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.

2. The Lender being party to an unfair credit relationship under the Credit Agreements and related Purchase Agreements for the purposes of Section 140A of the CCA.

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

Miss B and Mr R say that the Supplier made a number of pre-contractual misrepresentations at the Time(s) of Sale – namely that the Supplier:

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

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

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

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

1. They did not receive a copy of the Information Statement prior to the purchase or if they did, they did not have adequate time to review it.
2. The contractual terms setting out (i) the duration of their Fractional Club membership and (ii) the obligation to pay annual management charges for the duration of their membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
3. They were pressured into purchasing Fractional Club membership by the Supplier.
4. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.
5. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
6. No adequate or transparent explanation was given to Miss B and Mr R as to the features of the loan agreements which may have made them unsuitable for them or have a significant adverse effect which they would be unlikely to foresee, especially given the length of the term, their age, the high interest rate and the total charge for the credit provided.
7. The Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs.

The PR also raised some general concerns with the membership. Namely, an alleged lack of availability and exclusivity.

The Lender did not send a substantive response to their complaint within the eight weeks required by the Regulator, so Miss B and Mr R referred the complaint to the Financial

Ombudsman Service. The Lender later sent their final response letter to the complaint on 24 March 2021, rejecting it on every ground.

It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

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

I considered the matter and issued a provisional decision on 16 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 Miss B and Mr R could make against the Supplier.

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 respective purchase prices prior to the trade-ins were £53,497 for the Time of Sale 1 and £44,866 for the Time of Sale 2 i.e., over £30,000 for both purchases. As it is the purchase price of the product or service that needs to be taken into account, and the purchase prices for both sales here were in excess of £30,000, a claim under Section 75 relating to the purchases 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 Miss B and Mr R's claim I am satisfied it includes an element which is an alleged breach of contract, so this could potentially be considered under Section 75A. Namely, their concerns relating to availability and exclusivity.

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 Miss B and Mr R's claim.

Miss B and Mr R have said 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 consider that the Supplier was not living up to its end of the bargain and had breached the Purchase Agreements. 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 Miss B and Mr R states that the availability of holidays was/is subject to demand. And, from what the Supplier has to say, they did use their membership(s) to holiday on around five occasions.

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 Agreements.

They also said there was a lack of exclusivity, given the fact that the Supplier's resorts were open to be booked by people who weren't members. But, while those who weren't Fractional Club members might have been able to holiday at the Supplier's resorts, I can't see that this meant Miss B and Mr R didn't receive what they were entitled to as members under the Purchase Agreements.

For these reasons, therefore, I do not think the Lender is liable to pay Miss B and Mr R 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 and/or Section 75A claim in question.

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

Miss B and Mr R also say that the credit relationship(s) between them and the Lender were 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 Times 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 relationships between Miss B and Mr R and the Lender were unfair. As I have said, there were two purchases which are the subject of this complaint (the Time of Sale 1 and Time of Sale 2 as outlined above), each with an associated credit agreement, so each must and will be considered as individual events. However, the evidence provided, and points raised by Miss B and Mr R and the PR are largely identical for each, so I see no purpose in this provisional decision to repeat my findings twice. So, while treating them as individual events, I will set out my findings largely as one.

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 Miss B and Mr R's membership of the both the Fractional Club 1 and Fractional Cub 2 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.

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[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 (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 relationships between Miss B and Mr R and the Lender along with all of the circumstances of the complaint and I do not think the credit relationships between them were 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 Times 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 Times 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 Times of Sale; and*
4. *The inherent probabilities of the sales given their circumstances.*

I have then considered the impact of 1-4 on the fairness of the credit relationships between Miss B and Mr R and the Lender.

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

Miss B and Mr R'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 Miss B and Mr R and carried on unfair commercial practices which were prohibited under the CPUT Regulations. 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 Miss B and Mr R. 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 Miss B and Mr R 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 Miss B and Mr R. If there is any further information on this (or any other points raised in this provisional decision) that Miss B and Mr R wish to provide, I would invite them to do so in response to this provisional decision.

Miss B and Mr R say they were pressured by the Supplier into purchasing Fractional Club membership at the Times 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 presentations that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to. They were also given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel their membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Miss B and Mr R made the decisions to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

The misrepresentations I've described previously could also be something that led to an unfair debtor-creditor relationship[2], so I've considered what Miss B and Mr R have had to say with this in mind.

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

The PR also said in the letter of complaint that the Supplier told them that membership was an 'investment' when that was not true. But, for reasons I'll go on to explain below, Miss B and Mr R's membership plainly did have an investment element to it.

As for the rest of the Supplier's alleged pre-contractual misrepresentations, while I recognise that Miss B and Mr R have concerns about the way in which their Fractional Club memberships were sold, they haven't persuaded me that there was an actionable misrepresentation by the Supplier at the Times of Sale for the other reasons they allege. And I say that because beyond the bare allegations, little to no evidence has been provided to support them, including in Miss B and Mr R's testimony about what happened at the Times of Sale.

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

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

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

The Lender does not dispute, and I am satisfied, that both of Miss B and Mr R's Fractional Club memberships 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 Times 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.

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

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

To conclude, therefore, that either or both Fractional Club memberships were marketed or sold to Miss B and Mr R 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 that membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Miss B and Mr R, 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 Miss B and Mr R as an investment.

But with that said, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. And I accept that it's possible that Fractional Club membership was marketed and sold to them as an investment in breach of Regulation 14(3) given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Club membership without breaching the relevant prohibition.

Nonetheless, it is not necessary to make a formal finding on that particular issue because, 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.

Were the credit relationships between the Lender and Miss B and Mr R 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 Miss B and Mr R 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 Miss B and Mr R, 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 them to enter into the Purchase Agreements and the Credit Agreements is an important consideration.

I've looked at Miss B and Mr R's initial recollections of the sales process at each of the Times of Sale.

In their first witness statement, dated 1 June 2017, regarding the Time of Sale 1 specifically, they've said:

> *"We were told that our fees would go down again, and we were told that we needed to be in FPOC2".*

The Letter of Complaint reflects this, saying about the Time of Sale 1:

> *"[the Supplier] had introduced a new Fractional product, that he called 'FPOC2', which was better than FPOC1. Our clients were told that there would be no booking fees, with the new product, and [sales agent name] also told them that their management fees would go down too. For those reasons, they really needed to be in the new product".*

Their more recent recollections now provided, reflect the above and also say:

> *"He [the sales agent] said that was better than the previous fractional product, as there were no booking fees with this new product…He said that management fees would reduce, and we were advised for that reason alone, we needed to have the new product…So, after a few hours, we were persuaded to trade in FPOC1 for FPOC2, mainly because we had dealt with [sales agent name] previously and we trusted him."*

In their initial recollections of the Time of Sale 2, Miss B and Mr R have said that they weren't sure why they upgraded again and that they were usually told 'some story' about why they should upgrade. The Letter of Complaint said the same, and their more recent recollections haven't described the Time of Sale 2 at all.

So, overall, they have said very little about the Time of Sale 2 at all and what they've had to say about the Time of Sale 1 (as outlined above) suggests they purchased it due to the lower fees associated with the new product.

Based on this evidence, I don't think the share in the Allocated Property was an important and motivating factor when they decided to go ahead with their purchases at the Times of Sale. And with that being the case, having weighed up everything that has been said and/or provided by both sides throughout this complaint, I am not persuaded that the investment potential of Fractional Club membership was material to the purchasing decisions Miss B and Mr R ultimately made.

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 Miss B and Mr R's decisions to purchase Fractional Club membership at the Times of Sale were 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 purchases whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationships between Miss B and Mr R and the Lender were unfair to them even if the Supplier had breached Regulation 14(3).

The provision of information by the Supplier at the Times 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 Miss B and Mr R when they purchased membership of the Fractional Club at the Times of Sale. But they and the PR say that the Supplier failed to provide them with all of the information they needed to make an informed decision.

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

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

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

Unfair term(s)

Miss B and Mr R say that the Purchase Agreements contain unfair contract terms (under the UTCCR) in relation to the duration of membership and the obligation to pay management charges for that duration.

To conclude that a term in the Purchase Agreements rendered the credit relationships between Miss B and Mr R and the Lender unfair to them, I'd have to see that the term was unfair under the UTCCR and that term was actually operated against Miss B and Mr R in practice.

In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Miss B and Mr R, have flowed from such a term, because those consequences are relevant to an assessment of unfairness under Section 140A. Indeed, the judge in the very case that this aspect of the complaint seems based on (Link Financial v Wilson [2014] EWHC 252 (Ch)) attached importance to the question of how an unfair term had been operated in practice: see [46].

As a result, I don't think the mere presence of a contractual term that was/is potentially unfair is likely to lead to an unfair credit relationship unless it had been applied in practice.

Having considered everything that has been submitted, it seems unlikely to me that the contract term(s) cited by Miss B and Mr R have led to any unfairness in the credit relationships between them and the Lender for the purposes of Section 140A of the CCA. I say this because I cannot currently see that the relevant terms in the Purchase Agreements were actually operated against Miss B and Mr R, let alone unfairly. The PR hasn't explained why exactly they feel these term(s) cause an unfairness and as I've said, I can't see that these term(s) have been operated in an unfair way against Miss B and Mr R in any event.

The provision of information at the Times of Sale

Miss B and Mr R say they weren't given sufficient information about the ongoing costs of the membership.

But they haven't expanded on this point with any further detail such as what they were told about the above elements at the Times of Sale, or what information they felt they should have been given that they weren't. It also hasn't been explained how exactly they felt this caused an unfairness in the credit relationship(s) between Miss B and Mr R and the Lender.

But, in any event, it seems likely to me that Miss B and Mr R were told by the Supplier at the Times of Sale that the annual maintenance fees, for example, were payable each year and that they may increase. For example, I'm aware the Information Statement provided at the Times of sale generally explained that owners will be required to contribute to the charges for management, repair and maintenance of the property by means of an annual

management charge, payable whether weeks are used or not. And, that the charges will be budgeted annually and will be subject to increase or decrease as determined by the costs of managing the project and are payable in advance each year.

Miss B and Mr R also say that they weren't given adequate time to review the standard Information Statement before entering into the Purchase Agreements. But, from what I've seen, they were given this document to review at the same time as all of the other sales documentation.

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

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

So, while it's possible the Supplier didn't give Miss B and Mr R sufficient information, in good time, on the above elements of their membership, in order to satisfy its regulatory responsibilities at the Times of Sale, I haven't currently seen enough to persuade me that this, alone, rendered Miss B and Mr R's credit relationships with the Lender unfair to them.

Moreover, as I haven't seen anything else to suggest that there are any other reasons why the credit relationships between the Lender and Miss B and Mr R were 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 relationships between the Lender and Miss B and Mr R were 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."

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

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

What I've decided – and why

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

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

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss B and Mr R to accept or reject my decision before 28 November 2024.

Fiona Mallinson
Ombudsman