DRN-5180734

The complaint

Ms M'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 her under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

What happened

Ms M (together with another – Mr L) purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 14 March 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,200 fractional points at a cost of £15,349 which included the first year's *"Membership / Dues"* of £783 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Ms M and Mr L 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.

Ms M and Mr L paid for their Fractional Club membership by taking finance of £15,349 from the Lender in their joint names (the 'Credit Agreement').

Unfortunately, Mr L passed away in August 2015. So, it appears the Purchase Agreement and Credit Agreement reverted to Ms M's sole name.

Ms M – using a professional representative (the 'PR') – wrote to the Lender on 15 June 2018 (the 'Letter of Complaint') to complain about the timeshare purchase made on 14 March 2014. The Letter of Complaint read (in full):

"Our clients bought into [the Supplier] *in 2014 using your finance at a cost of £15,349.00 They got the usual sales talk of how buying into Fractional Points was a great thing to do for their future as, in 19 years, the Fractionals would be turned into big money by selling the Resort However, if you read point 4 on their contract, it clearly states that the Vendor or Management Company would have no re-sale, rental or re-purchase of Fractional Points.*

They also state that CLC make no representation as to the future price or value of the Allocated Property or any Fractional Rights but this is exactly the opposite of the sales pitch the Representative give (sic) *to all CLC clients. Every one tells the same story, that it will be sold and they would get a huge profit on their investment.*

Also, the Maintenance fees are now horrendously expensive and availability is at a new low for members, yet anyone can get great availability by clicking on [a specified online travel platform] *and at a much cheaper rate than* [the Supplier's] *members are paying in maintenance fees.*

Our client is now having to pay this loan herself as her partner has died and is finding things very difficult She now requests a full return of the money she has paid as she feels the product was mis-sold."

The Lender dealt with Ms M's concerns as a complaint and issued its final response letter on 4 December 2018, rejecting it on every ground.

Ms M 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.

Ms M disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. In responding, the PR also said, *"…the fact you are getting hundreds of complaints for the same thing should say that they* [the Supplier] *were lying throughout the presentation…".*

Shortly afterwards, the PR added (in full):

"We would like to take into consideration relating to the recent Judicial Review the circumstances that our clients entered into the Fractional Owner Club Scheme.

These new upgraded contracts did not offer any additional benefits to our clients and only continued the rights they already had but with a shortened duration, our clients would have the Fractional Rent allocation should they wish to rent out within the asset backed investment, with a shortened term to sell at the end of the term for large profit.

With this taken into consideration this cannot be viewed as a "timeshare contract" as the terms did not fall within the definition of a timeshare contract but as a collective Investment Scheme, which they are neither qualified nor authorised to give advice on or sell to our clients.

This would deem the contract as an unfair relationship therefore as this applies to this particular case we would appreciate our clients are reviewed under the S140/a and S56 of the Consumer Credit Act, to be put back to the position that they had no been sold into this CIS which linked the Loan."

The legal and regulatory context

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

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

- The CCA (including Section 75 and Sections 140A-140C).
- The law on misrepresentation.
- The Timeshare Regulations.
- The Unfair Terms in Consumer Contract Regulations 1999 ('UTCCR').
- The Consumer Protection from Unfair Trading Regulations ('CPUTR').
- 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').

Having considered Ms M's complaint, I reached a similar outcome to that of our investigator. But as I'd expanded somewhat on the reasons given, I issued a provisional decision ('PD') on 7 November 2024 giving Ms M and the Lender the opportunity to respond to my findings before I reach a final decision.

Despite follow up by this service, none of the parties to Ms M's complaint have acknowledged or provided any further comments or information for me to consider. So, Ms M's complaint was passed back to me in order to reach a final decision.

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.

For completeness, in my PD I said:

> I have considered all the available evidence and arguments to decide what is 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 Ms M 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 Ms M at the Time of Sale, the Lender is also liable.

For me to conclude there was a misrepresentation by the Supplier in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that the Supplier made false statements of fact when selling the timeshare product. In other words, that they told Ms M something that wasn't true in relation to one or more of the points raised. I would also need to be satisfied that the misrepresentations were material in inducing Ms M to enter the contract. This means I would need to be persuaded that Ms M reasonably relied on those false statements when deciding to buy the timeshare product.

This part of the complaint was made for the reasons that I set out at the start of this decision. They include the suggestion that Ms M was told that the Fractional Points would be turned into big money by selling the resort. The difficulty I have is identifying what was actually said at the Time of Sale. The PR have provided limited details and evidence to support the misrepresentations Ms M says the Supplier made, although I acknowledge she does say she was told these things. So, I've thought about this alongside the limited evidence that is available from the Time of Sale

As I've explained above, Ms M's Fractional Club membership included a share in the net sale proceeds of a property named on the Purchase Agreement after the membership term ends. So, simply telling Ms M that she was buying a fraction or share of one of the Supplier's properties was not untrue. Ms M'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. But I can't see anything to suggest that she was told the sale of the Allocated Property would result in her receiving *"big money".* In fact, I've found nothing within the evidence provided to suggest the Supplier gave any assurances or guarantees about the future sales value of Ms M's Fractional Club membership, or the Allocated Property. And Ms M hasn't explained in any detail what was specifically said and in what circumstances or what she understood "*big money*" to mean.

The PR also reference *"point 4 on their contract".* This appears to be a reference to the Member's Declaration signed and initialled by Ms M at the Time of Sale. Point 4 says, *"We understand that* [the Supplier]*, the Trustee or the Manager does not and will not run any resale or rental programmes and will not repurchase Fractions* [or Membership Points] *or act as an agent in the sale other than as a trade in against future property purchases* […]*".*

This particular point refers to the sale, disposal or rental of the membership and fractions during the course of the Purchase Agreement term. It does not relate to the ultimate sale of the Allocated Property when the Purchase Agreement ends. The Information Statement provided at the Time of Sale is clear in explaining how the Allocated Property will be sold once the Purchase Agreement ends together with the Trustee's (who owned the legal title to the Allocated Property) role in facilitating that.

While I recognise that Ms M has concerns about the way in which her Fractional Club membership was sold, she has not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for any of the reasons she alleges.

For these reasons, therefore, I do not think the Lender is liable to pay Ms M any compensation for the alleged misrepresentations of the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

Section 75 of the CCA: the Supplier's breach of contract

I've already summarised how Section 75 of the CCA works and why it gives Ms M a right of recourse against the Lender. So, it isn't necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, the Lender is also liable.

Ms M says that *"availability is at a new low for members, yet anyone can get great availability by clicking on* [a specified online travel platform] *and at a much cheaper rate than* [the Supplier's] *members are paying in maintenance fees".*

Some of the sales paperwork signed by Ms M states that the availability of holidays was/is subject to demand. It also looks like she made use of her fractional points to holiday on four occasions between 2014 and 2018 – whereupon she applied to surrender her membership. I accept that she 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.

I also don't think it's possible to directly compare Ms M's Fractional Club membership costs to those ordinarily associated with traditional holiday accommodation bookings. The Fractional Club membership appears to provide more than just the ability to book holiday accommodation and is, ultimately, a completely different kind of holiday product. So, it's not possible to make a simple cost comparison.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Ms M any compensation for a breach of contract by the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

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

I have already explained why I am not persuaded that the contract entered into by Ms M was misrepresented (or breached) by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Ms M also provides reasons which could suggest that the credit relationship between her 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 she 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 Ms M 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 Ms M'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 Ms M 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 Court of Appeal's decision in *Scotland* was recently followed in *Smith*.

1. the Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale;
2. the provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;
3. evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; and
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 Ms M and the Lender.

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

Ms M's complaint about the Lender being party to an unfair credit relationship was made on the basis that the Fractional Club membership had been sold to her as an investment. This allegation was mentioned in the Letter of Complaint but was expanded on in November 2023 after our Investigator had issued their initial view. I have considered that further.

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 PR initially alleged that Ms M was told by purchasing the Fractional Club membership, *"the Fractionals would be turned into big money"* and Ms M *"would get a huge profit on* [her] *investment".* And following our Investigator's view, the PR later argued that the Fractional Club membership cannot be viewed as a timeshare contract as the terms did not fall within the definition of a timeshare contract but as a collective investment scheme ('CIS').

However, Mrs W acquired holiday rights when joining the Fractional Club and subsequently upgrading her Fractional Club membership. So, it met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations. And it also meant it was exempt from giving rise to a CIS. So, the PR is mistaken in its argument on this point (see paragraphs 39-54 in Shawbrook & BPF v FOS).

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 in alleging that Ms M was told she would get a huge profit on her investment, the PR suggests 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.

Ms M's share in the Allocated Property clearly, in my view, constituted an investment

as it offered her the prospect of a financial return – whether or not, like all investments, that was more than what she 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 Ms M 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 her as an investment, i.e. told her or led her to believe that Fractional Club membership offered her the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

In the initial complaint and subsequent submissions, the PR has not set out in any particular detail why or how Ms M's Fractional Club membership was sold as an investment or what she was specifically told that led her to believe it was an investment. So, I have also considered, amongst other things, the paperwork from the Time of Sale.

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 Ms M, the financial value of her 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 Ms M as an investment.

In particular, the documentation includes the following:

- Note 5 of the Members Declarations for Purchase Agreement signed by Mrs M says, *"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".*

- Part 6, note 5 of the Information Statement says, *"The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for direct purposes of a trade in nor 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".*

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 based upon the allegations made, I accept that it's *possible* that Fractional Club membership was marketed and sold to Ms M 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.

But it isn't necessary to make a formal findings on that point as, even if the Fractional Club membership was marketed and sold to Ms M as an investment, I am not currently persuaded that would make a difference to the outcome in this complaint anyway.

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

But the original complaint provides no real clarity about what it was that prompted Ms M to purchase her Fractional Club membership. And while allegations have been made about what she was told at the Time of Sale, Ms M hasn't explained in any detail what was said that she relied upon and ultimately persuaded her to proceed with the purchase. During the course of their investigation, our investigator asked the

PR whether a witness statement/testimony had been provided by Ms M. But the PR didn't respond, so no such statement has been provided.

Furthermore, the complaint also appears to focus in on the ongoing costs associated with the purchase of Ms M's Fractional Club membership - both in terms of the maintenance fees payable and the ongoing loan repayment costs following the sad death of her partner.

In response to Ms M's complaint, the Supplier confirmed to the Lender that Ms M used the Fractional Club membership to take a holiday with Mr L in June 2014. And having subsequently advised them of Mr L's death in October 2015, Ms M then took three further holidays. However, in June 2018 (around the same time as the original complaint) Ms M voluntarily surrendered her membership. Ms M's complaint submission to this service also confirms that she had been finding it very hard financially following Mr L's death.

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 Ms M'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 she would have pressed ahead with her purchase whether or not there had been a breach of Regulation 14(3). And I'm persuaded that her complaint is primarily driven by a change in her financial circumstances rather than any alleged unfairness in the relationship between her and the Lender arising out of the sale. And for that reason, I'm not persuaded that the credit relationship between Ms M and the Lender was unfair to her even if the Supplier had breached Regulation 14(3).

The provision of information by the Supplier at the Time of Sale

The original complaint suggests that *"Maintenance fees are now horrendously expensive…".* So, I have thought about what information she was given about the fees at the Time of Sale and whether a lack of information provided then could have caused an unfair debtor-creditor relationship.

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Ms M when she purchased membership of the Fractional Club at the Time of Sale. 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.

It is possible that some of the terms governing the Fractional Club's ongoing costs go against the requirements of the UTCCR. But given the particular circumstances of

this complaint, even if some of the terms in question did constitute unfair contract terms under the UTCCR, it seems unlikely to me that they led to any actual unfairness in the credit relationship between Ms M and the Lender for the purposes of Section 140A. I say this because I cannot see that the potentially offending terms were operated against Ms M during the time that she was party to the Credit Agreement – nor can I see that there were any ongoing effects of unfairness because of the terms in question. And with that being the case, I cannot see that the potential unfairness of those terms eventuated in practice.

I acknowledge that it is also possible that the Supplier did not give Ms M sufficient information, in good time, on the various charges they could have been subject to as Fractional Club members in order to satisfy the requirements of Regulation 12 of the Timeshare Regulations. But even if that was the case, as I have already said, I cannot see that the ongoing costs of membership were applied unfairly in practice. And as neither Ms M nor the PR have persuaded me that she would not have pressed ahead with the purchase had the finer details of the Fractional Club's ongoing costs been disclosed by the Supplier in compliance with Regulation 12 of the Timeshare Regulations, I cannot see why any failings in that regard are likely to be material to the outcome of this complaint given its fact and circumstances.

Moreover, as I haven't seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Ms M was unfair to her 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 Ms M was unfair to her 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 Ms M's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with her under the Credit Agreement that was unfair to her 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 her.

Having received nothing more to consider from any of the parties to this complaint, I've no reason to vary from my provisional findings. So, while I appreciate Ms M is likely to be very disappointed, I will not be asking the Lender to do anything more here.

My final decision

For the reasons set out above, I do not uphold Ms M's complaint against Shawbrook Bank Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms M to accept or reject my decision before 31 December 2024.

Dave Morgan
Ombudsman