DRN-5233742

The complaint

Mrs K and Mr S's complaint is, in essence, that First Holiday Finance 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.

What happened

Mrs K and Mr S purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 24 November 2016 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 810 fractional points at a cost of £13,110 (the 'Purchase Agreement').

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

Mrs K and Mr S paid for their Fractional Club membership by paying £500 as a deposit and taking finance of £12,610 from the Lender in their joint names (the 'Credit Agreement').

Mrs K and Mr S – using a professional representative (the 'PR') – wrote to the Lender on 17 July 2018 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. A breach of fiduciary duty, in that the payment of commission as a result of the Credit Agreement, had not been disclosed to them.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

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

Mrs K and Mr S say that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. Told them that purchasing Fractional Club membership was the only way they could exit their current membership, but that was not true.
2. Told them that Fractional Club membership had a guaranteed exit after a finite number of years, but that was not true.
3. Told them that the Supplier's holiday resorts were exclusive to its members when that was not true.

Mrs K and Mr S 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 them.

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

The Letter of Complaint set out several reasons why Mrs K and Mr S say that the credit relationship between them and the Lender was unfair to them under Section 140A of the CCA. In summary, they include the following:

1. The contractual terms setting out (i) the duration of their Fractional Club membership and/or (ii) that they had no control over the amounts due for the duration of their membership, were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR')[1].
2. The commission paid by the Lender to the Supplier was not disclosed to them at the Time of Sale.
3. No choice of finance providers was given to them.
4. The decision to lend was irresponsible as the Lender did not carry out the required affordability assessment.

The Lender acknowledged their complaint and told the PR that no commission had been paid to the Supplier. It asked the Supplier to respond to the merits of the complaint on its behalf. The Supplier did so, rejecting their complaint on every count.

As Mrs K and Mr S were unhappy with this outcome, the PR referred their complaint to our Service. Under the heading *"please tell us what your complaint is about"* the following was entered:

> *Firstly, [the Supplier] and [the Lender] failed to conduct a proper assessment of Our Clients' ability to afford the loan, rendering the agreement unfair pursuant to s.140A Consumer Credit Act 1974; secondly, [the Lender] paid a commission to [the Supplier] which was not declared to Our Clients rendering the agreement unfair pursuant to s.140 Consumer Credit Act 1974, and; thirdly, [the Supplier] unduly pressured Our Clients into entering into a contract with [the Supplier] and a finance agreement with [the Lender], rendering the agreement unfair pursuant to s.140A Consumer Credit Act 1974.*

And under the section titled *"How do you want the business to put things right for you?"* the following was entered:

> *To refund all monies paid to [the Lender], together with interest thereon, the repayment of commissions paid by [the Lender] to [the Supplier] and a cancellation of the remainder of the finance agreement.*

The PR also submitted a statement setting out Mrs K and Mr S's recollection of their entire relationship with the Supplier and the Lender.

Mrs K and Mr S's complaint was considered by an Investigator at this Service, who didn't think it ought to be upheld.

Mrs K and Mr S did not agree with this, and the PR submitted that the Investigator had not paid any regard to the outcome of *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*'). It said that it was clear from Mrs K and Mr S's statement that

[1] Although the PR stated this was a breach of the UTCCR this appears to be an error. The date of this sale meant that it was protected under the Consumer Rights Act 2015 ('CRA'), and I will deal with it as such.

the Fractional Club was represented to them by the Supplier as an investment, and that this representation was fundamental to their purchase.

No agreement could be reached, so the matter came to me to consider.

And having done so, I agreed with the outcome reached by the Investigator. I didn't think Mrs K and Mr S's complaint ought to be upheld, but in reaching that conclusion I had expanded somewhat on the reasons why. So, I set out my initial thoughts in a Provisional Decision (the 'PD') and invited both Mrs K and Mr S and the Lender to respond with any new evidence or arguments if they wished to.

In my PD I began by setting out the legal and regulatory context. I said:

"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 UTCCR.*
- *The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations').*
- *Case law on Section 140A of the CCA – including, in particular:*
    - *The Supreme Court's judgment in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 ('Plevin') (which remains the leading case in this area).*
    - *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
    - *Patel v Patel [2009] EWHC 3264 (QB) ('Patel').*
    - *The Supreme Court's judgment in* Smith *v* Royal Bank *of* Scotland *Plc [2023] UKSC 34 ('Smith').*
    - *Carney v NM Rothschild & Sons Ltd [2018] EWHC 958 ('Carney').*
    - *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm) ('Kerrigan').*
    - *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')."

I then set out my initial thoughts on the merits of Mrs K and Mr S's complaint:

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

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

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

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

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

The CCA introduced a regime of connected lender liability under section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.

In short, a claim against the Lender under Section 75 essentially mirrors the claim Mrs K and Mr S 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 Mrs K and Mr S at the Time of Sale, the Lender is also liable.

This part of the complaint was made for several reasons that I set out at the start of this decision. They include the suggestion that Fractional Club membership had been misrepresented by the Supplier because it told Mrs K and Mr S that the purchase of the Fractional Club was the only way out of their current membership. But I cannot see how this could possibly relate to the sale being considered here. I think this because this was Mrs K and Mr S's first timeshare purchase, so they didn't have any existing membership to exit, so I am unsure why this complaint point was made. I am not persuaded that this misrepresentation was made by the Supplier because I've seen no evidence to say it was, and I can see no reason why it would have been.

The Letter of Complaint also includes the suggestion that Fractional Club membership had been misrepresented by the Supplier because Mrs K and Mr S were told that the Fractional Club membership had a guaranteed end date. But I can't see that what the Supplier said here was actually untrue. I've not seen anything which makes me think that the Allocated Property would not be able to be sold at the conclusion of the contract period. The Terms and Conditions set out that the title to the property is held by independent trustees, the sale of the Allocated Property can only be carried out by the Trustees on or after the proposed sale date, and the Allocated Property cannot be removed from the trust before that sale date. What's more, the sale date can only be delayed for up to two years by the unanimous written consent of all fractional owners, in which Mrs K and Mr S are included.

And finally, the Letter of Complaint sets out that the Supplier told Mrs K and Mr S that membership of Fractional Club meant its resorts were exclusive to members. But other than this bare allegation in the Letter of Complaint, there is no further evidence to support what is

being said here. There is nothing to suggest who said this, when and in what context. And it is simply not mentioned at all by Mrs K and Mr S in their statement. So, I am not persuaded that this misrepresentation was made.

What's more, as there's nothing else on file that persuades me there were any false statements of existing fact made to Mrs K and Mr S by the Supplier at the Time of Sale, I do not think there was an actionable misrepresentation by the Supplier for the reasons they allege.

For these reasons, therefore, I do not think the Lender is liable to pay Mrs K and Mr S 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 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 Mrs K and Mr S was misrepresented by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Mrs K and Mr S also says that the credit relationship between them and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that they have concerns about. It is those concerns that I explore here.

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between the Mrs K and Mr S 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 Mrs K and Mr S'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."[2]

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

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.

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

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 K and Mr S and the Lender, along with all of the circumstances of the complaint. When coming to my conclusion, and in carrying out my analysis, I have looked at:

1. *The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale;*
2. *The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*
3. *Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; 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 Mrs K and Mr S and the Lender. And having done so, I do not currently think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A.

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

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

The PR says that the right checks weren't carried out before the Lender lent to Mrs K and Mr S. 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 Mrs K and Mr S 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. From the information that has been provided to date, I am not satisfied that the lending was unaffordable for Mrs K and Mr S. If there is any further information on this (or any other points raised in this provisional decision) that Mrs K and Mr S wish to provide, I would invite them to do so in response to this provisional decision.

The PR also says in the Letter of Complaint that the Supplier was paid commission by the Lender as a result of it arranging the Credit Agreement, and that this commission payment was not disclosed to Mrs K and Mr S thereby rendering their credit relationship with the Lender unfair. But the Lender has told both this Service and the PR that no commission was paid by it to the Supplier in this case, and this would seem likely to be the case given the Lender was the Supplier's in-house credit provider. So, I am not persuaded that any commission was paid in this case.

The PR also said that the credit relationship between Mrs K and Mr S and the Lender was rendered unfair to them because there was no choice of lender given to them. But even if

this was the case, I can't see that this has caused any unfairness here. It would seem from their statement that an application to the initial choice of lender was rejected, and there is nothing in Mrs K and Mr S's statement which would indicate that they were in any way unhappy with the lender they used to make the purchase here. I acknowledge that they paid a £500 deposit payment using a bank card, but there is nothing which leads me to think that Mrs K and Mr S had any alternative means to pay the remaining balance for the Fractional Club membership, and it would seem that taking the finance agreement that was made available was the easiest and most straightforward way to make the purchase that they wanted.

I'm not persuaded, therefore, that Mrs K and Mr S's credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above. But although not mentioned in either the Letter of Complaint or in the PR's initial submissions to this Service, there is another reason why Mrs K and Mr S now 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 K and Mr 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 K and Mr S say that the Supplier did that at the Time of Sale, saying in their statement:

> *"The company led us to believe that the product would enable the whole family to holiday. He advised us we could sell it eventually, get our money back and make a profit. He also explained that they had a system whereby you could rent weeks back to the company and make income. We saw this as an investment opportunity and the reason why we purchased."*

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 K and Mr S'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 Fractional Club membership was marketed or sold to Mrs K and Mr S in a manner that was in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

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 K and Mr S, 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 K and Mr S 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 while that was not alleged by either Mrs K and Mr S nor their PR when they first complained about a credit relationship with the Lender that was unfair to them, 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.

However, I don't think it is necessary to make a finding on this point because, as I'll go on to explain, I am not currently persuaded that would make a difference to the outcome in this complaint anyway.

<u>Was the credit relationship between the Lender and Mrs K and Mr S rendered unfair?</u>

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

But I'm not currently persuaded that it did. I'll explain.

Mrs K and Mr S have set out their recollections of the Time of Sale in their statement.

> *"The company led us to believe that the product would enable the whole family to holiday. He advised us we could sell it eventually, get our money back and make a profit. He also explained that they had a system whereby you could rent weeks back to the company and make income. We saw this as an investment opportunity and the reason why we purchased."*

So, it seems likely that Mrs K and Mr S were aware that Fractional Club had an investment element to it, but I am not persuaded that this was a significant motivating factor for them in their purchase. I think they would have likely bought the membership whether or not it had been positioned as an investment in a way that breached Regulation 14(3) of the Timeshare Regulations.

When they bought Fractional Club they were on a promotional holiday from the Supplier, so it is a fair assumption to make that they were interested in holidays, and specifically the type of holidays the Supplier was offering, and they said in their statement that membership would enable the whole family to take holidays together. So, it seems to me to be likely that they bought the Fractional Club membership for the holidays it could provide. And there is no colour or context provided by Mrs K and Mr S as to what was said about the potential for profit from the purchase. And I have some concerns regarding the accuracy of their recollections in any case. They have talked about the ability to rent unused weeks back to the Supplier and make an income, but from what I know about this particular Supplier that was not possible – the Supplier had no resale or rental service, so I think Mrs K and Mr S are mistaken here. So given everything, I am not persuaded that the investment element of Fractional Club was a particular motivating factor for them.

And further, when Mrs K and Mr S refer in their statement to what is causing them concern about their membership, they only talk about the lack of availability, its value for money and that they are struggling financially. And they say they want to terminate the agreement and come out of the membership as soon as possible. It seems to me that if Mrs K and Mr S had bought the Fractional Club as an investment it would be unlikely that they would just want to walk away from it like that.

And my view on this is strengthened by the fact that the investment element was not mentioned at all in either the Letter of Complaint or the referral to this Service. It seems to me, that had it been important to Mrs K and Mr S that Fractional Club had been positioned as an investment at the Time of Sale by the Supplier, this would have been included when they explained their concerns to the PR and they in turn set out their concerns to the Lender, and then to our Service. But this was not mentioned in either submission as something that was of concern to them. It was only brought up by the PR after the judgement in Shawbrook & BPF v FOS.

I find it hard to understand that if the investment element of Fractional Club was important to them, and was material to their purchasing decision, why this was not set out as a concern in the testimony from Mrs K and Mr S, the Letter of Complaint or in their submission to this Service.

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 K and Mr S'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). And for that reason, I do not think the credit relationship between Mrs K and Mr S 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

The PR also said that the contractual terms governing the ongoing costs of Fractional Club membership, and that Mrs K and Mr S have no control over those costs, were unfair contract terms under the UTCCR. As I said at the beginning of this provisional decision, I think the PR has made an error here, because the UTCCR had been replaced by the CRA by the time Mrs K and Mr S made this purchase. So that is what I will consider this point against.

One of the main aims of the Timeshare Regulations and the CRA 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 CRA 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.

In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mrs K and Mr S, have flowed from such a term, because those consequences are relevant to an assessment of unfairness under Section 140A. For example, the judge in 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. And I've not seen any evidence which would persuade me that any of the terms mentioned by the PR are actually unfair to Mrs K and Mr S, nor even that they have been enforced in a way that would render their credit relationship with the Lender unfair to them.

Given the facts and circumstances of this complaint, I am not persuaded that the Supplier's alleged breaches of the CRA are likely to have prejudiced Mrs K and Mr S's purchasing decision at the Time of Sale and rendered their credit relationship with the Lender unfair to them for the purposes of section 140A of the CCA.

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 K and Mr S 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 K and Mr S was unfair to them for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

Conclusion

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

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

The responses to the PD

The Lender accepted the outcome I had reached with no further comment. The PR, on Mrs K and Mr S's behalf, did not agree, and submitted a comprehensive reply. In summary, and where relevant to the complaint being considered here, it said:

- Mrs K and Mr S's statement shows that they purchased the Fractional Club because they would share in the investment.
- The investment element of the purchase need not be the only, or even the overriding reason. It only needs to be one reason for making the purchase.
- Mrs K and Mr S already had points, so what other benefit would the new purchase provide if not the share in the investment.
- The Supplier breached Regulation 14(3) of the Timeshare Regulations. The PR said that Mrs K and Mr S had said the following during the course of this complaint:
    - They were told they could realise *'investment'* on the funds they'd invested in the Fractional Club membership, when the Allocated Property was sold.
    - They were told that they were converting a product with no resale value, to a product with a resale value.
    - While they were given a warning by the Supplier that all investments could go up or down in value, they were led to believe that it was more likely they'd receive a return on investment than not when the Allocated Property was sold, because property prices historically trended upwards.
- The Supplier's training and marketing materials in use at the Time of Sale, along with

the September 2012 sales slides and the 2013 Training manual suggest that the Fractional Club membership was sold to Mrs K and Mr S in breach of Regulation 14(3).

- A breach of Regulation 14(3) is sufficient to make the Credit Agreement unfair under Section 140A of the CCA.
- It is for the creditor to prove that the facts alleged do not give rise to unfairness.

As the deadline for any further submissions has now passed, the case has been returned to me for further consideration

What I've decided – and why

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

And having done so, and having considered everything afresh, I remain satisfied that Mrs K and Mr S's complaint against the Lender ought not to be upheld. But before I explain why, I want to make clear that I am deciding the outcome of this complaint on the balance of probability – i.e., what I considered to have been most likely to have happened at the time.

The PR has said that the Supplier's sales and marketing materials and training at the Time of Sale, when taken alongside what Mrs K and Mr S have said about what happened, means that they think the Supplier breached Regulation 14(3) of the Timeshare Regulations when it sold the Fractional Club to them at the Time of Sale. And this breach meant that the associated credit relationship between Mrs K and Mr S and the Lender was unfair.

But as I said in the PD, I agree that it is possible that the Supplier *did* breach this regulation, by selling and/or marketing the Fractional Club to them as an investment, 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 even if there was a breach of Regulation 14(3), in the circumstances of *this* complaint, I am not persuaded that an unfairness in the credit relationship between Mrs K and Mr S and the Lender was caused.

As I set out in my PD, the Supreme Court's judgement in Plevin makes clear that regulatory breaches do not *automatically* 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.

And as I also set out in my PD, and being mindful of *Carney* and *Kerrigan*, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mrs K and Mr S and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3)[3] led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

And having considered everything submitted by the PR in response to my PD, I remain satisfied that any possible breach of Regulation 14(3) by the Supplier at the Time of Sale

[3] which, having taken place during its antecedent negotiations with Mrs K and Mr S, 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)

was immaterial to Mrs K and Mr S's decision to purchase membership of the Fractional Club.

In response to my PD the PR has said that Mrs K and Mr S already had 'points' so it could not see any reasons for the purchase other than the investment potential. But I cannot see how this can relate to Mrs K and Mr S – they were new clients of the Supplier and I've seen nothing which leads me to think they had owned a timeshare or similar arrangement before, so they didn't already have 'points'.

The PR has also now set out what it says Mrs K and Mr S have said during the course of this complaint to support its position that Mrs K and Mr S were motivated by the investment potential of the Fractional Club. But the points now made were not included in their statement, nor in any of the submissions made to either the Lender nor this Service at any point. And as I've already said, here, Mrs K and Mr S simply did not allege until after the judgment in *Shawbrook & BPF v FOS* was handed down that the Supplier led them to believe that Fractional Club membership would, or was likely to lead to a financial gain, inducing them to take out Fractional Club membership. Yet that is something I would have expected to see them say if it was important to them or caused them to enter into the Purchase Agreement and/or the Credit Agreement. And I consider their statement, written much closer to the events being considered here, better evidence than the very recent recollections as set out by the PR. These recent submissions were, after all, made since the judgment in *Shawbrook & BPF v FOS* and my findings in the PD, so they run the risk of having been tainted by more recent events.

In the absence of such an initial allegation, either in their statement or in their complaint to the Lender and our Service, and when taken with all of the circumstances of *this* case, I find that I cannot say that the alleged breach of Regulation 14(3), even if true, was something that warrants relief given the circumstances of this complaint.

My final decision

I do not uphold Mrs K and Mr S's complaint against First Holiday Finance Ltd.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs K and Mr S to accept or reject my decision before 27 January 2025.

Chris Riggs
Ombudsman