DRN-5282778

The complaint

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

What happened

Mr and Mrs T had been timeshare members with the Supplier since 2006.

In March 2013, they traded in their existing membership (the 'Vacation Club') towards the purchase of a new timeshare product from the Supplier (the 'Fractional Club'). This was financed by another lender and a complaint about this sale has already been dealt with by this Service under a separate reference.

In September 2013, Mr and Mrs T made a further purchase of Fractional Club membership. But they cancelled this within the 14 day cooling off period.

Then, on 27 February 2014 (the 'Time of Sale'), Mr and Mrs T made a further purchase of Fractional Club membership. They entered into an agreement with the Supplier to buy 5,260 fractional points at a cost of £74,129 (the 'Purchase Agreement'). But after trading in their existing timeshare, they ended up paying £6,918 for membership of the Fractional Club. It is this purchase, and its associated credit agreement, that is the subject of this complaint.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs T more than just holiday rights. It also included a share in the net sale proceeds of a property named on their Purchase Agreement (the 'Allocated Property') after their membership term ends.

Mr and Mrs T paid for their Fractional Club membership by taking finance of £6,918 from the Lender in both of their names (the 'Credit Agreement').

Mr and Mrs T – using a professional representative (the 'PR') – wrote to the Lender on 15 January 2019 (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. 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.
3. The Credit Agreement being unenforceable because it was not arranged by a credit broker regulated by the Financial Conduct Authority (the 'FCA')[1] to carry out such an activity.

[1] The PR referred here in their submissions to the credit broker not having the relevant authorisation from the FCA. However, at the time of this particular sale, it was the Office of Fair Trading ('OFT') who issued the relevant licences to carry out such an activity – which I'll address in more detail further below.

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

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

1. told them that Fractional Club membership was an "investment" when that was not true.
2. told them that Fractional Club membership had a guaranteed end date when that was not true.
3. told them that the Supplier's holiday resorts were exclusive to its members and that they would have priority booking over points members when that was not true.

Mr and Mrs T 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 Mr and Mrs T.

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

The Letter of Complaint set out several reasons why Mr and Mrs T 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 which allowed the Supplier to retain membership and any money already paid under the agreement, should Mr and Mrs T fail to make a payment due under the agreement, were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCRs').
2. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
3. The Supplier failed to provide sufficient information in relation to the Fractional Club's liabilities and ongoing costs.

The Lender didn't respond to Mr and Mrs T's complaint within the relevant period required by the regulator, so the PR then referred the complaint on their behalf to the Financial Ombudsman Service.

The Lender subsequently dealt with Mr and Mrs T's concerns as a complaint and issued its final response letter on 12 August 2019, rejecting it on every ground.

The complaint was assessed by an Investigator at this Service who, having considered the information on file, upheld the complaint on its merits.

The Lender 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 11 December 2024. I've summarised that decision below:

- In relation to Mr and Mrs T's complaint about the Lender's handling of their Section 75 claim for misrepresentations, I explained that certain conditions must be met if the relevant protection afforded to consumers is engaged, one of which being that the purchase price must be more than £100 but no more than £30,000. And, since the purchase price in this case prior to the trade-in was over £30,000, a claim under

Section 75 could not succeed.

- Where the purchase price is over £30,000 a claim could be considered under Section 75A, but this can only relate to a breach of contract. I thought Mr and Mrs T's concerns about the difficulties they say they had in booking holidays amounted to such a claim, but I hadn't seen enough to persuade me that the Supplier had breached the Purchase Agreement.
- So, overall, I didn't think the Lender acted unfairly or unreasonably when it dealt with the Section 75 and/or Section 75A claim in question.
- I wasn't persuaded that the credit relationship was unfair to Mr and Mrs T for the reasons relating to the checks carried out by the Lender at the Time of Sale, or alleged misrepresentations by the Supplier at the Time of Sale.

The PR also alleged that at the Time of Sale, the Supplier marketed and sold Fractional Club membership to Mr and Mrs T as an investment in breach of Regulation 14(3) of the Timeshare Regulations and this was also something which rendered the credit relationship between them and the Lender unfair to them under Section 140A. In relation to this point, I said:

- Overall, based on the evidence available, I provisionally concluded that even if the Supplier had marketed or sold Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I was not persuaded that Mr and Mrs T's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I thought the evidence suggested they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I did not think the credit relationship between Mr and Mrs T and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

Lastly:

- I also didn't think the credit relationship was rendered unfair under Section 140A for any of the other reasons the PR had raised.
- I wasn't persuaded that the Credit Agreement was arranged by an unauthorised credit broker because, having looked at this Service's internal records, I could see that the credit intermediary the PR referred to did hold, at the Time of Sale, a Consumer Credit Licence issued by the Office of Fair Trading. And, there wasn't any evidence that its Licence did not cover credit broking.

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

The Lender confirmed receipt of my provisional decision, but had nothing further to add. The PR did respond and asked to see all of the submissions the Lender had provided to us – this was provided to them.

The PR then provided some further comments they wished to be considered in relation to some aspects of the complaint which I will outline and address further below.

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 UTCCRs.
- 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*').
    - *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time – which, in this complaint, includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code').

What I've decided – and why

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

And having done that, and having reconsidered everything in light of the PR's latest submissions, I've reached the same overall conclusion as I did in my provisional decision. I do not uphold this complaint.

But before I explain why, I want to again 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 PR hasn't provided anything further in relation to this part of the complaint in their further submissions. As no further submissions have been made on this part of the complaint, and having reconsidered everything, I see no reason to depart from my provisional findings, which I will repeat below:

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

In short, a claim against the Lender under Section 75 essentially mirrors the claim Mr and Mrs T could make against the Supplier.

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

In this case, I can see that the purchase price prior to the trade-in was £74,129 i.e., over £30,000. As it is the purchase price of the product or service that needs to be taken into account, and this purchase price was in excess of £30,000, a claim under Section 75 relating to the purchase cannot succeed.

But where the purchase price is in excess of £30,000, a claim can be considered under Section 75A of the CCA. But a claim under Section 75A can only relate to a 'breach of contract' – misrepresentation isn't included.

Although not expressed in those exact terms, I think Mr and Mrs T's concerns about the difficulties they say they had in booking the holidays they wanted suggest that they consider that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement.

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 still do not think that the Lender was unfair or unreasonable when it rejected Mr and Mrs T's claim.

I say this because 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 that I'm aware was generally provided to consumers like Mr and Mrs T, states that the availability of holidays was/is subject to demand. It also looks like they made use of their fractional points to holiday on multiple occasions, as they've described in their testimony. I accept that they may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

So, from the evidence I have seen, I do not think the Lender is liable to pay Mr and Mrs T any compensation for a breach of contract by the Supplier.

Overall, therefore, with all of that being the case, I still 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?

As outlined above, Mr and Mrs T also said 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 I explained in my provisional decision, 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 Mr and Mrs T and the Lender was unfair.

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

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

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

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr and Mrs T's membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

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

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

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

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

In the case of *Scotland & Reast*, 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.

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.

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

As I explained in my provisional decision, I have considered the entirety of the credit relationship between Mr and Mrs T and the Lender, along with all of the circumstances of the complaint, and I still do not think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale;
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 Mr and Mrs T and the Lender.

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

Mr and Mrs T'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.

The PR says that the right checks weren't carried out before the Lender lent to Mr and Mrs T. I explained in my provisional decision that even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mr and Mrs T 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. Neither the PR nor Mr and Mrs T made any further submissions on this point, so I'm not persuaded that the loans were unaffordable for Mr and Mrs T.

I've already explained above why I don't think the Lender dealt with Mr and Mrs T's Section 75 claim unfairly or unreasonably. But, as I explained in my provisional decision, misrepresentations could also be something that led to an unfair debtor-creditor relationship[3], so I've considered the other points Mr and Mrs T have raised with this in mind.

Mr and Mrs T said they were told Fractional Club membership was an investment when that was not true. But, for reasons I'll go on to explain below, Mr and Mrs T's membership plainly did have an investment element to it.

Mr and Mrs T also said the Supplier told them that membership had a guaranteed end date when that was not true. No further evidence has been provided beyond the bare allegation made here, but in any event, 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 generally 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 by the unanimous written consent of all fractional owners, in which Mr and Mrs T are included.

Lastly, Mr and Mrs T said the Supplier told them that the resorts were exclusive to members

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

and that they would have priority booking over points members when that was not true. But, beyond the bare allegation, they've said little to support this, to add colour and context to what they've alleged. I also note from their testimony they've said that following their purchase, the resorts became 'no longer exclusive' and they were 'no longer getting priority booking', suggesting they did, at least initially, receive the exclusivity and priority booking they were promised at the Time of Sale. So, such a statement from the Supplier at the Time of Sale, if made, wouldn't appear to be untrue.

The PR didn't provide anything more in relation to these points in response to the provisional decision.

So, and having reconsidered everything, I remain unpersuaded, that Mr and Mrs T's credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above. But, as I explained previously, there is another reason, perhaps the main reason, why they suggest 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 remain satisfied, that Mr and Mrs T's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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

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

But the PR (and Mr and Mrs T) say that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In *Shawbrook & BPF v FOS*, the parties agreed that, by reference to the decided authorities, "*an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit*" at [56]. I will use the same definition.

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

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr and Mrs T as an investment in breach of Regulation 14(3), I have to be persuaded that it was

more likely than not that the Supplier marketed 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 Mr and Mrs T, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs T as an investment.

But, with that said, I recognised in my provisional decision, and continue to do so, that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. And, as I did in my provisional decision, I accept that it's *possible* that Fractional Club membership was marketed and sold to Mr and Mrs T 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.

In response to my provisional decision, the PR said they thought the evidence in this case showed that it was not only possible that it was marketed and sold to Mr and Mrs T as an investment at the Time of Sale, but probable. And it asserts in its response that I made a finding in my provisional decision that the membership was not marketed or sold as an investment. But this is incorrect – I made no such finding.

Again, as I explained in my provisional decision, I didn't think it 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 didn't think that made a difference to the outcome in this complaint anyway. And I remain of that opinion.

This is because even if the Supplier had breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, this is not the end of the matter, and does not automatically mean that the associated credit relationship must be unfair. And, I must stress here that it is for me to determine the complaint on its individual facts and circumstances – making a decision as to what is, in my opinion, fair and reasonable in light of them.

Was the credit relationship between the Lender and Mr and Mrs T 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 still seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs T 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 Mr and Mrs T, 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.

As I said in my provisional decision, in their testimony, Mr and Mrs T have taken the opportunity to set out why they're now unhappy with their membership. And, in doing so, they didn't refer to the investment element. Instead, they said:

> "*After our fractional purchases, we made good use of our holidays to Tenerife and Spain, however we soon started experiencing difficulties in booking the holidays that we wanted to take, the main difficulties were as follows:*
>
> *a) There was never any availability in the apartments that we wanted*
>
> *b) To book to stay in the apartment that we desired, we were told we would need to book at least 3 years in advance*
>
> *c) It seemed that we were no longer getting priority booking as promised*
>
> *d) The [Supplier] resorts were no longer exclusive to members – members of the public could book a stay in a [Supplier] hotel for a relatively cheap price*
>
> *e) Maintenance fees grew more than we expected them to*"

And, they go on to describe that it was only after pursuing the route of making a complaint that they say they were told the membership isn't an investment, or refer to this element at all.

As noted above, following the provisional decision, the PR asked to see a copy of the Lender's submissions as well as what the Supplier's sales notes from the Time of Sale said. These were shared with the PR and to be clear, I have considered all available evidence when reaching my decision, as I did when reaching my provisional decision.

In relation to this Time of Sale, the notes say "*Change to omit booking fees*".

Having received the sales notes, the PR provided some further comments on them, questioning their provenance and reliability. For example, they said the identity of the authors of the notes hasn't been disclosed. The PR also said they were concerned that this evidence was being preferred over Mr and Mrs T's testimony.

I acknowledge the comments the PR has made here, but I haven't seen anything which makes me think the comments recorded in the sales notes are not what Mr and Mrs T told the Supplier at the Time of Sale. And, the notes do suggest to me that Mr and Mrs T made their purchase, at least in part, in order to benefit from the lack of booking fees offered by the Supplier's second version of the fractional product (which they bought at this Time of Sale, having purchase the Supplier's first version of the product previously). The PR has said in response to the provisional decision that there must have been some reason other than holidays that Mr and Mrs T bought the product since they only increased their points by a small amount at the Time of Sale (although I think it's important to stress that they did still increase). But, even if I agreed with this, I think this evidence from the Time of Sale explains that other reason.

But in any event, as I've outlined above and below, I have considered Mr and Mrs T's testimony and relied on that evidence in reaching my decision.

On this point, in their response, the PR also provided a copy of some brief further comments from Mrs T, sent to them by email. In this, she has said:

> "*The sales person [sic] first words to us was [sic], we can turn our points into property and in 19 years we would get our money back plus a profit (due to property values [sic] increases). They gave us a current market value and assured us that because Tenerife was such a popular destination for tourists and investors that prices would increase as the years went by.*
>
> *[…]*
>
> *We met lots of different levels of sales and management as they assured us we were making a good investment choice.*"

I acknowledge the comments Mrs T has now provided, but in my view, the original witness testimony remains the best evidence I have of what they remember from the Time of Sale, why they made their purchases and why they're unhappy with their membership now. I say this because it was put together much closer to the Time of Sale and when the original complaint was made. And, I'm also mindful that it's possible Mrs T's more recent comments may have been influenced by the judgement in *Shawbrook & BPF v FOS*, given when they've been provided.

It's also difficult to explain why the comments Mrs T has now provided weren't included in the original witness statement, particularly if the investment element of the membership was an important and motivating factor to their purchasing decision.

Based on the evidence, given in Mr and Mrs T's own words, I don't think the share in the Allocated Property was an important and motivating factor when they decided to go ahead with their purchase at the Time 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 decision Mr and Mrs T 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 remain unpersuaded that Mr and Mrs T's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I still think the evidence suggests they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr and Mrs T and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

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

It's clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mr and Mrs T when they purchased membership of the Fractional Club at the Time of Sale. But, the PR said that the Supplier failed to provide them with all of the information they needed to make an informed decision and that some of the contractual terms were unfair.

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.

As previously outlined, Mr and Mrs T said that the Purchase Agreement contains unfair contract terms (under the UTCCRs) in relation to the Supplier's ability to terminate membership where they failed to make a payment due under the agreement.

But, in order to conclude that a term in the Purchase Agreement rendered the credit relationship between Mr and Mrs T and the Lender unfair to them, I'd have to see that the term was unfair under the UTCCRs, and that the term was actually operated against Mr and Mrs T in practice.

In other words, as previously explained, it's important to consider what real-world consequences, in terms of harm or prejudice to Mr and Mrs T, 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.

Having considered everything that has been submitted, it still seems unlikely to me that the contract term(s) cited by Mr and Mrs T have led to any unfairness in the credit relationships between them and the Lender for the purposes of Section 140A of the CCA. I'll explain.

In response to the provisional decision, the PR said the Supplier has served 'notice to cancel' Mr and Mrs T's membership, although they didn't provide any copy of the relevant correspondence.

In any event, from what the PR has said, this was issued after the original complaint was made to the Lender where they complained about the relevant unfair term. And, from other similar notices that I've seen, it's likely the membership was only suspended temporarily at that point and the purpose of the aforementioned notice was only to make Mr and Mrs T aware of this and that there was an outstanding balance of management fees. And, that the membership might be cancelled if the relevant fees remained unpaid, but that Mr and Mrs T could apply for reinstatement of their membership anytime within the next five years. The PR has not said that any cancellation actually proceeded to happen, and I haven't seen any evidence that is the case either.

So, I still cannot see that the relevant terms in the Purchase Agreement were actually operated in an unfair way against Mr and Mrs T or that this caused an unfairness in the credit relationship which requires a remedy.

Mr and Mrs T say that they weren't warned about the liabilities of Fractional Club ownership and their continuing liability for maintenance fees.

But the PR hasn't explained what the particular liabilities are that they're referring to here, or why these would have had an adverse effect on Mr and Mrs T. 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 not being warned the product was a liability rather than an asset and the risk of disposing of the product on the open market but haven't given any reason as to why these are unfair in this particular case or why these cause the credit relationship to be unfair. And, they haven't provided anything further in relation to this point in response to the provisional decision.

Again, in relation to maintenance fees, it seems likely to me that these were explained to Mr and Mrs T at the Time of Sale. I say this because I'm aware that consumers would generally have signed an Information Statement at the time of sale which explained that maintenance fees were payable, and that these would be due annually. And, as previously outlined, Mr and Mrs T had already had a Fractional Club membership before that they had owned for nearly a year by this Time of Sale. So, they were also presumably already familiar with the annual maintenance fees associated with the product when they upgraded at this Time of Sale. As outlined above, they had also previously been members of the Supplier's Vacation Club for which they also would have had to pay annual fees, so again, this wouldn't have been unfamiliar to them.

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

Moreover, as I still haven't seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Mr and Mrs T was unfair to them because of an information failing by the Supplier, I'm not persuaded it was.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I still don't think the credit relationship between the Lender and Mr and Mrs T was unfair to them for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

The complaint about the Credit Agreement being unenforceable because it was arranged by a credit broker that was not authorised to carry out that activity

The PR says that the Credit Agreement was arranged by an entity who they say were an unauthorised credit broker (at the Time of Sale), the upshot of which is to suggest that the Lender wasn't permitted to enforce the Credit Agreement as a result.

However, as previously explained, having looked at the Financial Ombudsman Service's internal records, I can see that the credit intermediary the PR referred to in their original complaint did hold, at the Time of Sale, a Consumer Credit Licence issued by the Office of Fair Trading. And, there isn't any evidence to suggest that its Licence did not cover credit broking.

In response to the provisional decision, the PR made reference to the credit intermediary using different trading names. And, I acknowledge that the credit broker named on the Credit Agreement appears to be a subsidiary of the Supplier, and in the form that it is named it does not appear to have been licenced by the OFT at the time. But, this appears to simply be an administrative error which references the credit intermediary's physical address ('exhibition centre') rather than their name.

Further, the Supplier was suitably licenced, and I cannot see a reason why an unlicenced entity would have brokered this particular Credit Agreement, when the sale was completed by the representative of a duly licenced entity, and the same sales company was responsible for and had completed all the other parts of the sale.

But even if I am wrong about this, and an unlicenced entity brokered this particular Credit Agreement (and I don't think I am) it is not something that would warrant compensation being paid to Mr and Mrs T in any event.

Section 27 of FSMA (*"Agreements made through unauthorised persons"*) only applies to regulated activities, which in this case doesn't cover consumer credit lending prior to 1 April 2014.

In October 2019, the Regulator, the Financial Conduct Authority (the 'FCA') issued explanation and guidance relating to Validation Orders to allow an otherwise unenforceable credit agreement. This was last updated in October 2024. Insofar as it's relevant to Mr and Mrs T's complaint, the FCA explanation says,

> *"For agreements entered into before 1 April 2014, a modified regime applies.* […] *For agreements that were entered into before this date and which are unenforceable against the borrower, the borrower has no right to recover any money paid or other property transferred under the agreement or compensation for loss".*

That aside, if Mr and Mrs T's Credit Agreement was found to be unenforceable – and I make no such finding – it would normally mean that whilst the obligations under the agreement remain in existence, one or both parties to the agreement can't enforce compliance in the courts. So, if the Lender took steps against Mr and Mrs T to enforce the agreement, they might have a defence. However, I don't think this is relevant in Mr and Mrs T's case because no such steps to enforce the agreement appear to have occurred.

In reality, Mr and Mrs T took the finance from the Lender and were repaying it. Mr and Mrs T knew they had the finance, the amount borrowed and what it was for (the Fractional Club purchase). So, even if the loan was found to be improperly brokered, I still haven't seen anything that persuades me that it resulted in something that would require the payment of compensation.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs T'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 them 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.

My final decision

For the reasons given, I do not uphold Mr and Mrs T's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T and Mrs T to accept or reject my decision before 11 March 2025.

Fiona Mallinson
Ombudsman