DRN-5283676

The complaint

Mrs A and Mr N'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 their claim under section 75 of the CCA.

Background to the complaint

Mrs A and Mr N purchased membership of a timeshare ("the Fractional Club") from a timeshare provider ("the Supplier") on 15 October 2012 ("the Time of Sale"). They entered into an agreement with the Supplier to buy 747 fractional points at a cost of £5,246 ("the Purchase Agreement").

Fractional Club membership was asset backed – which meant it gave Mrs A and Mr N 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 A and Mr N paid for their Fractional Club membership by taking finance of £5,246 from the Lender ("the Credit Agreement").

Mrs A and Mr N – using a professional representative ("the PR") – wrote to the Lender in August 2019 ("the Letter of Complaint") to complain about:

1. Misrepresentations by the Supplier at the Time of Sale, including that they were misled about when the Allocated Property would be sold and that they were not told their children would inherit their management fee liability.
2. High pressure sales tactics by the Supplier, including that the Supplier did not give them time to consider if the membership was right for them.
3. The Fractional Club being an unregulated collective investment scheme ("UCIS") as defined by s.235 of the Financial Services and Markets Act 2000 ("FSMA"). PR pointed to sections of FMSA that it argued meant the Supplier had acted unlawfully and, therefore, the Lender also acted improperly in funding the purchase of a UCIS. It argued that this means Mrs A and Mr N were entitled to compensation.

The Lender dealt with Mrs A's and Mr N's concerns as a complaint and issued its final response letter on 23 September 2019, rejecting it on every ground.

Mrs A and Mr N then referred the complaint to the Financial Ombudsman Service. Later, in July 2023 Mrs A and Mr N provided a statement setting out their memories of the sale. In that statement, they added some further points of complaint:

4. The Supplier had failed to tell them that there would be booking fees to pay.
5. They had had to book their holidays a year in advance.
6. The holiday resorts were not up to the advertised standard, and this was a breach of contract.
7. It had turned out that it would have been cheaper to book the resorts with third parties than with the Supplier.

8. The Lender did not carry out the right creditworthiness assessment when deciding to lend to them.

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

Mrs A and Mr N disagreed with the Investigator's assessment, and on their behalf the PR asked for an Ombudsman's decision. The PR added that the Supplier had mis-sold the Fractional Club membership by selling or marketing it as an investment, which is prohibited by regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations"). It was said that this rendered Mrs A and Mr N's relationship with the Lender unfair under section 140A of the CCA.

I wrote a provisional decision which read as follows.

My provisional findings

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under an FCA regulation (specifically rule 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 sections 56, 75 and 140A to 140C);
- The law on misrepresentation;
- The Timeshare Regulations;
- The Unfair Terms in Consumer Contracts Regulations 1999 ("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"*);
    - *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"*).

In its response to the investigator's opinion, the PR stated that *Plevin* was irrelevant. I don't agree. *Plevin* remains the leading case in this area. While the product which had been mis-sold in that case was neither a timeshare nor a collective investment scheme, but an insurance policy, nevertheless I am quite sure that the principles discussed in that

judgement concerning section 140A of the CCA are equally relevant and applicable when that section is considered in the context of a timeshare.

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").

My provisional findings

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 A and Mr N could make against the Supplier. Here, Mrs A and Mr N did not explicitly make a claim under section 75, however, PR said referred to that provision when the complaint was referred to our service.

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 A and Mr N at the Time of Sale, the Lender is also liable.

A misrepresentation is a false statement of fact which induces a person to enter into a contract which they would not have entered into otherwise.

While I recognise that Mrs A and Mr N have concerns about the way in which their Fractional Club membership was sold, they have not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the reasons they allege. I say that for the following reasons.

They have said that the Supplier told them that Fractional Club membership had a guaranteed end date in 19 years, when that was not true. I think it would be more accurate to say that it was guaranteed that the Allocated Property would be put up for sale in 19 years; I cannot see that there was any guarantee that a buyer would necessarily be found. I accept that under rule 9.1 of the *Fractional Property Ownership Club Rules,* the Supplier (or a business closely associated with it) can unilaterally delay putting the property up for sale by up to two years. However, the fact that the sale could potentially happen after 20 or 21 years instead of 19 years does not convince me that Mrs A or Mr N would not have still purchased their fractional points if they had known that at the Time of Sale. And the sale can not be further delayed without the unanimous agreement of all of the fractional owners, including Mrs A and Mr N. So while the end date was not actually guaranteed to be in 19 years, it was guaranteed that the sale process would begin within no later than 21 years. Although I accept that the information given to them was not complete, and was therefore not accurate, I do not think that it amounts to a misrepresentation.

There is no evidence to support the allegation that the Supplier told Mrs A and Mr N that the annual management charges would not increase beyond the rate of inflation, nor was that allegation made in their original claim in 2019. The first time it was raised was in 2023, eleven years after the Time of Sale, and on the balance of probabilities I am not satisfied that their memory of what they were told is reliable. There is a right in rule 5 to challenge such an increase in the management charge, and this may be what was discussed. But I am not satisfied that there is clear enough evidence to show that a misrepresentation occurred. I also note that there is evidence in the contractual documentation that they were told fees would be calculated every year and that *part of* the fees were linked to inflation, which is not the same as saying that the whole of the fees would be so limited.

What's more, as there's nothing else on file that persuades there were any false statements of existing fact made to Mrs A and Mr N 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 A and Mr N any compensation for the alleged misrepresentations of the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the section 75 claim in question.

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

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

Mrs A and Mr N say that they could not holiday where and when they wanted to (except by booking unreasonably far in advance) – which, on my reading of the complaint, suggests that they consider that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement. Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork signed by Mrs A and Mr N 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 13 occasions between 2013 and 2018. 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.

I have not seen evidence from Mrs A and Mr N as to the standard of quality of the resorts, nor of what was promised to them. So I am not able to say that they did not get the level of service or accommodation they had been promised by the Supplier

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

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

I have already explained why I am not persuaded that the contract entered into by Mrs A and Mr N was misrepresented (or breached) by the Supplier in a way that makes for a successful claim under section 75 of the CCA and outcome in this complaint. But Mrs A and Mr N also say that the credit relationship between them and the Lender was unfair under section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that they have concerns about. It is those concerns that I explore here.

As section 140A of the CCA is relevant law, 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 A and Mr N 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 two 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 A and Mr N's membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by section 12(b). That made them antecedent negotiations under section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per section

56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

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

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

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

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

In the case of *Scotland & Reast*, the Court of Appeal said, at paragraph 56, that the effect of section 56(2) of the CCA meant that "*negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law"* before going on to say the following in paragraph 74:

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

So, the Supplier is deemed to be the 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):

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

"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 A and Mr N and the Lender along with all of the circumstances of the complaint and I do not think the credit relationship between them was likely to have been rendered unfair for the purposes of section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

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

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

Mrs A and Mr N have said that the way in which Fractional Cub membership was sold to them gave rise to an unfair credit relationship. But they have also mentioned other matters that might give rise to such an unfair relationship. So I have considered those here.

They alleged that the Supplier misled them and carried on unfair commercial practices which were prohibited under the CPUT Regulations, in part for the same reasons they gave for their section 75 claim for misrepresentation. But given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.

Mrs A and Mrs N say that the right checks weren't carried out before the Lender lent to them. 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 A and Mr N was actually unaffordable at the Time of Sale before also concluding that they lost out as a result and then consider whether the credit relationship with the Lender was unfair to them for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for Mrs A and Mr N at the Time of Sale (although I accept that they struggled to afford it later on). If there is any further information on this (or any other points raised in this provisional decision) that Mrs A and Mr N wish to provide, I would invite them to do so in response to this provisional decision.

Mrs A and Mr N say that they were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledge that they may have felt weary after a sales process that went on for a long time. But they say little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to. They were also given a 14-day cooling off period, and they have not provided a credible explanation for why they did not cancel their membership during that time. And with all of

that being the case, there is insufficient evidence to demonstrate that Mrs A and Mr N made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

I'm not persuaded, therefore, that Mrs A and Mr N's credit relationship with the Lender was rendered unfair to them under section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why they say their credit 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? And was it a UCIS?

The Lender does not dispute, and I am satisfied, that Mrs A and Mr N's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

That means it was not an unregulated CIS. Regulation 3 of the Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 says:

"Arrangements of the kind specified by the Schedule to this Order do not amount to a collective investment scheme."

And paragraph 13 of that Schedule (as amended) says:

"Arrangements do not amount to a collective investment scheme if the rights or interests of the participants are rights under a timeshare contract or a long-term holiday product contract."

So I am satisfied that the Supplier did not sell Mrs A and Mr N a UCIS, so the PR's arguments on this point must fail[2]. However, as Fractional Club membership was a regulated contract under the Timeshare Regulations, other provisions apply.

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

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

But PR says that the Supplier did exactly that at the 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. The expectation of *gain* or *profit* is crucial, as the judge in that case mentioned at [72], in which she said that confusing profit with just getting "something back" would be a legal mistake.

Mrs A and Mr N's share in the Allocated Property clearly, in my view, constituted an

[2] This point was dealt with at length in *Shawbrook & BPF v FOS.*

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. So, for example, the fact that the lender's final response letter mentions that the product was indeed an investment does not prove that it was marketed and sold as such at the Time of Sale.

To conclude, therefore, that Fractional Club membership was marketed or sold to Mrs A and Mr N 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.

I can't just take that to have been automatically proved just because of what the High Court said in *Shawbrook & BPF v FOS* at [77]. The judge did not say that all timeshares will have been sold in breach of regulation 14(3) just because they are investments, or just because of the tension between that regulation and the nature of the product. Indeed, the judge specifically said at [71] that if the ombudsman whose decision was under consideration in that case had concluded that the timeshare had been mis-sold because of the intrinsic design of fractional ownership timeshares, then that would have indicated that he had made an error of law. So instead, I have to consider the available evidence to decide what happened in this particular instance.

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 A and Mr N, 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 A and Mr N as an investment.

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 A and Mr N 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, even if I did conclude that membership was sold in breach of Regulation 14(3), I am not currently persuaded that would make a difference to the outcome in this complaint anyway. I explain why in the next section.

Was the credit relationship between the Lender and Mrs A and Mr N rendered unfair?

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

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

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

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

And in *Kerrigan*, HHJ Worster said this in paragraphs 213 and 214:

"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court ***may*** *make an order* ***if*** *it determines that the relationship is unfair to the debtor. […]*

[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

So it seems to me that, if I am to conclude that a breach of regulation 14(3) led to a credit relationship between Mrs A and Mr N and the Lender that was unfair to them and warranted relief as a result, then an important consideration is whether the Supplier's breach of regulation 14(3) (which, having taken place during its antecedent negotiations with Mrs A and Mr N, 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 is deemed to be something done by the Lender) led them to enter into the Purchase Agreement and the Credit Agreement.

But as I've already said, there was no suggestion in Mrs A and Mr N's initial recollections of the sales process at the Time of Sale that the Supplier led them to believe that the Fractional Club membership was an investment from which they would make a financial gain, nor was there any indication that they were induced into the purchase on that basis.

In the Letter of Complaint, the PR did not say that Mrs A and Mr N bought Fractional Club membership because of the investment element or that it had been marketed or sold to them as an investment. Rather, the majority of the complaint appeared to be an argument that Fractional Club membership was a type of investment (UCIS), that by its very nature meant compensation was due. But, as discussed at length above, the fact that Fractional Club membership had investment properties does not, in and of itself, mean there was an unfair credit relationship.

In July 2023, Mrs A and Mr N provided their memories of the sale in a statement, which I have considered. This statement was signed, but undated, so it is not clear to me when it was drafted, but it was supplied around eleven years after the sale. They say:

"8. We were subtly manipulated into purchasing increasing amounts of timeshare products with promises that were not true and encouraged into mounting debt to mitigate losses, by getting some form of return on all of the payments we were making.

9. We were told that the purchase was an investment, and we will be able to sell and recoup money after 15 years on the sale of the property."

From the information I have seen, it doesn't appear that they held any timeshare before the one in question, so I can't see how the statement at paragraph 8 is relevant to the sale in question. Further, although they talk about a 'return', they also say they would be able to "*sell and recoup money after 15 years*". The use of the word recoup does not, in my view, fit with any expectation or hope of a profit on what they paid for membership, rather it is with the idea of getting a return of some or all of what they paid at the outset. So, although in the summary of their statement they say "*[w]e were sold this membership as a means for financial growth and return on investment"*, that is not something I think is reflected in the substance of their evidence, nor was it something alleged at the outset of their complaint.

Instead, Mrs A and Mr N say that the reason they took out Fractional Club membership was not down to the investment element, rather it was due to the pressure they were put under to purchase. But, for the reasons set out above, I do not think the evidence I have seen suggests that there were significant levels of pressure applied.

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 A and Mr N'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 A and Mr N and the Lender was unfair to them even if the Supplier had breached regulation 14(3).

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

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mrs A and Mr N when they purchased membership of the Fractional Club at the Time of Sale. But they and their PR say that the Supplier failed to provide them with all of the information they needed to make an informed decision.

Specifically, they allege that the Supplier failed to tell them that their children would inherit their liability to pay annual maintenance charges after their death. But it certainly was not the case that their children would inherit their liability, or that there was no way out of the original timeshare membership. The Purchase Agreement is a personal contract, which will expire on their deaths (if it is still subsisting at that time). Any debts already incurred before their deaths would be owed by their estates, but that is a rule in the general law and I don't think the Supplier was obliged to tell them all about that; but such debts cannot be inherited by their children, nor can their children be compelled to become members or owners. And rule 7 says that owners (that is, Mrs A and Mr N) can transfer their rights to the Allocated Property to someone else on the open market at any time during their ownership.

Mrs A and Mr N also say that the Supplier failed to tell them that there would be booking fees to pay, and that they could have got cheaper holidays elsewhere. If cheaper holidays were available elsewhere (I've seen no evidence of that and so I make no finding about it), then I don't think that was something which the Supplier was obliged to tell them about. And if the salesman really did not mention that they would have to pay booking fees, then I think they would have complained about that when the first booking fee was charged, rather than five years later. So I think it more likely that they were told about the fees at the Time of

Sale, and that they have since forgotten.

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 A and Mr N was unfair to them because of an information failing by the Supplier, I'm not persuaded that 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 A and Mr N 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 A and Mr N's section 75 claims, 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.

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

Responses to my provisional decision

Shawbrook accepted my provisional decision. The PR did not. In summary, it made the following points:

1. Whether or not Mrs A and Mr N made a profit on the sale of the Allocated Property in terms of their share of the sale proceeds exceeding what they had paid for their Fractional Club membership, their purchase was still an investment, because they were also getting the use of the holiday accommodation as well, and when both of these advantages are taken together, then Mrs A and Mr N can be said to have profited.

2. This case is exactly the same as another case which had been decided by another ombudsman in October 2024, which had been upheld ("the other case"). The PR provided a copy of the ombudsman's decision in that case, in which there had been a finding that the supplier had breached regulation 14(3), and so I should make the same finding in this case.

3. The Supplier's sales documents say "you will get a return after that period. When was the last time you went on a holiday and got some money back?" and "a share of net proceeds".

4. The Supplier had deliberately concealed from Mrs A and Mr N that Fractional Club membership was an investment.

My findings

I have reconsidered the evidence in this case, but my conclusion remains the same. I will explain why, using the same numbering as above.

1. Although I do understand the argument that the PR has made about taking into account not only the sales proceeds but also the use of the holiday accommodation when considering whether Mrs A and Mr N were expecting to make a financial profit, I do not agree with it. The issue in this decision is not whether Mrs A and Mr N made a profit or if they understood the mechanism through which that might happen, rather it's whether (a) the Supplier sold or marketed Fractional Club membership as an investment and (b) if that led them to take it out. That is why I said:

   "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 A and Mr N and the Lender that was unfair to them and warranted relief as a result, then an important consideration is whether the Supplier's breach of regulation 14(3) (which, having taken place during its antecedent negotiations with Mrs A and Mr N, 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 is deemed to be something done by the Lender) led them to enter into the Purchase Agreement and the Credit Agreement."

   But as I explained, I did not think that Mrs A and Mr N's own evidence demonstrated that they purchased membership with the hope or expectation of financial gain or profit, whether that be by getting back more money than they paid for membership or by getting something back along with taking holidays. In short, I simply did not think the evidence suggested Mrs A and Mr N took out the membership they did because of any potential breach of Regulation 14(3) by the Supplier. And the PR explaining that there could be several interpretations of what was meant by "profit" does not change my mind on that.

2. I do not agree that the other case referred to by the PR is identical to this one. Each decision turns on its own facts and every Ombudsman must come to their own assessment of what is fair and reasonable given the facts and circumstances of the specific complaint. So although I have read the decision in the other case, it does not mean I ought to uphold Mrs A and Mr N's complaint.

3. I have considered the sales materials the PR has provided me with, and it appears to be material that was used by the Supplier around the Time of Sale. But this material goes to the question of whether the Supplier breached Regulation 14(3), not whether Mrs A and Mr N were motivated by that breach to go on to purchase the membership. And, as I have already said, I do not think that they did buy membership due to any breach of Regulation 14(3). So although I have read what the PR has said, it does not change the outcome of this complaint.

4. I do not follow how this allegation could be correct. The PR has said that the Supplier sold Fractional Club membership as an investment. But if the Supplier concealed from Mrs A and Mr N that membership was an investment, I fail to see how it could market or sell it as such. So I do not change my mind from my provisional decision.

My final decision

So my final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs A and Mr N to accept or reject my decision before 5 March 2025.

Richard Wood

Ombudsman