DRN-5394405

The complaint

Mrs C's complaint is, in essence, that First Holiday Finance Ltd (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with her under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

What happened

Mrs C purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 13 May 2014 (the 'Time of Sale'). She entered into an agreement with the Supplier to buy 1,750 fractional points at a cost of £6,850 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mrs C more than just holiday rights. It also included a share in the net sale proceeds of a property named on her Purchase Agreement (the 'Allocated Property') after her membership term ends.

Mrs C paid for her Fractional Club membership by paying a £500 deposit and then taking finance for the remaining amount of £6,350 from the Lender in her sole name (the 'Credit Agreement').

Mrs C – using a professional representative (the 'PR') – wrote to the Lender on 8 October 2019 (the 'Letter of Complaint') to complain about the following points:

1. Misrepresentations by the Supplier at the Time of Sale giving her 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[1].

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

Mrs C says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier told them that Fractional Club membership had a guaranteed end date when that was not true[2].

Mrs C says that she has a claim against the Supplier in respect of the misrepresentation(s) set out above, and therefore, under Section 75 of the CCA, she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mrs C.

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[1] The PR didn't specifically raise a complaint of an unfair credit relationship in this letter, but the other points raised could only realistically relate to such a complaint.

[2] The PR listed other points here as alleged misrepresentations, but on my reading of the complaint they appear to relate to not being given certain information at the Time of Sale - this can only be considered as part of a complaint about an unfair credit relationship. So, I've listed those other points in that section accordingly.

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

The Letter of Complaint set out some other points which suggest Mrs C feels that the credit relationship between her and the Lender was unfair to her under Section 140A of the CCA.

In summary, they include the following:

1. The Fractional Club membership is an unregulated collective investment scheme (UCIS), the promotion and financing of which is illegal.
2. The Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs.

The Lender responded to the complaint on 13 November 2019, in which they explained they had forwarded the complaint to the Supplier for them to respond. As no response to the complaint had been received within the eight-week period required by the regulator, the PR then referred the complaint to the Financial Ombudsman Service.

As part of that referral, the PR sent a letter to this Service confirming their points of complaint, including that they were making a complaint of an unfair credit relationship under Section 140A of the CCA for the following reasons (in addition to what they'd already outlined in the Letter of Complaint to the Lender):

1. The Purchase Agreement is void as the membership is a floating week timeshare which is illegal.
2. The interest rate on the loan being 13.81% compared to the Bank of England base rate in September 2011 being 0.50% is an unfair term.

The Supplier subsequently sent a response to the complaint on 3 December 2019, rejecting it on all grounds.

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

Mrs C disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

In response to the Investigator's view, the PR wrote a further letter in which they raised the following new points of complaint:

1. Fractional Club membership was marketed and/or sold to Mrs C at the Time of Sale as an investment contrary to Regulation 14(3) of the Timeshare Regulations 2010.
2. The Credit Agreement was arranged by a credit broker who was not authorised to carry out such an activity and as a result the Credit Agreement is unenforceable.

I considered the matter and issued a provisional decision dated 19 February 2025. In that decision I said:

"***The legal and regulatory context***

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

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

- *The CCA (including Section 75 and Sections 140A-140C).*
- *The law on misrepresentation.*
- *The Timeshare Regulations.*
- *The 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') (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').

My provisional findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

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

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

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

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

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

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

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender does not dispute that the relevant conditions are met in this complaint. And as I'm satisfied that Section 75 applies, if I find that the Supplier is liable for having misrepresented something to Mrs C at the Time of Sale, the Lender is also liable.

This part of the complaint was made for several reasons but as I outlined at the start of this decision, only one of the points raised by the PR in that section of the Letter of Complaint could reasonably be an allegation of a misrepresentation i.e. a false statement of fact. Namely, where they said the Supplier told Mrs C that Fractional Club membership had a guaranteed end date when that was not true. But, I can't see that what the Supplier said here was actually untrue. I've not seen anything which makes me think that the Allocated Property would not be able to be sold at the conclusion of the contract period. The Terms and Conditions 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 Mrs C is included.

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

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

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

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

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between Mrs C and the Lender was unfair.

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

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

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

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mrs C'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."[3]

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.

I have considered the entirety of the credit relationship between Mrs C 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 C and the Lender.

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

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

Mrs C'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.

I'll firstly address the main reason why she says the credit relationship with the Lender was unfair to her. And that's the suggestion that Fractional Club membership was marketed and sold to her as an investment in breach of the prohibition against selling timeshares in that way.

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

The Lender does not dispute, and I am satisfied, that Mrs C'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 PR says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

The PR has said that the Fractional Club membership amounted to a UCIS. However, that is a matter of law and was decided in Shawbrook and BPF v FOS, when such a finding was rejected by the judge (at 39 to 54). It follows, as Mrs C acquired timeshare rights under the purchase, it did not amount to a UCIS.

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

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

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

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

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 C, the financial value of her share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mrs C 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 specifically alleged by either Mrs C nor her PR when she first complained about a credit relationship with the Lender that was unfair to her, I accept that it's possible that Fractional Club membership was marketed and sold to her 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.

So, I have taken all of that into account. However, on my reading of the evidence provided that is not what appears to have happened at that time. I say this because beyond the bare allegation, neither Mrs C nor the PR have provided any evidence to support it.

So, while PR now argues that the Supplier marketed and sold Fractional Club membership to Mrs C as an investment, following the outcome of Shawbrook & BPF v FOS, I'm not persuaded this was the case based on the evidence provided thus far. Indeed, the PR seems to argue that because the membership had an investment element to it, this must mean there was a breach of Regulation 14(3). However, as I've already explained, this is not the case. Having an investment element in a timeshare arrangement does not, in and of itself, breach Regulation 14(3).

So, in the absence of persuasive evidence to suggest otherwise, I find that it is unlikely that the Supplier led Mrs C to believe that membership offered her the prospect of a financial gain (i.e., a profit), given the evolving version of events and lack of evidence provided to date.

But, even if I am wrong to conclude that, on this occasion, membership was unlikely to have been sold in a way that breached Regulation 14(3), given what I have already said about the evidence provided, I am not currently persuaded that would make a difference to the outcome in this complaint anyway.

<u>Was the credit relationship between the Lender and Mrs C rendered unfair?</u>

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

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

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

"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the

debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"

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

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

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

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mrs C and the Lender that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) which, having taken place during its antecedent negotiations with Mrs C, 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 her to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

But as I've already said, no evidence has been provided to support that the Supplier led Mrs C to believe that the Fractional Club membership was an investment from which she would make a financial gain nor was there any indication that she was induced into the purchase on that basis. So, I've seen nothing to make me think any unfairness has been caused.

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 C's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests she would have pressed ahead with her purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mrs C and the Lender was unfair to her even if the Supplier had breached Regulation 14(3).

Other points

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 C when she purchased membership of the Fractional Club at the Time of Sale. But she and PR say that the Supplier failed to provide her with all of the information she needed to make an informed decision, particularly in relation to the annual management charges and that these have increased.

However, I can see that the Purchase Agreement (which Mrs C signed) explained that purchasers would be required to pay an annual management charge and this would be payable whether weeks were used or not. It also explained that the charges would be distributed among the fractional owners fairly and equitably according to the number of

weekly periods each owner was entitled to use each year. And, that charges would be subject to increase or decrease according to the costs of managing the Fractional Club and would be due annually in advance each year.

Mrs C also hasn't explained what information she was given about this at the Time of Sale, and why this was insufficient. So, I'm not persuaded this caused an unfairness in the credit relationship that requires a remedy.

In relation to the Purchase Agreement being voidable, I note that the PR didn't explain the reasons why they feel a timeshare that provides for a 'floating week' or the ability to use points to book holidays, is a voidable agreement, or provided any evidence to support this assertion. There is nothing I have seen thus far that makes me think this is the case. Instead, having taken everything into account, including all relevant legislation, rules and regulations, I can't see anything that would mean the agreement was voidable. Points based timeshares were common models that haven't been prohibited in English law and I've seen nothing to suggest that all timeshare agreements had to refer to a specific apartment or set week.

In relation to the interest rate on the loan, I acknowledge this was somewhat higher than the base rate, but I can see that the applicable rate was clearly explained on the Credit Agreement in question, which Mrs C signed. Further, the PR hasn't explained why they feel the interest rate was unfair in this particular case or why it causes the credit relationship to be unfair. Being charged interest when borrowing money is normal and I haven't seen anything to persuade me that this caused an unfairness in the credit relationship.

So, overall, I'm not persuaded that Mrs C's credit relationship with the Lender was rendered unfair to her under Section 140A for any of the reasons above.

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

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

The PR says that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that the Lender wasn't permitted to enforce the Credit Agreement as a result. This is a new point which wasn't part of the original complaint made to the Lender. But, I will deal with it briefly here as I think it is misconceived.

Having looked at the Financial Ombudsman Service's internal records and the FCA register, I can see that the broker named on the Credit Agreement as the credit intermediary was, at the Time of Sale, authorised by the FCA for credit broking. So, I am not persuaded that the Credit Agreement was arranged by an unauthorised credit broker."

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

The Lender responded to my provisional decision and confirmed they had nothing further to add. The PR disagreed, and provided some further information they wished to be considered in relation to whether the Fractional Club membership was sold to Mrs C as an investment.

Having received the responses from both parties, I'm now finalising my decision.

What I've decided – and why

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

Following the responses from both parties, I've considered the case afresh and having done so, I've reached the same decision as that which I outlined in my provisional findings, for broadly the same reasons.

Again, my role as an Ombudsman isn't to address every single point which has been made to date, but to decide what is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, this doesn't mean I haven't considered it.

Rather, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision.

As noted above, the further comments and evidence the PR provided in response to my provisional decision only related to the issue of whether Fractional Club membership was sold to Mrs C as an investment at the Time of Sale and whether, in turn, that caused the credit relationship between her and the Lender to be unfair. The PR didn't make any further points in relation to the other parts of her complaint. Indeed, they haven't said they disagreed with any of my provisional conclusions in relation to those other points. Since I haven't been provided with anything more in relation to those other parts of the complaint by either party, it follows that my conclusions in relation to them remain the same as I set out in my provisional decision.

Turning to the PR's further comments and evidence, they've said that in the original Letter of Complaint, they highlighted the investment elements of the Fractional Club membership. And, I acknowledge this, but I explained in my provisional decision that beyond the bare allegation that membership was sold to Mrs C as an investment at the Time of Sale, neither Mrs C nor the PR had provided any evidence to support it.

The PR have also highlighted various parts of the sales documentation which they say show that Fractional Club membership was an investment. They also highlighted that there were disclaimers in the paperwork which states that membership was not sold to Mrs C as an investment and advised prospective purchasers to obtain investment advice. The PR questions why prospective purchasers would need investment advice if it was not sold to them as such.

But I don't think sufficient account has been taken here of the part of my provisional decision which said:

> "*Mrs C's share in the Allocated Property clearly, in my view, constituted an investment as it offered her the prospect of a financial return – whether or not, like all investments, that was more than what she first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.*
>
> *In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.*
>
> *To conclude, therefore, that Fractional Club membership was marketed or sold to Mrs C as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to her as an investment, i.e. told her or led her to believe that Fractional Club membership offered her the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.*
>
> *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 C, the financial value of her share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mrs C 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.*"

In response to the provisional decision, the PR has provided a statement from Mrs C setting out her recollections of the sale.

In this, she has said:

> "*The [Supplier's] pitch to me at the seminar was to trade-in my points timeshare plus pay them a further £6,580 to purchase the Fractional.*
>
> *The [Supplier] told me that the property the Fractional was part of, would be sold several years later and I would get my money out*".

The PR then asked Mrs C what she meant by the above and she said:

> "*The way I understood the [Supplier's] comment of 'get my money out' was that I would get the money I had paid at the seminar of £6,850 plus all the money I had put in to purchase the points timeshare which I traded in to purchase the Fractional plus any increase in value of the property when it was sold compared to the current price*".

I acknowledge Mrs C has now said this, but it's ultimately difficult to explain why such allegations were not made at the outset of the complaint. Some of the allegations within this description, such as being told that she would receive back all of the money she had paid for her previous membership, on top of everything else mentioned, without any explanation as to how that would actually be achieved, seem rather implausible and therefore in my view, inherently unlikely to have been made. And, I do have to be mindful that given when this has

been provided, her recollections could have been influenced by the outcome in *Shawbrook & BPF vs FOS* in addition to my findings in the provisional decision. So, I don't think I can ultimately put much, if any, weight on what has now been said in this statement.

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

But, it is not ultimately necessary to make a formal finding on that particular issue because, as I explained in my provisional decision, even if the Supplier did breach Regulation 14(3) at the Time of Sale, I remain unpersuaded that makes a difference to the outcome in this complaint anyway.

This is because even if the Supplier had marketed or sold Fractional Club membership to Mrs C as an investment at the Time of Sale, I remain unpersuaded that the prospect of a financial gain was material to Mrs C's decision to purchase.

In the statement provided by the PR in response to my provisional decision, when asked by the PR what persuaded her to purchase, Mrs C said:

> "*My husband passed away in September 2012 and this seminar was in May 2014. My mind was still coming to terms of [sic] his passing. I would not have purchased the Fractional by paying more money on top of my trade-in points timeshare value, if I was not going to get all the money I have paid to [the Supplier] over the years for both my points and fractional timeshares, even if [the Supplier] promised better holidays or offered any other incentives*".

I acknowledge what Mrs C has said here, but she's only referred to getting back all the money she had paid to the Supplier previously for her previous purchases. And, again, if this was important to Mrs C, it's difficult to explain why this was not mentioned or explained at the outset of the complaint. And as I've already said, I do have to be mindful that given when this has been provided, her recollections could have been influenced by the outcome in *Shawbrook & BPF vs FOS* and my provisional decision So again, I don't think I can ultimately put much, if any, weight on what has now been said in this statement.

So, while I acknowledge what Mrs C has now said, for these and all of the reasons I explained in my provisional decision, I'm still not sufficiently persuaded that her decision to purchase at the Time of Sale was motivated by the prospect of a financial gain. It follows that I still do not think the credit relationship between Mrs C and the Lender was unfair to her even if the Supplier had breached Regulation 14(3).

My final decision

For the reasons set out above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms C to accept or reject my decision before 11 April 2025.

Fiona Mallinson
Ombudsman