DRN-5497919

The complaint

Mr J's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by being party to an unfair credit relationship with him under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA').

Although the timeshare in question was bought jointly between Mr J and Mrs J, it was purchased using finance taken out in Mr J's sole name. As such, he is the only eligible complainant here, but I will refer to both Mr and Mrs J in this decision where appropriate to do so.

What happened

Mr and Mrs J purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 19 May 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,210 fractional points at a cost of £19,920 (the 'Purchase Agreement'). But after trading in their existing timeshare, they ended up paying £7,970 for membership of the Fractional Club.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs J 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 J paid for their Fractional Club membership by taking finance of £20,253 from the Lender in his sole name (the 'Credit Agreement'). This loan also consolidated the outstanding balance of a previous loan from a different lender.

Mr J wrote to the Lender on 18 September 2020 (the 'Letter of Complaint') to complain about 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.

The Letter of Complaint set out several reasons why Mr J says that the credit relationship between him and the Lender was unfair to him. In summary, they include the following:

- Fractional Club had been misrepresented in that they did not receive the holidays they had been promised – the choice of destinations was very limited.
- The Supplier had used aggressive sales techniques to convince them to make the purchase.
- No affordability assessment was carried out.
- They were not properly informed of the 14-day cancellation period.
- The high interest rate of the Credit Agreement was unfair.
- There were unfair terms in the Purchase Agreement.

The Lender considered Mr J's complaint but was unable to issue its final response within the eight weeks required by the regulator. So, Mr J, who was at this point represented by a professional representative (the 'PR'), referred his complaint to the Financial Ombudsman

Service.

In addition to the complaint points above, the PR's referral to this Service also said:

- The Purchase Agreement means that Mr and Mrs J do not own any shares in actual property, only points.
- The Fractional Club was sold to Mr and Mrs J as an investment.
- They had been told the annual maintenance fees would only rise by 1.9% whereas they have actually risen by 4.3%.
- They have never been able to book accommodation and have never used their membership.
- The Supplier was not authorised by the Financial Conduct Authority (the 'FCA') to broker credit at the Time of Sale.

On 30 April 2021 the Lender issued its final response to Mr J's complaint, rejecting it on every ground.

Mr J's complaint was then assessed by an Investigator at this Service who, having considered the information on file, rejected the complaint on its merits.

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

My provisional decision

Having considered everything that had been submitted, I thought the outcome reached by the Investigator was correct – I didn't think Mr J's complaint ought to be upheld, but I thought the reasons not to do so could be expanded on. As such I set out my initial thoughts in a provisional decision (the 'PD') and invited all parties to respond with any new evidence or arguments that they wished me to consider before I made my final decision.

In my PD I began by setting out the legal and regulatory context I thought relevant to this complaint:

"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')."

I then went on to consider the merits of Mr J's complaint:

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

And having done that, I do not currently think this complaint should be upheld. I understand that this will come as a disappointment to Mr and Mrs J, and I'm sorry about that.

But before I explain why I have come to the provisional decision that I have, 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 140A of the CCA: did the Lender participate in an unfair credit relationship?

Mr J says that the credit relationship between him 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 he 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 Mr J and the Lender was unfair.

Under Section 140A of the CCA, a debtor-creditor relationship, like the one between the Lender and Mr J, can be found to have been or be unfair to the debtor (Mr J) 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 of unfairness 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.

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 J'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). So, they were what is known as antecedent negotiations under Section 56(1)(c) – so 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.

So, this means that 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. It needs to take into account the entirety of the credit relationship, which in this case, as the loan is still current, is still in existence.

So, I have considered the entirety of the credit relationship between Mr J and the Lender, along with all the circumstances of the complaint. In carrying out my analysis, and in coming to my conclusion, 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 J and the Lender. And having done that, I do not think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. I'll explain.

<u>The Supplier's sales & marketing practices at the Time of Sale</u>

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

They included that the Fractional Club had been misrepresented by the Supplier, in that he and Mrs J had not received the holidays they had been promised. He says they had found the choice of destinations to be very limited. But other than this bare allegation, there is little

colour or context which helps me understand what Mr and Mrs J were told by the Supplier at the time. In a statement Mr J has written he describes the Supplier's sales staff telling them that upgrading from their existing membership to the Fractional Club would give them enough points to achieve the accommodation they wanted. But other than saying they have never used their Fractional Club membership, Mr J has not said when they tried to book what they wanted and found they were unable to do so. And he has said nothing about what he and Mrs J were told about the choice of destinations they could have travelled to. So, I am not currently persuaded that there were misrepresentations made in this regard.

Mr J says that he and Mrs J 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 Mr J says 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. I can see from Mr J's statement and from his subsequent emails to the Investigator that they felt they had to make the purchase in order to achieve the holidays that they wanted and not to lose the money they had already spent on their existing membership, but that is not the same as being forced into the purchase by the Supplier when they did not want it. They were also given a 14-day cooling off period in which they would have been able to cancel the Purchase Agreement and associated Credit Agreement without penalty. I note that Mr J said in the Letter of Complaint that they were not properly informed of this cancellation period, but I'm not persuaded that this is the case. I think they were likely informed of it as I can see they both signed the form titled 'SEPARATE STANDARD WITHDRAWAL FORM TO FACILITATE THE RIGHT OF WITHDRAWAL'.

This document set out that Mr and Mrs J had the right to withdraw from the contract within 14 calendar days without giving any reason, and this right commenced on 19 May 2014. And this was not the first fractional product that they had bought from the Supplier, and from what Mr J has said, he was aware that the Supplier gave this right when selling its products. And had Mr and Mrs J, as he now attests, purchased Fractional Club when they simply did not want to due to the pressure they were put under at the Time of Sale, I can't see why they did not cancel their membership during the 14-day cooling off period. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs J made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

Mr J says that the right checks weren't carried out before the Lender lent to him. 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 Mr J was actually unaffordable, before also concluding that he lost out as a result, and then consider whether the credit relationship with the Lender was unfair to him for this reason. Again, from the information provided, although Mr J says that recently he has found it difficult to afford the monthly payments, I am not satisfied that the lending was unaffordable for Mr J. If there is any further information on this (or any other points raised in this provisional decision) that Mr and Mrs J wish to provide, I would invite them to do so in response to this provisional decision.

I'm not persuaded, therefore, that Mr J's credit relationship with the Lender was rendered unfair to him under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why he says his credit relationship with the Lender was unfair to him. And that's the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs J'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, in its referral of Mr J's complaint to this Service, says that the Supplier did exactly that at the Time of Sale. And Mr J also says the same in a statement sent to this Service on 12 December 2023. He says, where relevant:

> *"The summary of what went on is that three employees were between them throwing out facts and figures and saying with what we had [the previous fractional membership] was a worthless investment in regards of no future holidays as we couldn't accrue enough Fractional Points to achieve any holiday accommodation in our two agreed dates. Therefore, our only option would be to part exchange our existing fraction take out a new loan and pay off existing loan and get a new Fractional Timeshare with which we could accrue enough points to achieve accommodation for our agreed weeks. We would also be able to sell on our weeks if we didn't want to use them, for our own financial gain, and when I retire, I could pay off loan and be able to sell timeshare on."*

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

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

So, for me to conclude that Fractional Club membership was marketed or sold to Mr and Mrs J in a way that breached 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 J, 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 J as an investment.

However, with all of that said, I acknowledge that the Supplier's training material, which has been provided to this Service in relation to other complaints, left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's possible that Fractional Club membership was marketed and sold to Mr and Mrs J 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 and Mr J's statement and subsequent accounts of what happened at the Time of Sale, that is not what appears to have happened at that time. There is simply no suggestion in the original Letter of Complaint written by Mr J that the Supplier sold or marketed Fractional Club membership to them as an investment.

So, while PR now argues that the Supplier marketed and sold Fractional Club membership to Mr and Mrs J as an investment, I don't recognise that assertion in his initial Letter of Complaint to the Lender. And although Mr J does describe in his statement being told by the Supplier that they could rent out to other people his unused weeks if he wished, at no point did he say or suggest that the Supplier led them to believe that their Fractional Club membership would lead to an overall financial gain (i.e., a profit). It should also be noted that the Supplier did not offer a rental scheme for unused points, so I think it unlikely that it would have said this to Mr J.

Indeed, Mr J's initial recollections in his original Letter of Complaint were put together much closer to the Time of Sale and are, in my view, better evidence of what he remembers of the sales process at that time and why they were unhappy with it than his more recent recollections. After all, if Fractional Club membership had been marketed and sold as an investment by the Supplier at the Time of Sale and this was important to him, it is difficult to understand why Mr J did not mention that in his original Letter of Complaint.

So, I am not persuaded that, on this occasion, Fractional Club membership was sold and/or marketed to Mr and Mrs J in a manner that breached Regulation 14(3) of the Timeshare Regulations.

But even if I am wrong to conclude that, given what I have already said about Mr J's recollections of the sales process at the Time of Sale, 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 Mr J rendered unfair?</u>

There has been a significant amount of case law in this area, and I've taken it all into consideration here. For example, 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.

So, what does that mean to the complaint I am considering here? If I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr J and the Lender that was unfair to him and warranted relief (for example, compensation) as a result, whether the Supplier's breach of Regulation 14(3) led him and Mrs J to enter into the Purchase Agreement, and him into the Credit Agreement is an important consideration.

But as I've already said, there was no suggestion in Mr J's initial Letter of Complaint to the Lender, where he set out his concerns regarding how the Fractional Club was sold to him and Mrs J, 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. Indeed, it seems that Mr and Mrs J were unhappy with their existing timeshare in terms of holidays, and without wishing to lose the money that they had paid for it by simply trying to sell it on, they decided to purchase the Fractional Club in order to get the holidays that they were looking for. Mr J sets this out in his statement:

> *"… [the Supplier was] throwing out facts and figures and saying with what we had [the previous fractional membership] was a worthless investment in regards of no future holidays as we couldn't accrue enough Fractional Points to achieve any holiday accommodation in our two agreed dates. Therefore, our only option would be to part exchange our existing fraction take out a new loan and pay off existing loan and get a new Fractional Timeshare with which we could accrue enough points to achieve accommodation for our agreed weeks."*

So, I think, from everything that has been submitted, Mr and Mrs J's motivation when trading in their existing membership and purchasing the new Fractional Club membership at the Time of Sale, was they thought they'd be able to take the holidays they wanted with it. I'm not persuaded that a potential profit in the future was a motivating factor for them, because there simply isn't the evidence to suggest that was likely in this case.

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, (which as I've said, I don't think is the case here), in any event I am not persuaded that Mr and Mrs J'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 they would have pressed ahead with their purchase for the holidays they thought it would give them, 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 J and the Lender was unfair to him even if the Supplier had breached Regulation 14(3).

<u>The provision of information by the Supplier at the Time of Sale</u>

It is 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 J when they purchased membership of the Fractional Club at the Time of Sale. But the PR says that the Supplier failed to provide them with adequate information relating to the annual management fees to enable them to make an informed decision. The PR says they were told the annual maintenance fees would only rise by 1.9%, whereas they have actually risen by 4.3%.

One of the main aims of the Timeshare Regulations and the UTCCR was to enable consumers to understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. And if a supplier's disclosure and/or the terms of a contract did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, that may lead to the Timeshare Regulations and the UTCCR being breached, and, potentially the credit agreement being found to be unfair under Section 140A of the CCA.

I can see from the contractual documentation that was completed at the Time of Sale, that Mr and Mrs J signed to say they accepted and understood the terms of the contract. And for

example, on the Member's Declaration form that they signed, there are 16 bullet points, setting out the terms. Number 4 says:

> *"We understand that currently the Management Charge is €1,356.00 for 2014 and that an invoice will be sent for this within 3 months of full payment of the Agreement and thereafter by 1st January each year of occupation."*

So, I think it likely that Mr and Mrs J were provided with the information about the requirement to pay management charges in addition to the cost of the membership itself. But as regards how much each subsequent annual management charge would be, other than the bare allegation that they were told it would only increase by 1.9%, Mr J has provided nothing to support this. And I think it inherently unlikely that the Supplier would have said that any increase would be set at a level such as this, given that the charge is set annually and reflects the varying requirements of the resort as a whole for each particular year. And in any event, Mr J hasn't provided detail of what they actually had to pay. But, even if Mr and Mrs J were told something such as they are alleging here, 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 errors render a credit relationship unfair must also be determined according to their impact on the complainant. And I can't see that this information, or lack of correct information, if that is what it was, would have made a difference here. I think Mr and Mrs J wanted to purchase the membership anyway and would have likely done so even if the possible increases in management charges were made clearer than they were. So, while it's possible the Supplier didn't give Mr and Mrs J sufficient information, in good time, on the various charges they would be subject to as Fractional Club members 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 J's credit relationship with the Lender unfair to him.

Mr J, in his Letter of Complaint to the Lender says that the loan's high interest rate made the agreement unfair to him. But I can see in the signed Credit Agreement that it clearly states the applicable interest rate and the duration of the agreement. It also explains the total amount Mr J would be repaying after interest and charges. There are also further explanatory notes beside and below this which are noted as important and to be read carefully.

Being charged interest when borrowing money is normal, and I do not see that charging interest would have led to an unfairness in this case. I note that Mr J says he feels the interest rate was high but again, the interest rate was set out on the face of the loan agreement, so it would have been clear to Mr J. Further, I've not been provided with any reason why such a rate was unfair given Mr J's circumstances, so I can't say the level of interest led to an unfairness that requires a remedy in this case.

Mr J also says there were unfair terms included in the Purchase Agreement. For me to conclude that a term in the Purchase Agreement rendered the credit relationship between Mr J and the Lender unfair to him, I'd have to see that a term was unfair under the UTCCR, and that the term was actually operated against Mr J in practice. In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mr J have flowed from such a term, because those consequences are relevant to an assessment of unfairness under Section 140A.

But Mr J hasn't expanded on this point and said which term(s) he was referring to, whether they have been applied in practice, nor indeed how they have caused unfairness. So, I am not persuaded that any term within the Purchase Agreement, nor the associated Credit Agreement was unfair.

Moreover, as I haven't seen anything else to suggest that there are any other reasons why

the credit relationship between the Lender and Mr J was unfair to him because of an information failing by the Supplier, I'm not persuaded it was.

The complaint about the Supplier not being regulated by the FCA to carry out the relevant activity.

The PR, in its referral of Mr J's complaint to this Service, says that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that the Lender wasn't and isn't permitted to enforce the Credit Agreement.

This complaint has never been put to the Lender, so it has not had an opportunity to consider it and respond. However, I don't think there is any prejudice to the Lender in me considering this complaint point here in this provisional decision, as the Lender can provide an answer to this point in its response if it wishes to.

In respect of the merits of this complaint point, having looked at the FCA register, I can see that the Supplier, 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.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I am not persuaded that the Lender was party to a credit relationship with Mr J under the Credit Agreement that was unfair to him 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 Mr J."

The responses to the PD

The Lender did not respond but Mr J did – he did not accept the outcome and explained his reasons for not doing so. In summary, he said:

- He and Mrs J had gone to Spain in 2014 in an attempt to relinquish the fractional membership they had purchased in 2013 as they had missed the deadline for cancelling it, and they had not used it and had no interest in that type of holiday.
- At the 2014 meeting they had been convinced their fractional points were worthless and that they needed to increase their fractional share to allow some holidays, and that the property would be sold in the future, or they could sell their holiday weeks and sell their fractional share in the future.
- They have never used their fractional points so have not had any benefit from them.
- When the finance was arranged, he was in a good job with two years to go before he retired. So, after retiring his pension was paying for both his mortgage and the Credit Agreement repayments.
- There were two occasions in 2014 and one in 2018 where he had problems making the required repayment. In 2020 he was experiencing financial difficulties so wrote to the Lender.
- The Malaga resort owned by the Supplier went into liquidation around November 2020, so the sale of the Allocated Property won't happen.
- Although he and Mrs J signed the sales documentation, the Supplier's three sales agents cajoled Mrs J which in turn put more pressure on him, and they were unable to walk away as they needed the Supplier to take them back to their accommodation.

Mr J then went into detail about his personal and financial circumstances, and explained the difficulties that the required repayments towards the Credit Agreement were now causing him.

What I've decided – and why

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

And having done so, and having thought carefully about what Mr J has said in response to my PD, I'm afraid I have not changed my mind. I do not think this complaint ought to be upheld, for the same reasons as I've set out in the PD.

Before I go on to the merits of Mr J's complaint, I would like to acknowledge and thank Mr J for his candour about his difficult and distressing personal circumstances since making the purchase. I have considerable sympathy for what he and Mrs J have, and are still going through, and I would urge him to speak to the Lender to try and come to an arrangement which will reduce the financial stress he is experiencing.

But I have to make a decision on the merits of this complaint on the balance of probability – that is, what I consider more likely than not to have happened. So, I am not saying here that I don't believe what Mr J is saying, it is just that I am not persuaded, given *everything* that has been submitted, that his complaint ought to be upheld when also taking into account the legal and regulatory context.

In response to the PD, Mr J has repeated, in essence, that he and Mrs J were unfairly pressured by the Supplier to make the purchase of Fractional Club. He says they were convinced that their current holding of fractional points was worthless, and they need to purchase more in order to take holidays. But as I said in the PD, while acknowledging that the sales process may have been lengthy and tiring, I am not persuaded that they made the purchase due to the pressure placed on them. They were, after all, given a 14-day cancellation period, during which time they were able to cancel both the Purchase Agreement and the associated Credit Agreement without penalty. And had they only made the purchase due to the pressure, and due to having to rely on the Supplier to give them a lift back to their property, I don't understand why they didn't cancel their membership during this 14-day period if it was something that they didn't actually want. And the fact that Mr and Mrs J have never actually used their membership to take a holiday doesn't, in itself, mean the Fractional Club or Credit Agreement was mis-sold, or that they ought to be allowed to exit either or both agreements.

As regards the decision to offer him the finance, and the affordability of the repayments, I remain unpersuaded that the Lender was irresponsible when it agreed to provide Mr J finance for the purchase of Fractional Club. The Lender seems to have made the decision to lend based on the information Mr J supplied it about his personal and income position, in conjunction with its own checks. And there is no suggestion that the Lender was aware, or could have been aware of the future changes to Mr J's financial and personal circumstances. And it seems, from what he has said, that the changes to his personal circumstances had a significant detrimental effect on his financial situation. And as I've said, I can't see that this would have been foreseeable for either Mr J or the Lender.

I also remain unpersuaded, for the reasons I gave in the PD, that the Fractional Club membership being considered here was sold and/or marketed by the Supplier to Mr and Mrs J as an investment. And while I have seen that parts of the Supplier's business have been sold on following administration, I can't see any reason why the Allocated Property would not be put up for sale by the trustee's as required under the terms of the Purchase

Agreement at the end of the membership term.

Mr J has again said, in response to the PD, that the Supplier persuaded him and Mrs J that the purchase of the Fractional Club was the only way that they could get holidays. He has not said that a potential profit was a motivating factor for them. So, as I can only consider the sale of Fractional Club in the context of the fairness of the credit relationship in the associated Credit Agreement, whether I think it likely that a breach of the Timeshare Regulations was material to their purchasing decision is a necessary and important consideration for me.

And I am not persuaded that Mr and Mrs J'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 they were persuaded to press ahead with their purchase for the holidays they thought it would give them.

So, as I've said, on balance, 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, (and again, I don't think that is the case here), in any event, I don't think such a breach was material to their purchasing decision.

And for that reason, I am not persuaded that the associated credit relationship between Mr J and the Lender was unfair to him even if the Supplier had breached Regulation 14(3), and as such I do not think Mr J's complaint ought to be upheld.

My final decision

I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 20 May 2025.

Chris Riggs
Ombudsman