DRN-5525685

The complaint

Mr K complaint is, in essence, that Mitsubishi HC Capital UK Plc (the 'Lender') acted unfairly and unreasonably by lending to him irresponsibly to pay for what he alleged was a scam timeshare contract, which he says was mis-sold to him.

Background to the complaint

Previous contact with the timeshare provider (the 'Supplier')

In April 2018, Mr K attended a presentation about the Supplier's timeshare membership. He agreed to purchase a Trial membership but changed his mind and cancelled within the 14-day withdrawal period. While he told the Supplier he did not think it was the right time, he indicated he may be interested in becoming a member in future. After this, the Supplier offered him a promotional holiday for April 2019, on condition that he attended a presentation during that holiday – which Mr K accepted.

Purchase of Fractional Club membership

On 10 April 2019 (the 'Time of Sale'), while on the promotional holiday, Mr K purchased full membership of a timeshare (the 'Fractional Club') from the 'Supplier'. He entered into an agreement with the Supplier to buy 1,070 fractional points at a cost of £14,823 (the 'Purchase Agreement'), which could be used to take holidays with the Supplier and its affiliates.

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

Mr K paid for his Fractional Club membership by taking finance of £14,823 from the Lender (the 'Credit Agreement').

Mr K's complaint to the Lender

Mr K contacted to the Lender on 19 September 2019 to complain about:

1. The amount of interest charged on the Credit Agreement.
2. The Supplier mis-selling Fractional Club membership, which he felt was a scam.
3. The Supplier not giving him the opportunity to check the contract before he signed it.
4. The Lender not carrying out checks to determine if he could afford the Credit Agreement.

The Lender's response

On 21 August 2020, the Lender provided its final response to Mr K's complaint. This said

that:

1. Mr K was provided with the necessary pre-contract credit information prior to signing the Credit Agreement and had the opportunity to review this before signing it. This included information about the interest rate and the required repayments.

2. During the sale of Fractional Club membership Mr K was given time to read the documentation and ask questions prior to signing.

3. After verbally agreeing to the purchase, Mr K spent time with the Supplier's Compliance Officer who went through all the documentation with him before he signed it. Mr K also had a 14-day period in which he could cancel the Purchase Agreement and Credit Agreement without penalty, which he was made aware of at the Time of Sale.

4. The Lender considered his loan application, checked his credit record, and based on this concluded that the loan was affordable for him.

Referral to the Financial Ombudsman Service

On 24 November 2020, Mr K referred his complaint to the Financial Ombudsman Service. On his complaint form he said he was complaining because:

1. The night before the presentation Mr K had a disturbed night's sleep due to his child being unwell. He says the Supplier was made aware of this, but it refused to reschedule the presentation. This put him under pressure and impaired his ability to understand the contract.

2. The Supplier told Mr K that he could cancel the Fractional club membership at any time and receive some refund *"due to increase in value of property"*.

3. Mr K did not speak to the Lender, and the interest rate of the Credit Agreement was not explained to him.

4. Mr K signed the documents before having the opportunity to read them.

5. Following some bad experiences with the Supplier in July and August 2019, Mr K asked to cancel the contract, but was told he could not do so.

6. Fractional Club membership lasts for 19 years but Mr K says it does not really have an end unless all members decide to sell at the same time. Had this been explained he would not have entered into the Purchase Agreement.

Our Investigator's assessment

Our Investigator considered the information on file and asked Mr K for his recollections of what he was told by the Supplier at the Time of Sale. Mr K provided this on 2 January 2024. Mr K reiterated that he had little sleep the night before the presentation and said:

> *"Under these conditions, we just wanted the whole thing to end asap.*
>
> *The whole situation put us under so much pressure. We felt put into a situation where we don't have a choice but to attend their presentation regardless of our circumstances. We felt that since we had free stay from them therefore, we are under an obligation to be under their influence and follow what they say.*

They kept on showing us the beautiful pictures of beaches and luxury rooms. One rep took us to one two bed apartment to show us what we will get if every time we go on holidays. The apartment with a terrace and kitchen with enough fruits and snacks always available every time we check in. Their hotels and resorts are available everywhere in the world.

As we never had opportunity to understand the whole model on that day, we enquired if we could cancel our membership and CLC reps said we can cancel the contract any time and walk out and they will give us some refund due to increase in value of property.

For us it looked great, so we signed papers quickly to end the presentation without reading anything so that we can address our child and take her back to room. As we were under the impression that we can walk out of the contract if we don't like the product as it was explained to us by CLC reps.

We were told we can start booking straight away and one staff member will visit us in our room on 11th to show us [how] to book. We will get a dedicated staff to handle all our booking in future. We thought, it will give us an opportunity understand if this product is really made to address our needs.

To our surprise no one ever came to our room on 11th of April 2019. We checked out on 12th of April 2019. As we had luggage of our own, and we were travelling via a budget flight therefore we had to leave all the paperwork CLC reps gave us on 10th of April 2019 with reception at resort and asked them to send it by post. We kept our membership cards with us. We never received any paperwork until 25th of April 2019."

Mr K went on to provide information about what happened after the Time of Sale in relation to problems he had using the membership and his subsequent attempts to cancel it. Mr K said he thought he would be able to try out the membership and cancel it at any time and receive some *"profit on the sale of property"*. Mr K said he did not feel Fractional Club membership represented value for money because:

1. Most of the Supplier's resorts are unnecessarily expensive in that Mr K could book at a cheap price without using his membership.

2. The Supplier doesn't have resorts all over the world, only in some selected locations.

3. All rooms are accommodation only and often in remote locations, meaning that Mr K incurs more cost for travel and food which makes the holidays very expensive.

On 8 January 2024, our Investigator issued an assessment rejecting the complaint on its merits.

Mr K disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. In summary he said that:

1. The Credit Agreement is based on an unfair relationship.

2. He was told he was purchasing Fractional Club membership was an investment on which he would make a return in future, which is in breach of the Timeshare Regulations[1].

3. A Judicial Review[2] and subsequent ombudsman decisions have upheld similar complaints.

4. The affordability and other checks carried out by the Lender were to make sure the Lender could recover the funds (which Mr K says was paid to scammers).

5. Mr K could not afford the loan repayments.

During the complaint Mr K mentioned that he had made a claim in the Spanish Courts against the Supplier alleging that the Purchase Agreement was invalid or void under Spanish Law. Mr K has now provided the comments of his solicitors which confirm the court case has been dismissed because the Spanish Court did not have jurisdiction.

Mr K also provided some further comments, suggesting the following is relevant to his complaint:

1. Section 75 of the CCA, which deals with misrepresentation. Mr K says that the Supplier misrepresented the Purchase Agreement by saying he could cancel it at any time, and that his Fractional Club membership had investment and resale value.

2. The Timeshare Regulations, which prohibit the sale and marketing of a timeshare as an investment. Mr K says the Supplier repeatedly framed Fractional Club membership as an *"opportunity for long-term returns"*.

3. Section 140A of the CCA, which deals with unfair credit relationship. Mr K says an unfair relationship was created because of the Supplier's misrepresentations and breach of the Timeshare Regulations.

4. Similar complaints upheld by the Financial Ombudsman Service, creating a precedent which has been ignored in our Investigator's assessment.

5. The loan was not affordable for Mr K at the Time of Sale. He was the sole earner in his household and was already paying a mortgage and living expenses that left little to no room for additional credit obligations.

My provisional decision

I previously issued a provisional decision explaining that I did not think this complaint should be upheld, which gave Mr K and the Lender an opportunity to respond with any further evidence, information, or comments they wanted me to take into account when making my final decision.

A copy of my provisional findings is included below and forms part of my final decision. The Lender did not respond by the deadline I gave. Mr K did respond, and I have included in my findings a summary of what he said as well as my response to those points. Ultimately,

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[1] The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010.
[2] 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').

Mr K's response has not caused me to change my findings from my provisional decision, and I have decided not to uphold this complaint.

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.

To be clear, a decision of an ombudsman at the Financial Ombudsman Service does not create a precedent that other ombudsmen must follow. Each complaint is considered and decided on its individual merits.

The legal and regulatory context that I think is relevant to this complaint is set out in this section.

The Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) (the 'CCA')

The timeshare(s) at the centre of the complaint in question was/were paid for using restricted-use credit that was regulated by the Consumer Credit Act 1974. As a result, the purchase was covered by certain protections afforded to consumers by the CCA, provided the necessary conditions were and are met. The most relevant sections as at the relevant time(s) are below.

- Section 56: Antecedent Negotiations
- Section 75: Liability of Creditor for Breaches by a Supplier
- Sections 140A: Unfair Relationships Between Creditors and Debtors
- Section 140B: Powers of Court in Relation to Unfair Relationships
- Section 140C: Interpretation of Sections 140A and 140B

Case Law on Section 140A

Of particular relevance to the complaint in question are:

1. The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') remains the leading case.

2. The judgment of the Court of Appeal in the case of *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')* sets out a helpful interpretation of the deemed agency and unfair relationship provisions of the CCA.

3. *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*') – in which the High Court held 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 relationship or otherwise the date the relationship ended.

4. The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*') – which approved the High Court's judgment in *Patel*.

5. *Deutsche Bank (Suisse) SA v Khan and others* [2013] EWHC 482 (Comm) – in Hamblen J summarised – at paragraph 346 – some of the general principles that apply to the application of the unfair relationship test.

6. *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 (‘*Carney*’).

7. *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) (‘*Kerrigan*’).

8. *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*’).

My Understanding of the Law on the Unfair Relationship Provisions

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.”*

So, the negotiations conducted by the Supplier during the sale of the timeshare in question was 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.140A(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.

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

The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in *Plevin* (at paragraph 17):

> *"Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with […] whether the creditor's relationship with the debtor was unfair."*

Instead, it was said by the Supreme Court in *Plevin* that the protection afforded to debtors by Section 140A is the consequence of all of the relevant facts.

The Law on Misrepresentation

The law relating to misrepresentation is a combination of the common law, equity and statute – though, as I understand it, the Misrepresentation Act 1967 didn't alter the rules as to what constitutes an effective misrepresentation. It isn't practical to cover the law on misrepresentation in full in this decision – nor is it necessary. But, summarising the relevant pages in *Chitty on Contracts (33rd Edition)*, a material and actionable misrepresentation is an untrue statement of existing fact or law made by one party (or his agent for the purposes of passing on the representation, acting within the scope of his authority) to another party that induced that party to enter into a contract.

The misrepresentation doesn't need to be the only matter that induced the representee to enter into the contract. But the representee must have been materially influenced by the misrepresentation and (unless the misrepresentation was fraudulent or was known to be likely to influence the person to whom it was made) the misrepresentation must be such that it would affect the judgement of a reasonable person when deciding whether to enter into the contract and on what terms.

However, a mere statement of opinion, rather than fact or law, which proves to be unfounded, isn't a misrepresentation unless the opinion amounts to a statement of fact and it can be proved that the person who gave it, did not hold it, or could not reasonably have held it. It also needs to be shown that the other party understood and relied on the implied factual misrepresentation.

Silence, subject to some exceptions, doesn't usually amount to a misrepresentation on its own as there is generally no duty to disclose facts which, if known, would affect a party's decision to enter a contract. And the courts aren't too ready to find an implied representation given the challenges acknowledged throughout case law.

The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations')

The relevant rules and regulations that the Supplier in this complaint had to follow were set out in the Timeshare Regulations. I'm not deciding – nor is it my role to decide – whether the Supplier (which isn't a respondent to this complaint) is liable for any breaches of these Regulations. But they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair. After all, they signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Fractional Club.

The Regulations have been amended in places since the Time of Sale. So, I refer below to the most relevant regulations as they were at the time(s) in question:

- Regulation 12: Key Information
- Regulation 13: Completing the Standard Information Form
- Regulation 14: Marketing and Sales
- Regulation 15: Form of Contract
- Regulation 16: Obligations of Trader

The Timeshare Regulations were introduced to implement EC legislation, Directive 122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts (the '2008 Timeshare Directive'), with the purpose of achieving 'a high level of consumer protection' (Article 1 of the 2008 Timeshare Directive). The EC had deemed the 2008 Timeshare Directive necessary because the nature of timeshare products and the commercial practices that had grown up around their sale made it appropriate to pass specific and detailed legislation, going further than the existing and more general unfair trading practices legislation.[4]

The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations')

The CPUT Regulations put in place a regulatory framework to prevent business practices that were and are unfair to consumers. They have been amended in places since they were first introduced. And it's only since 1 October 2014 that they imposed civil liability for certain breaches – though not misleading omissions. But, again, I'm not deciding – nor is it my role to decide – whether the Supplier is liable for any breaches of these regulations. Instead, they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair as they also signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

Below are the most relevant regulations as they were at the relevant time(s):

- Regulation 3: Prohibition of Unfair Commercial Practices
- Regulation 5: Misleading Actions
- Regulation 6: Misleading Omissions
- Regulation 7: Aggressive Commercial Practices
- Schedule 1: Paragraphs 7 and 24

The Consumer Rights Act 2015 (the 'CRA')

The CRA, amongst other things, protects consumers against unfair terms in contracts. It applies to contracts entered into on or after 1 October 2015 – replacing the Unfair Terms in Consumer Contracts Regulations 1999.

Part 2 of the CRA is the most relevant section as at the relevant time.

Relevant Publications

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').

[4] See Recital 9 in the Preamble to the 2008 Timeshare Directive.

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.

Having done that, I've decided to uphold this complaint. 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.

Below is a copy of my provisional findings as set out in my provisional decision, which form part of my reasoning for why I've reached my final decision. Following on from this I will set out the responses I've received to the provisional decision and any further findings in light of them.

START OF COPY OF PROVISIONAL FINDINGS

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

As both sides may already know, a claim against the Lender under Section 75 essentially mirrors the claim Mr K could make against the Supplier. Certain conditions must be met if this protection is engaged – which are set out in the CCA. The Lender does not dispute that the relevant conditions are met in this complaint, and I'm satisfied that they are.

While I recognise that Mr K has concerns about the way in which his Fractional Club membership was sold, he has not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale. And I say that because:

1. It was not a misrepresentation to say that his Fractional Club membership could be cancelled at any time. The Supplier does allow members to surrender their membership, leaving them with no further liabilities – but losing the right to any sale proceeds when the Allocated Property is sold.

   Mr K says that the Supplier went further than this and indicated that he would get some money back if he cancelled at any time. But I am not persuaded that the Supplier would've said this other than in relation to the 14-day withdrawal period in which time he would've got a full refund (and the Credit Agreement would also have been cancelled).

   Mr K says the Supplier told him the refund would be related to the *"increase in the value of property"*. It is not clear to me exactly what that means. But in any case, it does not appear very plausible that the Supplier would say this – given that is not how Fractional Club membership worked. And the Supplier did not offer any refund if membership was surrendered. So, I do not think I can reasonably conclude that the Supplier misrepresented the situation in the way Mr K has alleged.

2. Mr K says he was told Fractional Club membership lasted for 19 years, but this was untrue because it did not really have an end date. However, I think saying the membership term was 19 years was not a misrepresentation. It broadly describes how Fractional Club membership worked. Which was that after the 19-year membership term ended, the Allocated Property would be sold, and the fractional owners would receive their share of the net sale proceeds. The sale may not be immediate, and there was some provision in the Fractional Club Rules for the sale to

be delayed for up to two years in exceptional circumstances. But it could only be delayed longer if all the Allocated Property's fractional owners agreed. But the clear intention was that the trustee would sell the Allocated Property at the end of the membership term, and there was nothing in the Fractional Club Rules that would allow the Supplier or any fractional owner to stop this from happening. So, I do not think saying membership lasted for 19 years was a misrepresentation.

3. Mr K says the Supplier told him that Fractional Club membership had investment and resale value. Mr K has not explained in detail how the Supplier explained this. And it did not form part of his initial complaint to the Lender. Mr K has only mentioned this after our Investigator's assessment of the complaint. So, it would be hard for me to conclude that the Supplier did say this.

   In any case, Fractional Club membership can be sold privately if a buyer can be found – which is stated in the sales documents. So, it does not appear that, even if the Supplier did indicate Fractional Club membership may hold some investment or resale value, that this would be untrue. It was asset backed as explained above, being linked to the Allocated Property which would likely have some value. And the expectation was that the Fractional Cub members would receive their share of the net sale proceeds when the Allocated Property is sold at the end of the membership term.

There's nothing else on file that persuades there were any false statements of existing fact made to Mr K by the Supplier at the Time of Sale. So, I do not think there was an actionable misrepresentation by the Supplier for the reasons Mr K alleges.

For these reasons, I do not think the Lender is liable to pay Mr K 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 in relation to any Section 75 claim.

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

Mr K says that the credit relationship between him and the Lender was unfair under Section 140A of the CCA.

I have considered the entirety of the credit relationship between Mr K 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 Mr K and the Lender.

Mr K's allegation that Fractional Club membership was a scam

Mr K has suggested that Fractional Club membership was itself a scam. But it seems clear to me that Mr K entered into a regulated timeshare contract with the Supplier. And he used his Fractional Club membership to take holidays. I appreciate that Mr K is dissatisfied with his experience with the Supplier and with the holidays he took. But that does not mean that it was a scam. Nor does it mean that the Lender was wrong to lend to Mr K to fund his purchase of Fractional Club membership.

Misrepresentations

I have explained above why I do not think that the Supplier misrepresented Fractional Club membership in the ways alleged by Mr K. It follows that, there having been in my opinion no misrepresentations, this could not have led to an unfair credit relationship being created.

Pressure

Mr K says that he was pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledge that he may have felt weary due to a disturbed night and a sales process that went on for a long time. And he may have been distracted because his child was unwell. But to uphold the complaint due to pressure, I would need to be persuaded that Mr K felt he had no choice but to purchase Fractional Club membership when he simply did not want to. And that does not appear to be what he has said happened. Mr K's allegation is more that he felt pressured to attend the sales presentation, not that he was pressured into the purchase itself.

Mr K was also given a 14-day cooling off period during which he could've cancelled the purchase and Credit Agreement. I think he was aware of this right given he signed a page in the sales documents that explained this. He had also exercised a similar right the previous year in relation to trial timeshare membership which he initially agreed to purchase from the Supplier before changing his mind.

Mr K says he did not have the sales documents with him after leaving the Supplier's resort. But the Supplier clearly provided the relevant documents to Mr K at the Time of Sale. So, it fulfilled its obligations in terms of providing that paperwork to him. And I do not think the Supplier can be found to be at fault if Mr K chose, for whatever reason, to post the sales documents to his home rather than take them with him in person.

With all of that being the case, there is in my opinion insufficient evidence to demonstrate that Mr K made the decision to purchase Fractional Club membership because his ability to exercise that choice was significantly impaired by pressure from the Supplier.

Mr K did not have the opportunity to check the documents before he signed them

Mr K says he did not have the opportunity to read or understand the sales documents before signing them. But my understanding of the Supplier's sales process is that it takes a significant amount of time, during in which prospective customers can ask questions, including with the Supplier's Compliance Officer, before they sign the Purchase Agreement and Credit Agreement.

As mentioned above, Mr K also had the 14-day withdrawal period during which he could've read the sales documents and contacted the Supplier to ask further questions if he needed to. Or during which he could've cancelled the contract and Credit Agreement without penalty. Mr K says he didn't have the sales paperwork having chosen to post it to his home address rather than take it with him in person. But I do not think the Supplier can be found to be at fault for this. He could've cancelled within the 14-days if he felt he needed to look at the paperwork properly but had not been able to do so.

Mr K says he thought he could cancel at any time outside the 14-day withdrawal period and get some money back. But, as discussed above, I do not think it is likely that the Supplier told him this.

The Credit Agreement was not explained to Mr K including the interest rate

I'm satisfied that Mr K was provided with the necessary pre-contract credit information as well as the Credit Agreement, which he signed. Both of those documents set out all the information about the loan including the amount borrowed, the loan term, the monthly repayments, the total charge for credit, the interest rate, and the total amount payable. So, I am satisfied that Mr K was given the necessary information.

Mr K says he chose not to read the Credit Agreement before signing it. I appreciate his reasons for that. But he alternatively could've refused to sign the Purchase Agreement and Credit Agreement or insisted that he needed more time to think about it (for example overnight). Or he could've used the 14-day withdrawal period to read the documents and decide whether or not to cancel the purchase and Credit Agreement.

Overall, I think the required information about the Credit Agreement was provided to Mr K at the Time of Sale. So, I cannot say that the Supplier was at fault if Mr K was not aware of the details of the Credit Agreement, such as the interest rate.

At various points during the complaint Mr K has suggested that he was not aware he had entered into a separate Credit Agreement with the Lender. He says he thought he was paying for his membership on a monthly basis with the Supplier, so that if he cancelled his payments would stop. But, given the information he was provided with at the Time of Sale, and that he later settled the Credit Agreement directly with the Lender, I am not persuaded by this suggestion.

Mr K mentioned in January 2024 that English is not his first language. But there is no suggestion that this caused him to struggle to understand the discussions at the Time of Sale or the documents provided to him. Indeed, if he had not mentioned this when writing to us, I would not have been aware of it given his very good written English. So, this does not appear to have been something that the Supplier should've considered at the Time of Sale in terms of Mr K potentially not understanding what was being discussed.

I'm not persuaded, therefore, that Mr K's credit relationship with the Lender was rendered unfair to him under Section 140A for any of the reasons above. But Mr K also says his credit relationship with the Lender was unfair to him because Fractional Club membership was marketed and sold to him 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 Mr K'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 Mr K 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.

In my view, Mr K's share in the Allocated Property clearly constituted an investment as it offered him the prospect of a financial return – whether or not, like all investments, that was more than what he 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 Mr K 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 him as an investment, i.e. told him or led him to believe that Fractional Club membership offered him the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

There is competing evidence in this complaint as to whether Fractional Club membership was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations.

On the one hand, it is clear 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 K, the financial value of his 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 K as an investment. So, it's *possible* that Fractional Club membership wasn't marketed or sold to him as an investment in breach of Regulation 14(3).

On the other hand, 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. So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mr K as an investment in breach of Regulation 14(3).

However, whether or not there was a breach of the relevant prohibition by the Supplier is not ultimately determinative of the outcome in this complaint for reasons I will come on to shortly. And with that being the case, it is not necessary to make a formal finding on that particular issue for the purposes of this decision.

Was the credit relationship between the Lender and Mr K rendered unfair to him?

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.

And in light of what the courts had to say in *Carney* and *Kerrigan,* it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr K and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) (if there was one) led him to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

There was no suggestion in Mr K's initial complaint to the Lender that the Supplier had sold or marketed Fractional Club membership as an investment to Mr K at the Time of Sale. So, this is not an allegation that he has made consistently throughout this complaint.

The first suggestion that the Supplier might have said something about the future value of the Allocated Property was in the complaint form, where Mr K said the Supplier told him he could *"cancel the contract at any time and walk out and they will give us some refund due to increase in value of property"*. But this description does not meet the definition of investment as set out above. Mr K says that the Supplier told him he would get *"some refund"*. That does not indicate that he was given the expectation or hope of making a profit, but simply that he could get back some of what he had paid.

So, Mr K's description of what happened at the Time of Sale appears to have evolved over time. It was not until Mr K's email dated 9 January 2024, responding to the Investigator's assessment, that Mr K first stated that the Supplier told him that Fractional Club membership was *"an investment on which we will make a return in the future"*. This was after the judgement in *Shawbrook & BPF v FOS*. And I'm satisfied that Mr K was aware of that judgement given he referred to it in the same email, as well as to other timeshare complaints that have been upheld by the Financial Ombudsman Service due to a timeshare provider's breach of Regulation 14(3) being found to create an unfair credit relationship in individual cases.

This means there is a real risk that Mr K's more recent recollections have been influenced by the judgement in *Shawbrook and BPF v FOS*, as well as by his knowledge of the Financial Ombudsman Service upholding other timeshare complaints due to timeshare providers breaching Regulation 14(3).

Mr K has not consistently said throughout his complaint that the Supplier sold or marketed Fractional Club membership as an investment to him. He has only said this more recently, with the knowledge of the circumstances in which the Financial Ombudsman Service might uphold a complaint like this. So, I do not think I can give significant evidential weight to Mr K's more recent recollections.

I am also mindful that in Mr K's statement dated 2 January 2024, which Mr K said was his detailed recollection of the whole event (being the sale of Fractional Club membership). In this statement Mr K explained his reasons for entering into the Purchase Agreement as follows:

- *"They kept on showing us the beautiful pictures of beaches and luxury rooms. One rep took us to one two bed apartment so show us what we will get if every time we go on holidays. The apartment with a terrace and kitchen with enough fruits and snacks always available every time we check in. Their hotels and resorts are available everywhere in the world.*

  As we never had opportunity to understand the whole model on that day, we enquired if we could cancel our membership and CLC reps said we can cancel the contract any time and walk out and they will give us some refund due to increase in value of property.

  For us it looked great, so we signed papers quickly to end the presentation without reading anything so that we can address our child and take her back to room. As we were under the impression that we can walk out of the contract, if we don't like the product as it was explained to us by CLC reps."

From this it appears to me that the reason Mr K entered into the Purchase Agreement is because he was attracted to the idea of holidaying in resorts with beautiful beaches and luxury rooms. The statement at no point indicates that Mr K made the purchase because Fractional Club membership was described to him as being an investment or because he hoped or expected to make a financial gain or profit from it.

So, based on Mr K's earlier recollections, which I think are likely to be more accurate and more reliable than his later recollections, I am not persuaded that Mr K entered into the Purchase Agreement and Credit Agreement because the Supplier told him or led him to believe that Fractional Club membership was an investment (as defined above).

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 Mr K'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 he would have pressed ahead with his purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr K and the Lender was unfair to him even if the Supplier had breached Regulation 14(3).

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I do not think the credit relationship between the Lender and Mr K was unfair to him 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.

Irresponsible and unaffordable lending

Mr K says that the right checks weren't carried out before the Lender lent to him. The Lender has provided information about what checks it carried out. And Mr K has provided a copy of his credit report from December 2023 and some bank statements from around the Time of Sale.

Having considered this information, I am satisfied that the Lender carried out appropriate checks and made a reasonable lending decision based on the information available to it. The Lender calculated Mr K's likely disposable income based on the information he provided on the loan application form and other information available to it from Credit Reference

Agencies. And the Lender's calculations do not appear to be unreasonable given the evidence it had available at the time and the evidence that Mr K has now provided to us.

Neither Mr K's credit report nor the information available to the Lender at the Time of Sale showed any signs that he was in or at risk of financial difficulty. While he had some existing credit cards and other debt, there were no missed payments recorded. So, although Mr K says he did not have the money to make the repayments at the Time of Sale, there appears to be no reason why the Lender would've suspected this was the case. And no reason for it to ask for more information before accepting Mr K's loan application.

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 K was actually unaffordable before also concluding that he lost out as a result. From the information provided, I am not satisfied that the lending was unaffordable for Mr K or that the Lender was irresponsible in lending to him at the Time of Sale.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr K's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with him under the Credit Agreement that was unfair to him for the purposes of Section 140A of the CCA, and I do not think the Lender lent to Mr K irresponsibly or that the lending was unaffordable for him at the Time of Sale. 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 K.

If there is any further information on this complaint that Mr K wishes to provide, I would invite him to do so in response to this provisional decision.

END OF COPY OF PROVISIONAL FINDINGS

Responses to my provisional decision

The Lender did not respond to my provisional decision.

Mr K responded to say that he did not accept my provisional decision. In summary, he said the following:

1. In earlier correspondence, he mistakenly used the term *"refund"* due to being a non-native English speaker. However, what he meant was a *"return on investment"* – as this is how the product was described during the sales process.

2. Mr K's initial engagement with the Supplier was for a one-year package, which he cancelled. He was then offered what was presented as an *"upgrade"*, which turned out to be a 19-year contractual commitment to a complex and burdensome financial product. This was not explained clearly, and he was led to believe it was simply an extension, not a completely different long-term investment-style product.

3. Mr K received all the documentation only at the point of signing, not in advance. He was under pressure, fatigued, and emotionally distressed and was not given adequate time to understand or question the documents. He was assured that he could *"cancel at any time"* or *"walk away with no loss"*, which led him to trust that what he was signing was low-risk and flexible.

4. The language used in the documents such as *"fractional ownership"*, *"trust"*, *"property rights"*, *"term until 2037"* and forms such as the Fractional Rights Certificate and Ownership Club Application make it clear that the product was presented as an asset-based investment. It was not simply access to holidays. Mr K says he was sold the idea of equity, value, and long-term returns, all of which are hallmarks of an investment scheme.

5. Although on paper the Lender may have assessed affordability, this did not reflect real life. Mr says he was the sole earner, with a mortgage, bills, and family to support. The idea that he could cancel the product gave him a false sense of security, which influenced his acceptance.

6. Mr K has withdrawn his claim through the Spanish Courts and is seeking fair redress solely through the Financial Ombudsman Service.

7. Mr K paid off the loan solely to avoid damage to his credit score. That decision should not be treated as an indication that he accepted the terms or found them reasonable.

8. Mr K says the Supplier is in liquidation, which confirms that:

    i. Mr K was sold a product by a company that never fulfilled its obligations.

    ii. The Lender was paid in full, while Mr K was left with nothing.

    iii. There is no other avenue for recovery.

9. Mr K's first call to the Lender was made in shock and confusion. He instinctively knew the product was wrong. Mr K may not have used legal language like *"investment framing"* initially, but the substance of his concern was always the same – that he was misled into purchasing a complex financial product that he didn't understand. His later comments simply articulated what he already felt and experienced.

10. Mr K's signing of the Pre-Contract Credit Information was done under pressure and in reliance on false verbal assurances. His signature does not waive his rights under Section 75 or Section 140A of the Consumer Credit Act. It merely confirms that he received the form, not that he fully understood or accepted the misrepresented nature of the contract.

11. Mr K says I should take a fair and holistic view of the case. Some points may not have been framed in legal terms in Mr K's original complaint, but they reflect the same ongoing harm and grievance. This is one continuous issue, not a set of disconnected complaints.

<u>My findings on Mr K's additional comments</u>

I have carefully considered Mr K's response to my provisional decision, but I am not persuaded to alter my provisional findings. My reasons are set out below.

1. My K says he used the term refund when he meant return. I assume he is referring to his comments on our Complaint Form dated 22 November 2020 and his statement dated 2 January 2024. I both cases he wrote that he was told, "*we can cancel the contract any time and walk out and they will give us some **refund** due to increase in value of property".*

I accept it is possible that Mr K used the wrong word here when he meant return. That fits with the rest of the sentence. But I do not think being told he would get *"some **return** due to the increase in value of property"* definitively points to him being led to expect some financial gain or profit from Fractional Club ownership. So, it is hard for me to conclude this is what he meant. And in any case, I do not think that saying he expected "*some return"* differs significantly in meaning to him saying he expected *"some refund".* I think both point to Mr K expecting to get back some of what he paid (which would not meet the definition of an investment), not more than what he paid (which would).

As I said in my provisional decision, it was not until Mr K's email dated 9 January 2024 that he first clearly stated that the Supplier told him that Fractional Club membership was an investment. This was after the judgement in *Shawbrook & BPF v FOS*, of which Mr K was at that time aware. And, for the reasons set out in my provisional findings, I remain of the opinion that I cannot give significant evidential weight to Mr K's more recent recollections to the extent that I should uphold this complaint.

2. It seems unlikely that the Supplier would not have explained how Fractional Club membership worked, including the length of the membership term. My understanding is that these points would've been covered in the sales presentation as well as the sales documentation. I'm also mindful that Mr K said that one of the alleged misrepresentations of the Supplier was that he was Fractional Club membership lasted for 19 years when this was untrue. So, I'm satisfied he was aware of the length of the membership term. He was also made aware of the cost of the purchase and what he would have to repay if the loan ran to its full term.

   With this point, Mr K also appears to contradict his argument about being sold Fractional Club membership as an investment. He says that he was led to believe the Purchase Agreement was simply an extension of trial membership (even though he did not hold such membership), "*not a completely different, long-term investment-style product"*. This suggests that Mr K was not told Fractional Club membership was an investment, and he did not view Fractional Club membership as an investment at the time of sale. This aligns with my provisional findings where I have concluded that even if Fractional Club membership was sold as an investment, this was not why Mr K decided to enter into the Purchase Agreement (and so it did not create an unfair relationship between him and the Lender).

3. In my provisional decision I considered Mr K's allegations about not being given time to read and understand the documents and that he was told he could cancel at any time and walk away with no loss. Mr K has reiterated those same points, but I see no reason to alter or expand on my provisional findings about that.

4. Mr K says he was sold the idea of equity, value, and long-term returns, which are hallmarks of an investment scheme. And that some of the documents provided to him reinforced that. But as I said above, I am not persuaded that Mr K entered into the Purchase Agreement because he was told Fractional Club membership was an investment. So, even if he was told those things, or the documents implied them, considering all the circumstances of this complaint I do not think it rendered his relationship with the Lender unfair to him.

5. Mr K has said that the Credit Agreement was not actually affordable. But even if that was the case (and I make no such finding), I'm satisfied that the Lender carried out an appropriate creditworthiness check. And given the information available to it at the

Time of Sale, the Lender had no reason to ask for more information from Mr K nor to suspect that the lending was unaffordable for him. In effect, the Lender did nothing wrong in this regard so I would not uphold the complaint on this basis even if Mr K did in fact find the lending unaffordable.

6. I acknowledged in my provisional decision that Mr K's claim against the Supplier through the Spanish Courts had been dismissed and was not proceeding.

7. That Mr K paid off the loan was not pivotal to my provisional decision, although I mentioned it in passing when finding that Mr K was most likely aware that he had taken out a loan to pay for Fractional Club membership.

8. I understand that the Supplier has a complex corporate structure, with multiple companies registered in different jurisdictions. Some of those companies are in administration including, it would appear, the Supplier named on the Purchase Agreement.

   But looking at the Fractional Club Rules (the 'Rules'), I can see that the two companies that run the Fractional Club (called the Vendor and the Manager within the Rules) are companies based in the Isle of Man. These companies are still active as is the Fractional Club itself. And there are provisions within the Rules that allow the Fractional Club to continue to run if the Vendor and Manager could no longer administer it. So, it appears that if Mr K paid any outstanding management fees, then he could continue to use his Fractional Club membership (assuming he has not voluntarily surrendered it).

   Mr K says the Supplier never fulfilled its obligations. But it appears to me that Mr K purchased membership of the Fractional Club. He initially used that membership to take holidays. The Fractional Club is still running, and if Mr K had not stopped paying the annual management charges, he could still use his membership to take holidays and have a reasonable expectation of receiving his share of the net sale proceeds from the sale of the Allocated Property at the end of the membership term.

9. I acknowledge that Mr K may not have fully expressed his complaint on first calling the Lender. But I understand that was on 19 September 2019. It was not until 9 January 2024, over four years later, that he first clearly articulated that the Supplier had told him Fractional Club membership was an investment. And that was despite having articulated his complaint in writing in some detail on the Complaint Form dated 22 November 2020. That was over a year after the initial complaint call, by which time Mr K would've had time to think about what his complaint was really about, so he could explain this in full. Mr K completed the Complaint Form about 18 months after the Time of Sale and I think it is likely that his recollections then are more reliable than those made in 2024 – which were made with the benefit of knowing the circumstances in which the Financial Ombudsman Service might uphold a complaint such as this.

10. I did not suggest in my provisional decision that Mr K has waived his rights under the CCA. And nor do I do so now.

11. In reaching my decision I have taken into account what is, in my opinion, fair and reasonable in all the circumstances of this case, taking into account relevant law and regulations, regulator's rules, guidance and standards, codes of practice and (where appropriate) what I consider to have been good industry practice at the relevant time. And having done so, I have decided not to uphold this complaint.

In light of this, I remain of the opinion that this complaint should not be upheld. In summary, I have decided that:

- There were no misrepresentations on the part of the Supplier that would lead to a successful claim under Section 75 of the CCA, so the Lender was not unreasonable in rejecting Mr K's Section 75 claim.

- I have not found sufficient reasons to conclude that the relationship between Mr K and the Lender was unfair to him under Section 140A of the CCA.

- The Lender did not act irresponsibly when lending to Mr K, since it carried out appropriate checks and had no reason to think the lending was unaffordable for him.

My final decision

For the reasons I've explained, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 29 May 2025.

Phillip Lai-Fang
Ombudsman