DRN-5587747

The complaint

In summary, Mr and Mrs R's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA. They also say the lending was unaffordable.

What happened

Mr and Mrs R purchased membership of a timeshare (the 'Fractional Club membership' FCM), from a timeshare provider (the 'Supplier') on 8 October 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1620 fractional points at a cost of £7,950 (the 'Purchase Agreement').

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

Mr and Mrs R paid for their Fractional Club membership by taking finance of £7,950 from the Lender in their joint names (the 'Credit Agreement').

Mr and Mrs R – using a professional representative (the 'PR') – wrote to the Lender on 25 May 2020 (the 'Letter of Complaint'.) In summary, they said:

1. A complaint was being made under Section 75 and Section 140 of the CCA.
2. The contract was mis-sold as the Supplier took an advance payment in breach of the relevant regulations at the time of the sale.
3. The contract was mis-sold on the basis that it was an investment.
4. The decision to lend being irresponsible because (1) the Lender did not carry out the right creditworthiness assessment and (2) the money lent to them under the Credit Agreement was unaffordable for them.

When Mr and Mrs R referred the complaint to this service in January 2021, they made a number of additional complaint points. In summary they said:

1. The salesperson used aggressive, high pressured style of selling.
2. They were stuck with management fees that are continually rising.
3. They didn't own any shares in an actual property.
4. They weren't informed of the 14-day cooling off period.
5. Despite trying to book months in advance, they were never able to book accommodation.
6. It was implied by the Supplier that they could sell their points back to it.
7. The selling agent of the loan was not regulated, therefore, the loan was miss-sold

<u>Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale</u>

Mr and Mrs R say that the Supplier made a number of pre-contractual misrepresentations at

the Time of Sale – namely that the Supplier:

1. told them that they were buying an interest in a specific piece of "real property" when that was not true because they didn't own any shares in an actual property.
2. told them that they could sell their points back to the Supplier when that was not true.
3. they were never able to book the holidays they wanted or to the standard of accommodation they had been led to believe would be available.

Mr and Mrs R appear to be saying they have a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs R.

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

Mr and Mrs R also say that despite trying to book months in advance, they were never able to book any accommodation. They were then advised to book up to a year in advance which was not feasible.

As a result of the above, Mr and Mrs R say that they have a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs R.

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

The Letter of Complaint set out several reasons why Mr and Mrs R say that the credit relationship between them and the Lender was unfair to them under Section 140A of the CCA. In summary, they include the following:

1. FCM was marketed and sold to them as an investment, which they seem to be suggesting was in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. They weren't advised of rising annual maintenance fees.
3. They were pressured into purchasing FCM by the Supplier.
4. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment and the loan was unaffordable.
5. The Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs.

The PR referred Mr and Mrs R's complaint to the Financial Ombudsman Service in January 2021. My understanding is that they are no longer represented by the PR and represent themselves.

The Lender dealt with Mr and Mrs R's concerns as a complaint and issued its final response letter on 9 August 2021, rejecting it on every ground. The complaint was assessed by an Investigator who, having considered the information on file, upheld the complaint on its merits.

The Lender disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why the case was passed to me. I issued a provisional decision explaining why I didn't think the complaint should be upheld. In response, the Lender said it had nothing further to add. Mr and Mrs R didn't accept my provisional decision. In summary they said:

- They weren't happy with the decision and felt they were misled and put under pressure by the finance team which resulted in the mis-selling of the product in terms of the finance documents they signed.
- There appeared to be no way out in terms of selling the timeshare which is why they had to stop the maintenance payments.
- They were disappointed with the outcome and asked for it to be revisited, as they had lost a lot of money and use of the timeshare.

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.

The legal and regulatory context that I think is relevant to this complaint is set out below, in the section headed *"Appendix".*

Appendix: The Legal and Regulatory Context

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(s) was/were 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(s) in question was/were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.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."[1]

So, the Supplier is deemed to be Lender's statutory agent for the purpose of the pre-contractual negotiations.

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in *Patel* (which was recently approved by the Supreme Court in the case of *Smith),* that determining whether or not the relationship complained of was unfair had to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"* – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

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

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

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

<u>The Law on Misrepresentation</u>

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

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

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.

<u>The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations')</u>

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 Owners 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.[2]

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 Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR')

The UTCCR protected consumers against unfair standard terms in standard term contracts. They applied and apply to contracts entered into until and including 30 September 2015 when they were replaced by the Consumer Rights Act 2015.

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

- Regulation 5: Unfair Terms
- Regulation 6: Assessment of Unfair Terms
- Regulation 7: Written Contracts
- Schedule 2: Indicative and Non-Exhaustive List of Possible Unfair Terms

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(s).

Relevant Publications

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

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

What I've decided – and why

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

I do understand that Mr and Mrs R are naturally disappointed with my provisional decision. However, in their response to it, they haven't provided me with any new evidence or arguments that have persuaded me to change my opinion. So, I remain of the opinion that the complaint shouldn't be upheld. I've set out my reasoning below.

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

Section 75 of the CCA: the Supplier's 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 and Mrs R 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.

This part of the complaint was made for several reasons that I set out at the start of this decision. They include the suggestion that FCM had been misrepresented by the Supplier because Mr and Mrs R were told that they were buying an interest in a specific piece of "real property" when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr and Mrs R's share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.

As for the rest of the Supplier's alleged pre-contractual misrepresentations, while I recognise that Mr and Mrs R have concerns about the way in which their FCM was sold, they have not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the other reasons they allege. And I say that because I've considered what Mr and Mrs R have said, and what I know about the Supplier's sales process, to see if there is any evidence that supports their allegation that the Supplier implied, they could sell their points back to it. And from what I know about how the Supplier was likely to have sold the FCM, I haven't seen anything that suggests that Mr and Mrs R would have been told that. Also, Mr and Mrs R have provided their testimony of their recollections as to how the FCM was sold to them. And they haven't said it was implied that they could sell their points back to the Supplier. As a result, I can't say they were told this or that it was something which was material to their decision to purchase the FCM.

What's more, as there's nothing else on file that persuades me there were any false statements of existing fact made to Mr and Mrs R by the Supplier at the Time of Sale, I do

not think there was an actionable misrepresentation by the Supplier for the reasons they allege.

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

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

I've already summarised how Section 75 of the CCA works and why it gives Mr and Mrs R a right of recourse against the Lender. So, it isn't necessary to repeat that here.

Mr and Mrs R say that despite trying to book months in advance they were never able to book any accommodation. They were then advised to book up to a year in advance which was not feasible. And they say they have never been able to book accommodation to the standard they were expecting.

On my reading of the complaint, this all suggests that they consider that the Supplier was not living up to its end of the bargain and had breached the Purchase Agreement. Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork signed by Mr and Mrs R states that the availability of holidays was/is subject to demand. But, they clearly, and contrary to what they have said about not being able to book any accommodation, were able to book accommodation. So, I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

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

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

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

I have considered the entirety of the credit relationship between Mr and Mrs R 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;
2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;
3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; and

4. The inherent probabilities of the sale given its circumstances.

I have then considered the impact of these on the fairness of the credit relationship between Mr and Mrs R and the Lender.

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

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

The PR says that the right checks weren't carried out before the Lender lent to Mr and Mrs R. 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 and Mrs R was actually unaffordable before also concluding that they lost out as a result and then consider whether the credit relationship with the Lender was unfair to them for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for Mr and Mrs R. And they haven't provided any further information on this (or any other points raised in the provisional decision) in response to the provisional decision.

Mr and Mrs R say that they were pressured by the Supplier into purchasing the FCM at the Time of Sale. I acknowledge that they may have felt weary after a sales process that went on for a long time. But they say little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase FCM when they simply did not want to.

They were also given a 14-day cooling off period, which they say they weren't informed about. I am surprised that they say this, as the withdrawal form which informed them of their right of withdrawal was signed by Mr and Mrs R. So, I don't agree that they weren't informed of their right to withdraw, from the contract. And the explanation they have provided, isn't therefore in my opinion, a credible explanation for why they did not cancel their membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs R made the decision to purchase FCM, because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

I'm not persuaded, therefore, that Mr and Mrs R's credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why they say their credit relationship with the Lender was unfair to them. And that's the suggestion that FCM was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

Was FCM 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 R's FCM met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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

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

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

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

Mr and Mrs R'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 FCM 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 FCM was marketed or sold to Mr and Mrs R as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that FCM offered them 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 FCM 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 and Mrs R, 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 FCM was not sold to Mr and Mrs R as an investment. So, it's *possible* that FCM wasn't marketed or sold to them 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 FCM as an investment. So, I accept that it's equally possible that FCM was marketed and sold to Mr and Mrs R 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 and Mrs R rendered unfair to them?

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 and Mrs R and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) lead them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

Although Mr and Mrs R have said that the FCM was sold to them as an investment, I do have concerns about their testimony and how that impacts the credibility of what they have said on this issue. I say this because as I have outlined above, Mr and Mrs R have said that they didn't receive information about their right to withdraw from the contract, when they both in fact, signed the information statement that informed them of their right to withdraw from the contract.

In addition, they explained that they asked for the contract to be terminated because what they had been promised by the Supplier wasn't true. This statement also appears to be at odds with the contemporaneous evidence from the time they terminated the agreement. I say this because the Lender has provided details of the e-mail Mr R sent to the supplier on 12 November 2020 when he requested to surrender their membership. He said:

""'Hi N…. thanks for the confirmation that all is in order for the finalisation of our membership with …. wef 31.12.20. We have enjoyed many happy holidays at the … resorts over the years, but financially it is a massive issue for us in these unprecedented times. We do look forward to our trip next month to …. paradise, and do hope that it goes ahead. Appreciate the fact that we can opt back in for the future if our circumstances settle and become more stable."

It doesn't seem to me from Mr R's e-mail, that the reason he and Mrs R surrendered their membership in 2020, was for the reasons he's given to this service. On the contrary, it seems that Mr and Mrs R had enjoyed their use of the FCM, and their membership prior to their upgrade to FCM, and were having to suspend their membership at that time due to a change in their circumstances. And my reading of what they said, was that this was due to a change in their financial circumstances.

I accept that Mr and Mrs R's use of the FCM and enjoyment of the holidays it provided, doesn't necessarily mean that it wasn't sold to them as an investment which could have persuaded them to purchase the FCM. But, if their membership of the FCM had been suspended due to their dissatisfaction in learning that what they had been told about the FCM wasn't true (including from what they have said about it being marketed and/or sold by the Supplier at the Time of Sale as an investment, which would have been in breach of regulation 14(3) of the Timeshare Regulations), then I would have expected Mr R to have said that in his e-mail to the Supplier. But he didn't.

Also, I think Mr and Mrs R's surrender of the FCM is somewhat counterintuitive to what they have said about the FCM being positioned to them as an investment, which was from what they have said, a key consideration in their decision to purchase the FCM. If that had been a key motivation for them to purchase the FCM, then I wouldn't have expected them to surrender something which they considered to be an investment. And I haven't seen anything that suggests they tried to sell their FCM which I would have expected them to attempt to do if they considered it to be an investment.

On balance, therefore, even if the Supplier had marketed or sold the FCM as an investment in breach of Regulation 14(3) of the Timeshare Regulations, taking into account what I've said above, and given the particular circumstances of this case, I am not persuaded that Mr and Mrs R's decision to purchase FCM 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 whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr and Mrs R and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

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

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

In particular Mr and Mrs R say that the Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs. And it seems to me that they are suggesting that the contractual terms governing the ongoing costs of FCM and the consequences of not meeting those costs were unfair contract terms under the UTCCR.

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.

However, as I've said before, the Supreme Court made it clear in *Plevin* that it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A of the CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

It is possible that some of the terms governing the Fractional Club's ongoing costs go against the requirements of the UTCCR. But taking into account the particular circumstances of this complaint, even if some of the terms in question did constitute unfair contract terms under the UTCCR, it seems unlikely to me that they led to any actual unfairness in the credit relationship between Mr and Mrs R and the Lender, for the purposes of Section 140A. I say this because I cannot see that the potentially offending terms were operated against Mr and Mrs R during the time they were parties to the Credit Agreement – nor can I see that there were any ongoing effects of unfairness because of the terms in question.

I acknowledge that it is also possible that the Supplier did not give Mr and Mrs R sufficient information, in good time, about these matters in order to satisfy the requirements of

Regulation 12 of the Timeshare Regulations. But even if that was the case, as I have already said, I cannot see that the ongoing costs of membership were applied unfairly in practice. And as Mr and Mrs R have not persuaded me that they would not have pressed ahead with their purchase had the finer details of the Fractional Club's ongoing costs been disclosed by the Supplier in compliance with Regulation 12 of the Timeshare Regulations, I cannot see why any failings in that regard are likely to be material to the outcome of this complaint given its facts and circumstances.

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 and Mrs R was unfair to them because of an information failing by the Supplier, I'm not persuaded it was.

Section 140A: Conclusion

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

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

Mr and Mrs R say that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that the Lender wasn't permitted to enforce the Credit Agreement as a result.

However, it's not clear from what I've seen who the credit broker was in this case. On the application and purchase agreement, there is a company referred to as the company to whom the application is made to. But it's not clear if that is the company that brokered the credit. That company came under this service's compulsory jurisdiction at the time of the sale. I've not seen anything that shows any credit intermediary didn't hold, at the Time of Sale, a licence authorised by the FCA for credit broking. And in the absence of any evidence to suggest that its Licence did not cover credit broking, I am not persuaded that the Credit Agreement was arranged by an unauthorised credit broker. Also, even if the broker wasn't regulated, as the credit was brokered outside of the UK in Spain, I don't think that would have made any difference.

Spanish Supreme Court Ruling

Mr and Mrs R have said that a Spanish Supreme Court ruling means that selling the Fractional Timeshare was unlawful. It's not clear to me how any ruling under Spanish Law makes a difference, or is of importance in this case, when the agreements complained about were subject to English Law.

Conclusion

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

My final decision

For the reasons I've set out above, my decision is not to uphold Mr and Mrs R's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs R and Mr R to accept or reject my decision before 26 June 2025.

Simon Dibble
Ombudsman