DRN-5598600

The complaint

Mr D's complaint is, in essence, that Mitsubishi HC Capital UK Plc (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him 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.

Background to the complaint

Mr D, along with his wife Mrs D, purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 22 February 2018 (the 'Time of Sale'). Mr and Mrs D entered into an agreement with the Supplier to buy 1,300 fractional points at a cost of £17,433 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs D 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 D paid for their Fractional Club membership by taking finance of £17,433 from the Lender in Mr D's name (the 'Credit Agreement'). As only Mr D was named on the Credit Agreement, only he is able to refer a complaint about the Lender to our Service.

Mr D – using a professional representative ('PR1') – wrote to the Lender on 1 December 2021 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against the Lender under Section 75 of the CCA.
2. A breach of contract by the Supplier giving him a claim against the Lender under Section 75 of the CCA.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

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

Mr D says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. told him that Fractional Club membership had a guaranteed end date when that was not true.
2. told him that they were buying an interest in a specific piece of "real property", when that was not true.

Mr D says that he has 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, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to him.

(2) Section 75 of the CCA: the Supplier's breach of contract

Mr D says that the Supplier breached the Purchase Agreement because there is no guarantee that he will receive his share of the net sale proceeds of the Allocated Property.

As a result, Mr D says that he has a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to him.

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

The Letter of Complaint set out why Mr D believes that the credit relationship between him and the Lender was unfair to him under Section 140A of the CCA. In summary, he says:

1. The contractual terms setting out (i) the duration of his Fractional Club membership and (ii) the obligation to pay annual management charges for the duration of his membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR')[1].
2. The Lender failed to properly assess whether the Credit Agreement was affordable for him.
3. He was pressured into purchasing Fractional Club membership by the Supplier.
4. The Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs.

The Lender dealt with Mr D's concerns as a complaint and issued its final response letter on 28 October 2021, rejecting it on every ground.

Mr D then referred the complaint to the Financial Ombudsman Service. In doing so, PR1 sent a letter setting out the basis of Mr D's claim and responding to the Lender's final response. In doing so, it reaffirmed the previous points of complaint set out in the Letter of Complaint.

While the complaint has been with us, Mr D changed his representative to a new one ('PR2'). PR2 further stated that Fractional Club membership was marketed and sold to Mr D as an investment in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').

Mr D's complaint was assessed by an Investigator who, having considered the information on file, recommended that the complaint be upheld. She thought it was most likely that the Supplier had marketed and sold Fractional Club membership as an investment to Mr D at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of that breach on his purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr D was rendered unfair to him for the purposes of section 140A of the CCA.

The Lender disagreed with the Investigator's assessment and asked for an Ombudsman's decision, so it was passed to me to decide.

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.

[1] In fact, the legislation in force at the Time of Sale was the Consumer Rights Act 2015 ('CRA'), so I have considered the provisions of that act in this complaint.

The legal and regulatory context that I think is relevant to this complaint includes the following:

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."*[2]

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 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

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

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 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.[3]

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

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

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(s).

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').

My provisional decision

As my initial conclusions differed from those of our Investigator, I issued a provisional decision setting out why I didn't intend to uphold Mr D's complaint and inviting both parties to send me anything else they wanted me to take into account before I made a final decision. I said:

> I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.
>
> And having done that, I've reached a different decision to that of our Investigator in that I do not currently think this complaint should be upheld.
>
> But before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.
>
> **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 D 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 the reasons I set out at the start of this decision.

The first is the suggestion that Fractional Club membership had been misrepresented by the Supplier because Mr D was told that he was 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 D'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 PR1 might question the exact legal mechanism used to give Mr D that interest, it did not change the fact that he acquired such an interest.

The second alleged misrepresentation is that Mr D was told he would be guaranteed to exit the Fractional Membership at the end of a finite term, when that wasn't the case. In fact, at the end of the membership term, the Allocated Property was to then be marketed for sale and only once that sale completed would Mr D's membership come to an end.

I think the documentation given to Mr D at the Time of Sale, and in particular the "Fractional Property Owners Club Information Statement", made it clear that the membership ended when the Allocated Property was sold (as opposed to a fixed date). Of most relevance, it was written on page 2 that:

> "***Exact nature and content of the right(s):***
>
> *The agreement which you will be asked to sign is a purchase agreement to acquire Fractional Rights which will entitle you to all the benefits, rights and obligations of an Owner as set out in the Rules.*
> *…*
> *Your Fractional Rights will start on the date shown on the Purchase Agreement and expires automatically when your Allocated Property is sold.*"

Mr D signed this Information Statement. And when signing the Purchase Agreement itself, he was signing to confirm, amongst other things, his receipt of the Information Statement.

Similarly in the Purchase Agreement, it says:

> "***Duration of Ownership:*** *an Applicant's Fractional Rights and Points arising shall continue until the Sale Date when the Allocated Property is sold…"*

I also understand that as part of the Supplier's sales process, Mr D would've been talked through the Fractional Membership by way of a sales presentation. So I've reviewed the presentation materials that the Supplier used around the time of Mr D's purchase to see what, if anything, he would've been told about the duration of the Fractional Membership.

Those materials do not include anything that I consider amounts to a misrepresentation as to how and when the Fractional Membership would end. Rather, the content of the presentation mirrors that of the Information Statement as quoted above:

> *"… after 19 years of fantastic holidays, the property in which you own a fraction is sold and you will receive your share of the sale proceeds …"*

While I do not know exactly what Mr D was told when attending this presentation, I think it most likely that he was told something along the lines of the above, in keeping with the Supplier's standard practices of the time.

I'm not persuaded by his testimony that he was told something other than this. In the Letter of Complaint, PR1 said that "*Mr and Mrs D were advised that they would be guaranteed to exit the Fractional Points membership after a "finite number of years*". This was reiterated in the complaint form upon referral to us, when PR1 relayed Mr D's recollection of being told that "*the membership was to be with a definitive 'end date'*". I find these to be somewhat generic comments, lacking any real detail as to how and when the alleged misrepresentation was made, and by whom; notably omitting even the specific end date or number of years allegedly referenced by the Supplier.

Some further detail was added by way of a "Statement of Witness" submitted to us following our Investigator's assessment. This was a statement prepared by PR2 and signed by Mr D, which includes the following comments relevant to this point:

> *"We attended the presentation … where we were told that … the sale date of the property was to be in 19 years' time …"*

While this subsequent statement makes reference to the 19-year term, this is broadly a factual description of how the membership worked – that is, the property was to be sold after 19 years. It would naturally be very difficult for anyone to guarantee an exact date upon which that sale could be confirmed to take place some 19 years prior and, weighing up everything the parties have said and provided on this point, I find it unlikely that any "guarantee" was given to that effect. Rather, I think it is most likely that the information Mr D was given would've been in keeping with that set out in both the documentation he was provided and the standard sales materials in use at the time.

As for the rest of the Supplier's alleged pre-contractual misrepresentations, while I recognise that Mr D 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 for the other reasons he alleges. I note reference to the Supplier telling him and Mrs D that they could take their daughter to a particular resort and that this, and the prospect of "*more holidays of a great quality*" were what "*eventually sold*" the membership to them. But Mr D hasn't explained or evidenced how this amounted to a misrepresentation. I understand Mr D took at least two holidays during the membership, but I have no detail as to how these fell short of his expectations in light of the Supplier's alleged representations.

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

For these reasons, therefore, I do not think the Lender is liable to pay Mr D 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 deciding against paying 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 D a right of recourse against the Lender. So, it isn't necessary to repeat that here.

Piecing together various statements made by Mr D and the PR over the course of this complaint, I understand that he was led to believe he could "*go anywhere in the world … and at the time of [my] choosing*" but found this difficult in practice as "*availability [was] virtually non-existent*".

On my reading of the complaint**,** this suggests that Mr D considers 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 D states that the availability of holidays was subject to demand. It also looks like Mr D made use of his fractional points to holiday on two occasions. And as noted above, Mr D hasn't set out in any detail exactly how he feels the availability of holidays fell short of his expectations in light of the Supplier's representations. That notwithstanding, I can accept that he may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier has breached the terms of the Purchase Agreement.

Mr D also says that the Supplier breached the Purchase Agreement because there is no guarantee that he will receive his share of the net sale proceeds of the Allocated Property. I understand that he is saying that he fears that, when the time comes for the Allocated Property to be sold, he will not receive their share of the sales proceeds. However, it would seem that any breach of contract (if that occurs) lies in the future and is currently uncertain.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mr D 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 in deciding against paying 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 D 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 D also says that the credit relationship between him and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that he has concerns about. It is those concerns that I explore here.

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

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

Mr D'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 D. 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 D was actually unaffordable, before also concluding that Mr D lost out as a result, and then consider whether the credit relationship with the Lender was unfair to him for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for the Mr D – noting in particular that no assertion has been made or any evidence supplied to the effect that Mr D has actually found the lending to be unaffordable. If there is any further information on this (or any other points raised in this provisional decision) that Mr D wishes to provide, I would invite him to do so in response to this provisional decision.

Mr D 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 after a sales process that went on for a long time. But beyond describing in very general terms a "*hard sell pitch*", he has explained little about what was actually said and/or done by the Supplier during the sale that made him feel as if he had no choice but to purchase Fractional Club membership when he simply did not want to. He was also given a 14-day cooling off period and I do not see any reason why he couldn't have cancelled his membership during that time if he'd not wished to purchase it in the first place.

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

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

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

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

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

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

But PR says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

The 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 D's share in the Allocated Property clearly, in my view, 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 D 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 Mr D 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 D, 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 D 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 D 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 D 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 D and the Lender that was unfair to Mr D and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led him to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

To help me decide this point, I've carefully considered what Mr D has said in the course of his complaint about how the membership was sold to him and his motivation for taking it out.

Looking at the Letter of Complaint sent to the Lender when the complaint was first raised, it is notable that there is no mention of the membership having been sold as an investment, that it had been a factor in his decision to take it out or that he was unhappy at, for example, the level of return it offered. The same is true of the letter sent to us by PR1 when referring the complaint.

If the Supplier's promotion of the membership as an investment had been a significant factor in Mr D's decision-making, I would expect this to have been mentioned from the outset.

There are some comments to this effect in the complaint form he signed:

> *"I purchased this 'fractional property ownership' from [the Supplier], as I was told it was a great investment, and our holidays would be totally "exclusive"".*

This comment does, for the first time, identify the investment angle of the membership being a reason for Mr D taking it out. Although here it is alongside the prospect of the holidays he would be able to take. In addition, I find the comments to be generic in nature, with little by way of context as to how the membership was marketed as an investment and lead him to hope or expect to receive a financial gain, by whom and at what juncture.

I also note that the comments, while handwritten and in the first person, do not appear to have been written by Mr D himself. While Mr D signed the form to confirm his agreement with the content, it seems that PR1 added these handwritten notes. Given the rest of the form has been typed, I would question whether the addition of handwritten notes was to give the effect of having been added by Mr D himself. As PR2 acknowledges, this way of completing the form will probably have been PR1's "preferred way" of summarising the narrative given by its clients, and in this case by Mr D. While I accept that the comments may reflect what Mr D said to PR1, I find it hard to place much weight on them given their second-hand nature and that no such comments were made in the letters of complaint to the Lender or us.

In the Statement of Witness that was subsequently provided by PR2, Mr D recalled being told that the membership "*was a good investment as we were investing in property*" and that:

> *"property prices were always going up … [so] the resale value would be very good and therefore should provide us with a very good profit."*

So Mr D does recall the membership being positioned as an investment opportunity, with the prospect of realising a profit when it came to an end. That said, these recollections are again fairly generic in nature. It is notable that the most detailed recollection on this point was provided most recently (in February 2024, some three years after the complaint was first raised and six years since the Time of Sale). And, significantly, that they were provided subsequent to the judgment in *Shawbrook & BPF v FOS* – when no mention of a prospective financial gain was mentioned at the outset of the complaint.

It is not uncommon for there to be such inconsistencies, in my experience, within the testimony that is provided during the course of a complaint – especially one that relates to events from some time ago and where a complaint is as long-running as Mr D's. The publicised judgment of the *Shawbrook & BPF v FOS* case may also, understandably, have impacted Mr D's recollections.

Notwithstanding my concerns as to the accuracy of Mr D's recollections, it is significant that even where there is mention of the membership having been sold as an investment – as I've accepted it might have been – he has not said that this was a significant factor in his decision-making. In fact, elsewhere within the Statement of Witness, he describes the prospect of certain holidays as being "*what sold it to us*". As noted above, if Mr D's decision-making had been motivated by the prospect of a financial gain, I would expect this to have featured amongst the various concerns that were set out in the initial complaint.

Ultimately, I find the submissions made by Mr D and the PR at the outset of the complaint to be most instructive in this respect, and that he made no mention of an investment element – either in how the membership was sold to them or as a factor in his decision-making – is significant.

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 D'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 D and the Lender was unfair to him even if the Supplier 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 D when he purchased membership of the Fractional Club at the Time of Sale. But he and the PR say that the Supplier failed to provide him with all of the information he needed to make an informed decision, most notably with regard to the ongoing management charges due under the membership.

One of the main aims of the Timeshare Regulations and the CRA was to enable consumers to understand the financial implications of their purchase so that they 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 CRA 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.

I've considered firstly the information provided by the Supplier relating to the annual management charges to be paid in respect of the membership. Regulation 12 of the Timeshare Regulations required the Supplier to provide this information in a way that was "*clear, comprehensible and accurate"* and *"sufficient to enable the consumer to make an informed decision about whether or not to enter the contract*".

The specific information the Supplier was required to provide is outlined in schedule 1, part 3 of the Timeshare Regulations. The relevant section states the required information is:

> *"an accurate and appropriate description of all costs associated with the timeshare contract; how these costs will be allocated to the consumer and how and when such costs may be increased; the method for the calculation of the amount of charges relating to occupation of the property, the mandatory statutory charges (for example, taxes and fees) and the administrative overheads (for example, management, maintenance and repairs)."*

The documents the Supplier provided to Mr D set out some information about the ongoing costs that would be associated with the contracts. Broadly speaking, this information included the fact that there would be ongoing management charges to pay,

what these charges would be for the first year of membership (€999, as detailed in the aforementioned Information Statement that Mr D signed) and the potential consequences of non-payment.

There was not, however, much information about how the charges would be calculated, what exactly they covered or how they might increase over time (beyond reference to the annual management fee as being €999 "currently", which might imply the potential for variation). Mr D was directed to other, lengthy documents to find out more. But the Supplier didn't say where in these documents the relevant information could be found, and it is unclear to me if Mr D was provided with them at the Time of Sale (or subsequently). These other documents contained details of additional costs that were not mentioned in the contractual paperwork signed at the Time of Sale.

It is possible, therefore, that the Supplier didn't meet the requirements of Regulation 12 of the Timeshare Regulations to provide, in the prescribed way, an accurate and appropriate description of all costs. And while I've not analysed in detail the position regarding whether any of the terms relating to the management charges were unfair under the CRA, I think it's possible that some of the terms had the potential to operate in an unfair way, taking into account the lack of transparency and the level of discretion given to the Supplier as to the setting of various charges.

But given the facts and circumstances of this complaint, and based on what I've seen so far, I am not persuaded that the Supplier's alleged breaches of Regulation 12 of the Timeshare Regulations and the CRA in relation to the costs of membership are likely to have prejudiced Mr D's decision to purchase the membership or rendered his credit relationship with the Lender unfair to him for the purposes of section 140A of the CCA. I say this because Mr D hasn't provided any information or evidence which would lead me to believe that any potential breaches of Regulation 12 of the Timeshare Regulations by the Supplier, or the inclusion of unfair terms in his timeshare contract relating to the management charges, has led to any significant harm or unfairness to him arising in practice.

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 D was unfair to him 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 D 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 on that basis.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr D'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 having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate him.

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

Neither party responded to my provisional decision with any comments or evidence for me to take into account.

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 so, and with neither party having provided any further information in light of my provisional findings, I see no reason to reach a different conclusion. So this final decision simply confirms the findings as set out in my provisional decision, as reproduced above.

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 D to accept or reject my decision before 1 July 2025.

Ben Jennings
Ombudsman