

The complaint

Mr D's complaint is, in essence, that Mitsubishi HC Capital UK PLC trading as Novuna Consumer Finance¹ (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.

The timeshare in question was bought jointly by Mr and Mrs D, but as the loan used to make the purchase was in Mr D's sole name, he is the only eligible complainant here. I will, however, refer to both Mr and Mrs D where it is appropriate to do so.

What happened

Mr and Mrs D were members of a timeshare provider (the 'Supplier') – having purchased a number of Vacation Club ('VC') points from it over time.

As VC members, every year they could use their points in exchange for holidays at the Supplier's holiday resorts. Different accommodation had different points values, depending on factors such as location, size, and time of year, and each was subject to availability. So, for example, a larger apartment in peak season would cost more to a member in their points than a smaller apartment outside of school holiday periods.

But the product at the centre of this complaint is their membership of a different type of timeshare that I'll call the 'Fractional Club' – which they bought on 20 November 2011 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 2,988 fractional points at a cost of £38,610. But after trading in their existing membership, they ended up paying £11,099 (the 'Purchase Agreement') for their Fractional Club membership.

Unlike their existing VC membership, 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 the Purchase Agreement (the 'Allocated Property') after their membership term ends.

Mr D paid for their Fractional Club membership by taking finance of £11,099 from the Lender (the 'Credit Agreement'). The outstanding balance of this loan was cleared by Mr D on 22 February 2022.

Mr D – using a professional representative (the 'PR1') – wrote to the Lender on 27 April 2017 (the 'Letter of Complaint') to raise a number of different concerns about their purchase of the Fractional Club and the associated Credit Agreement. As those concerns haven't changed since they were first raised, and as both sides are familiar with them, it isn't necessary to repeat them in detail here beyond the summary above.

The Lender did not provide a substantive response to Mr D's complaint within the eight weeks required by the regulator, so the PR1 referred his complaint to the Financial Ombudsman Service.

¹ At the time the Lender was trading as 'Hitachi Capital Consumer Finance'.

The Lender then issued its final response to Mr D's complaint on 27 September 2019, rejecting it on every ground.

Unhappy with this outcome, Mr D asked this Service to consider the merits of his complaint. It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits. This Investigator thought that the Lender would have had a defence to the Section 75 claim under the Limitation Act 1980 (the 'LA') as the claim had been made more than six years after the events to which the claim related. And he didn't think Mr D's credit relationship with the Lender had been rendered unfair under Section 140A of the CCA for any reason.

Mr D disagreed with the Investigator's assessment and asked for an Ombudsman's decision.

Mr D then engaged a different professional representative (the 'PR2').

While the complaint was waiting to be allocated to an Ombudsman, a second Investigator reviewed everything that had been submitted, and he too didn't think Mr D's complaint ought to be upheld.

In response to the second Investigator's view, the PR2 said Mr D did not accept this outcome. But it only provided arguments in relation to one allegation – that the Supplier, at the Time of Sale, had sold and/or marketed the Fractional Club to Mr and Mrs D as an investment, in breach of Regulation 14(3) of the Timeshare Regulations². The PR2 said that this breach of the regulations was material to Mr and Mrs D's purchasing decision, and so had rendered Mr D's credit relationship with the Lender unfair under Section 140A of the CCA.

Having considered this the second Investigator did not change his mind, so as no informal resolution could be reached, the complaint was passed to me for a decision.

The provisional decision

Having considered everything that had been submitted, I didn't think the complaint ought to be upheld. I set out my initial thoughts in a provisional decision (the 'PD') which was sent to both sides with an invitation to submit any new evidence or arguments that they wished me to consider before I finalised my decision. In the PD I said:

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

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

However, before I explain why, I want to make it clear that I recognise that this complaint, when originally made by the PR1, was wide ranging and made on a number of different grounds - including:

- (1) Misrepresentations by the Supplier at the Time of Sale giving Mr D a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay; and*
- (2) The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.*

² The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010

However, as the PR2's response to the second Investigator's view relates only to Mr D's credit relationship with the Lender being rendered unfair due to a material breach of Regulation 14(3) of the Timeshare Regulations, it would seem that is the only aspect of this complaint that remains in dispute.

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

What's more, it is important to make the point that, in contrast to what might happen in court, neither side to this complaint has a burden of proof that it must discharge. After all, the jurisdiction under which I'm deciding this complaint is inquisitorial rather than adversarial – which means that my findings are made on the balance of probabilities, in light of the evidence and/or arguments from both sides.

So, while the PR2 has argued in response to the second Investigator's view that, under Section 140B(9) of the CCA, it is for the Lender to prove that its credit relationship with Mr D wasn't unfair simply because he alleges that it was, that fails to understand that the Financial Ombudsman Service deals with complaints rather than causes of action. And, in any event, to suggest that unsubstantiated allegations of fact must be disproved by the Lender if the credit relationship isn't to be deemed unfair also oversimplifies if not misunderstands the legal position. As HHJ David Cooke said in paragraph 26 of his judgment on *Promontoria (Henrico) Ltd v. Gurcharn Samra* [2019] EWHC 2327 (Ch):

“...the onus is on [the creditor] to show, to the normal civil standard, that the relationship is not unfair because of any of the reasons set out in s 140A(1)(a)-(c). Whether it is so unfair is a matter for the court's overall judgment having regard to all the relevant circumstances and matters, including matters relating (i.e. personal) to the creditor and debtor. This onus on the claimant does not however mean, in my judgement...that where [the borrower alleging an unfair credit relationship] makes allegations of fact on which he relies he does not have the burden of proving them to the normal civil standard. The onus placed on the creditor is as to the relationship between it and the debtor, and does not have the effect that factual allegations made by Mr Samra must be accepted unless they can be positively disproved by contrary evidence.”³

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

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

Mr D, via the PR2, has argued 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.

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

³ As approved by the Supreme Court in *Smith v. The Royal Bank of Scotland plc* [2023] UKSC 34 – see paragraph 40.

Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

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

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

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr and Mrs D's membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

Antecedent negotiations under Section 56 cover both the acts and omissions of the Supplier, as Lord Sumption made clear in *Plevin*⁴, 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*⁵ 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".

⁴ *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61

⁵ *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)

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.”⁶

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.

And having considered the entirety of the credit relationship between Mr D and the Lender, along with all of the circumstances of the complaint, I don’t 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 standard of the Supplier’s commercial conduct – which includes its sales and marketing practices at the Time of Sale along with any relevant training material;*
- 2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*
- 3. The commission arrangements between the Lender and the Supplier at the relevant time;*
- 4. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; and*
- 5. The inherent probabilities of the sale given its circumstances.*

⁶ The Court of Appeal’s decision in *Scotland* was recently followed in *Smith*.

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

The Supplier's alleged breach of Regulation 14(3) of the Timeshare Regulations

A share in the Allocated Property clearly constituted an investment as it offered Mr and Mrs D the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But it is important to note at this stage that 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 and Mrs 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 them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

And 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 and Mrs D, 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.

But on the other hand, I acknowledge that the Supplier's sales process 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 and Mrs 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's not necessary to make a formal finding on that particular issue for the purposes of this decision.

Would the credit relationship between the Lender and Mr D have been rendered unfair to him had there been a breach of Regulation 14(3) of the Timeshare Regulations?

Having found that it was possible that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach (if there was one) would have had on the fairness of the credit relationship between Mr D and the Lender under the Credit Agreement and related Purchase Agreement, as the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

Indeed, 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 him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led him and Mrs D to enter into the Purchase Agreement and Mr D into the Credit Agreement is an important consideration. In my view doing that accords with common sense, for if events would have unfolded in the same way whether or not such a pre-contractual breach had occurred, it would be difficult to attribute any particular importance to the breach when deciding whether an unfair debtor-creditor relationship ensued, or whether a remedy is appropriate.

But on my reading of the evidence before me, I am not persuaded that the prospect of a financial gain from Fractional Club membership was an important and motivating factor when Mr and Mrs D decided to go ahead with their purchase. I'll explain.

As I've said, Mr and Mrs D were existing members of a timeshare arrangement with the Supplier, and had been since 1999. And they set out their recollections of their purchases from the Supplier in a statement written in 2017 as part of the PR1's initial complaint submission.

The statement began by Mr D setting out the five different purchases he had made – the first four being 'points' memberships between 1999 and 2007, with the fifth (the Fractional Club) being bought at the Time of Sale.

He then set out what he remembered about how the memberships were sold. Where relevant he says:

"I was a happy timeshare owner using my timeshare to [sic] fulfill my family holiday requirements. Being happy, I attended a sales meeting to secure discounted holidays in the future. In doing so, I believed that the holidays would convey to me good title, be secure, and that the value of the timeshare [I bought], would be redeemed back to me when I elected to sell them. In fact, this possibility was inferred by [the Supplier] and in the confines of each meeting.

[...]

On each occasion, the products they sold were stated as a "one time opportunity", "only available on the day" and that "the products they sold retained an inherent value" which would be redeemed back to me, if I elected to re-sell them or others later.

[The Supplier] averred to the fact that the products they sold, were capable of being resold onto another either, by way of other re-sellers or themselves should I elect to instruct them.

[...]

In all the purchases, each [Supplier] representative explained the timeshares being sold "were an investment, "worth considerable amounts of money", "desired by others", "only available on the day" and could be "re-sold" whenever I wanted to. [The Supplier's] representatives also explained "a trust company" called First National Trust Company was engaged to protect my beneficial interests and that they would ensure the rights I paid for would be protected. [The Supplier] explained that I would be acquiring a timeshare, which would be placed into a pool of others and that they would allocate a Points value to them. With the Points I could then exchange them for accommodation, which [the Supplier] supplied.

As stated, I was happy with the timeshares, and holidays were delivered to me as represented. That being so, I acquired more and more Points.

In 2011 [my final purchase] I attended another sales presentation and was sold a "fractional ownership" which was represented to me as "I would own a part of the resort".

They explained that real property was going to be transferred to me and that again I could sell at some later stage. This was untruthful since no such property was conveyed and neither would any redemption opportunity follow.

In wanting to leave the timeshare on or about 2011, I explored the opportunity of re-selling what I had amassed over many years, and I was told by [the Supplier] that they would not buy it and that I should try and sell it with others. However, they presented the Fractional Timeshare as a way out of all the contracts I had acquired. The main reason why I wanted to get rid of the timeshares was that our two children had died, and the substantial benefits we had amassed were no longer required.”

On my reading of what Mr D has said, given the very sad circumstances in 2011, it is clear that he and Mrs D no longer wanted their VC membership. But it also seems that they didn't just want to hand it back to the Supplier – they wanted to try and get something back from it, and were advised by the Supplier that they could try and sell it privately, or as an alternative, they could switch it over to the Fractional Club - which had a shorter membership term and also would give them a return from the net sales proceeds of the Allocated Property at the end of the membership term.

But there is nothing in what Mr D has said which makes me think that they thought they could or would make a profit from the sale of the Allocated Property. Based on what he has said I am not able to reach that conclusion. On my reading of it, it seems Mr and Mrs D just wanted to try and recoup some of what they had spent on the memberships over the years. And that is important here – for a breach of Regulation 14(3) of the Timeshare Regulations to have been material to Mr and Mrs D's purchasing decision, I have to be persuaded that the potential for a profit was a motivating factor.

That doesn't mean they weren't interested in a share in the Allocated Property. After all, that wouldn't be surprising given the nature of the product at the centre of this complaint, and as I've said, it is likely that it was the potential to get some money back in the end that was a driver for their purchase, along with it being a way to exit their existing membership. But as Mr D doesn't persuade me that their purchase was motivated by the possibility of a profit, I don't think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decision they ultimately made.

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 and Mrs 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). 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 had breached Regulation 14(3).

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 and related Purchase Agreement that was unfair to him for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate Mr D.”

The responses to the provisional decision

The Lender responded accepting the provisional decision with no further comment. The PR2 also responded but did not accept it. It set out that Mr D wanted the opportunity to give

evidence by way of an interview, and went on to provide a comprehensive response setting out why it thought Mr D's complaint ought to be upheld. It said, in summary:

- The PD stated that even if there was a breach of Regulation 14(3) it was not causative, because Mr D was not motivated by the prospect of financial gain. The reasoning given in the PD cannot be sustained.
- Regulation 14(3) is engaged wherever a consumer is induced by the prospect of a financial return – it does not require speculative profit above capital.
- Mr D has been clear. The products were essentially marketed as an investment, worth considerable amounts of money, capable of resale, that value would be realised at a later stage. He was told the Fractional Club meant he would own part of a resort and could obtain value in due course.
- The Supplier's pricing sheet supports that this was a capital transaction, not a holiday purchase. It conveys the impression of an accumulated asset value rolled into a further investment, reinforcing the perception of retained and increasing financial value.
- This is irreconcilable with the PD's conclusion that the transaction was motivated by holiday usage.
- Further, Mr D already had access to holidays through his VC membership – the suggestion that further borrowing was undertaken to obtain additional holiday rights is commercially implausible.

The PR2 went on to set out to repeat how it considered the statutory burden of proof rests on the Lender to prove that a relationship is fair. It said the Lender had produced no evidence to demonstrate fairness. It said the PD had treated the absence of such evidence as a reason to reject the complaint, rather than as a failure by the Lender to discharge its burden. It also said the PD was inconsistent with the High Court's judgement in *Shawbrook & BPF v FOS*.

Finally, the PR2 also set out that there was no evidence that the entity named as brokering the Credit Agreement was authorised to carry on credit broking activities. It said that if the Credit Agreement was made in consequence of unlawful broking, Section 27 FSMA⁷ renders it unenforceable and gives rise to a right of recovery. It said this issue had not been investigated and was fundamental to the assessment of the fairness of the relationship.

As both sides have responded, the complaint has come back to me for further consideration.

The legal and regulatory context

The legal and regulatory context that I think is relevant to this complaint has been shared in several hundred published decisions on very similar complaints, as well as in the PD. So, there's no need for me to set this out again in detail here. I simply remind the parties that our rules⁸ say that in considering what is fair and reasonable in all the circumstances of the complaint, I will 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.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and

⁷ The Financial Services and Markets Act 2000

⁸ Financial Conduct Authority ("FCA") Handbook – DISP 3.6.4R ("R" denotes a rule).

reasonable in the circumstances of this complaint.

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

Again, my role as an Ombudsman isn't to address every single point which has been made to date, but to decide what is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, this doesn't mean I haven't considered it. Rather, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision.

The PR's further comments in response to the PD relate to the issue of whether the credit relationship between Mr D and the Lender was unfair. In particular, the PR has provided further comments in relation to whether the membership was sold to Mr and Mrs D as an investment at the Time of Sale, and has raised, for the first time, the suggestion that the Supplier may not have had the correct authorisation to broker the Credit Agreement.

As outlined in my PD, the PR1 originally raised various other points of complaint, all of which were addressed by the Investigators. But PR2 didn't make any further comments in relation to those in the responses to the Investigators or in its response to my PD. Indeed, it hasn't said it disagrees with any of the Investigator's findings in relation to those other points. And since I haven't been provided with anything more in relation to those other points by either party, I cannot see they remain in dispute. So, I'll focus here on the PR2's points raised in response to the PD.

Included in the PR2's response to my PD was a request for Mr D to be interviewed, or in other words, to take part in an oral hearing. Oral hearings are something that I can direct happen under DISP 3.5.5. However, the Financial Ombudsman Service is set up to decide complaints informally, and it is for me as the decision maker to determine what evidence I think I need to determine what is a fair and reasonable outcome to a complaint. Having considered everything, I do not think I need to hold an oral hearing to fairly determine this complaint.

This is because both parties have already provided lengthy submissions. In this case, I have a statement from Mr D, other evidence, including the documents from the sale, and full submissions from the PR and Lender to decide what I think was most likely to have happened. I'm satisfied I'm able to weigh up what Mr D has said against the available evidence and arguments to determine what I think happened on the balance of probabilities without the need for an oral hearing. And as it's in everyone's interest to resolve this complaint as soon as possible, to grant a hearing at such a late stage would inevitably prolong the resolution of this case.

I remain of the view that the information we have on file is enough to cover all the issues I need to consider to reach a fair decision. And as I've considered everything on file, including the specific points raised by the PR as part of its request, I'm of the view that an oral hearing isn't required.

PR2 has also maintained that it is for the Supplier to prove that the relationship between it and Mr D was fair. But for the reasons I set out in the PD, I do not agree, in relation to the circumstances here, that is correct. I am satisfied that the Lender has provided sufficient information to enable me to reach a conclusion about whether the relationship was fair or otherwise.

Finally, before I address the arguments about the specific merits of this complaint, the PR2 has questioned whether my PD runs contrary to the judgement handed down in *Shawbrook & BPF v FOS*. I don't believe it does. However, for the avoidance of doubt, each ombudsman must determine each case on its own specific facts, which is what I have done here.

In relation to Mr D's specific complaint, PR2 has highlighted the part of the PD that stated that even if there was a breach of Regulation 14(3) it was not causative, because Mr D was not motivated by the prospect of financial gain. It said the reasoning given in the PD cannot be sustained, and went on to suggest that Regulation 14(3) is engaged wherever a consumer is induced by the prospect of a financial return – it does not require speculative profit above capital.

But I do not agree with that point. As I said in the PD, a share in the Allocated Property clearly constituted an investment as it offered Mr and Mrs D the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But I remind the PR2 that the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). 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*, it only prohibits the *marketing and selling* of a timeshare contract as an investment.

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]. (my emphasis) That is the definition I have used here.

PR2 has maintained that the Supplier *did* sell and/or market the Fractional Club to Mr and Mrs D as an investment. But as I said in the PD, I do not discount that possibility – there is competing evidence in this case as to whether that occurred or not. But I again stress, whether or not there was a breach of the relevant prohibition by the Supplier is not ultimately determinative of the outcome in this complaint.

That is because, as I set out in the PD, if events would have unfolded in the same way whether or not such a pre-contractual breach had occurred, it would be difficult to attribute any particular importance to the breach when deciding whether an unfair debtor-creditor relationship ensued, or whether a remedy is appropriate.

And having considered all of the evidence, including the arguments put forward by PR2 following the PD, I remain unpersuaded that the prospect of a financial gain from Fractional Club membership was an important and motivating factor when Mr and Mrs D decided to go ahead with their purchase.

As I've said, it appears in 2011 Mr and Mrs D no longer wanted their VC membership due to their very sad personal circumstances. But, perhaps unsurprisingly, they didn't just want to hand it back to the Supplier – they wanted to try and get something back for it.

I accept that being a Fractional Club member meant that Mr and Mrs D would own a fraction of a property in a resort, and could obtain a return in due course. But, notwithstanding they probably were interested in the Allocated Property, as I said in the PD, there is nothing in what Mr D has said, that makes me think when purchasing the Fractional Club, that they thought they could or would make a profit from its eventual sale, which is important given the accepted definition of an '*investment*' as set out above. And when considering the wider circumstances I remain of that opinion.

PR2 has said that the PD wrongly concluded that the transaction was motivated by Mr and Mrs D's holiday usage, and that they wanted to obtain additional holiday rights. But I think PR2 is mistaken here – that was not suggested in the PD.

Finally, PR2 has suggested that whether the Supplier had the correct authorisation to broker the Credit Agreement should be considered. It said this because under Section 75 of FSMA, unlawful broking renders the Credit Agreement unenforceable and gives rise to a right of recovery. This is not something that has been raised before, but I don't think the argument has merit in any case.

The Credit Agreement to which this complaint relates is dated 20 November 2011. At that time, Credit Brokers had to be licenced by the Office of Fair Trading ('OFT').

But even if an unlicensed entity brokered this particular Credit Agreement (and I am not making any finding on this) it is not something that would warrant compensation being paid to Mr D in any event. Under the terms set out by the OFT, a breach of the licencing requirements would not make the Lender liable to pay Mr T compensation (unlike later loans regulated by the FCA). Further, I can't see how this could have caused an unfair relationship between Mr D and the Lender that warranted a remedy. In reality, Mr D took the finance from the Lender and subsequently repaid it. Mr D knew he had the finance, the amount borrowed and what it was for (the Fractional Club purchase). So, even if it was found to be improperly brokered, I haven't seen anything that persuades me that it resulted in an unfairness that would require the payment of compensation.

Conclusion

So, after careful reconsideration of the facts and circumstances of this complaint, I adopt my provisional conclusions as part of my final decision. For the reasons set out, I don't think the Lender acted unfairly or unreasonably when it dealt with Mr D's Section 75 claim, and I'm not persuaded that the Lender was party to a credit relationship with Mr D 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 for me to direct the Lender to compensate Mr D.

My final decision

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 22 May 2026.

Chris Riggs
Ombudsman