DRN-4993187

The complaint

Mr and Mrs M'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.

What happened

Mr and Mrs M purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 25 March 2013 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 7,000 fractional points (the 'Purchase Agreement'). After trading all 7,000 points in their existing timeshare (the 'European Collection'), they ended up paying £4,760 for membership of the Fractional Club.

Fractional Club membership was asset backed – which means it gave Mr and Mrs M 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 M paid for their Fractional Club membership by taking finance of £4,760 from the Lender in both of their names (the 'Credit Agreement'). This was paid off in October 2014.

Mr and Mrs M – using a professional representative (the 'PR') – wrote to the Lender on 4 December 2017 (the 'Letter of Complaint') to complain. They made the following points:

- They were told the only way out of their European Collection membership was by purchasing the fractional product.
- They were told the Resort would be sold in December 2027 and they would recoup their financial outlay plus a percentage of the profits from the sale.
- The Supplier has now been taken over by another company. They question who would now sell the holidays since all of the sales staff were made redundant.

The Lender dealt with Mr and Mrs M's concerns as a complaint and issued its final response letter on 5 February 2018, rejecting it.

Mr and Mrs M then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

Mr and Mrs M disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. No further comments were provided at that time.

One of our Service's Senior Investigators spoke to Mr and Mrs M on 1 May 2024. During that conversation, they provided further comments on their purchase of Fractional Club membership, including that the sale was pressured and that they weren't given a cooling off period in which to consider and cancel their purchase.

I issued a provisional decision on this case dated 24 July 2024, in which I set out my reasoning as to why I didn't think the complaint should be upheld. We've now received both parties' responses and so I'm finalising my findings within this final decision.

I have summarised my provisional decision below:

- In relation to alleged misrepresentation at the Time of Sale, I hadn't seen sufficient evidence to say that, on the balance of probabilities, there were any false statements of fact made to them by the Supplier as alleged. So, as I didn't think there was an actionable misrepresentation by the Supplier, I didn't think the Lender acted unfairly or unreasonably when it declined Mr and Mrs M's Section 75 claim.
- Mr and Mrs M said the Supplier had been taken over by another company, which seemed to me to be a suggestion that the sale of the Allocated Property in the future may be jeopardised by this. But, I noted that Mr and Mrs M had already relinquished their membership in December 2016 and I said it would seem that any breach of contract (if that occurs) lies in the future and is currently uncertain. So, based on what I'd seen so far, I didn't think the Lender was liable to pay Mr and Mrs M any compensation for a breach of contract by the Supplier.
- Some of Mr and Mrs M's points didn't fall neatly into a claim under Section 75 of the CCA. So, I then turned to consider their remaining points under Section 140A.
- The first of those points was that Mr and Mrs M suggested they were pressured into making their purchase. But they had provided little evidence to support this. I also noted that they were given a 14 day cooling off period, and what they had said indicated that they were aware from previous sales that they could decline to make a purchase. I wasn't therefore persuaded that their credit relationship with the Lender was unfair to them for that reason.
- Mr and Mrs M also suggested the product was sold to them as an investment. I provisionally concluded that while it was possible it was marketed and sold to them as an investment, I didn't think it was likely in this case that the Supplier breached the prohibition on selling timeshares as investments, based on the lack of evidence provided to support that allegation.
- I also said that even if I was wrong about the membership being sold as an investment, I wasn't currently persuaded that the investment element(s) of the membership were important enough to Mr and Mrs M's purchasing decision to render their credit relationship with the Lender unfair to them if the membership had, in fact, been sold as an investment.
- Lastly, Mr and Mrs M also said they weren't given a cooling off period for their purchase. But, I explained in my provisional decision that I could see the 14 day cooling off period was available to them and that this was clearly set out on the face of the loan agreement, signed by Mr and Mrs M. And, their testimony indicated that copies of the relevant documentation was sent to their home following the sale. So, I didn't think this was a reason to uphold the complaint either.
- So, overall, I intended to reject the complaint because I didn't think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs M's Section 75 claim, and I wasn't persuaded that the Lender was party to a credit relationship with Mr and Mrs M under the Credit Agreement that was unfair to them.

The Lender responded to my provisional decision and confirmed they had nothing further to add.

The PR responded on Mr and Mrs M's behalf and provided some further comments from them regarding the sale, which I've considered along with everything else which has been provided previously.

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4 R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (when appropriate), what I consider to have been good industry practice at the relevant time.

I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:

- The CCA (including Section 75 and Sections 140A-140C).
- The law on misrepresentation.
- The Timeshare Regulations.
- The UTCCR.
- The CPUT Regulations.
- Case law on Section 140A of the CCA – including, in particular:

    - The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') (which remains the leading case in this area).
    - *Scotland & Reast v British Credit Trust Limited* [2014] EWCA Civ 790 ('*Scotland and Reast*')
    - *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*').
    - The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*').
    - *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
    - *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
    - *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But they represented a minimum standard. And 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.

Following the responses to my provisional decision, 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.

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.

What is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

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

As I outlined in my provisional decision, the CCA introduced a regime of connected lender liability under Section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.

In short, a claim against the Lender under Section 75 essentially mirrors the claim Mr and Mrs M could make against the Supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender does not dispute that the relevant conditions are met in this complaint. And as I'm satisfied that Section 75 applies, if I find that the Supplier is liable for having misrepresented something to Mr and Mrs M at the Time of Sale, the Lender is also liable.

The PR did not explain in the Letter of Complaint whether they were making a Section 75 claim on Mr and Mrs M's behalf and on what basis. And the information I've seen doesn't help to clear that up. On my reading of the complaint, I still think only one of the concerns raised in the Letter of Complaint could reasonably be said to be a misrepresentation and that's Mr and Mrs M's assertion that they were told at the Time of Sale that the only way to exit their existing timeshare was to purchase their Fractional Club membership.

Mr and Mrs M haven't disputed this in their response to my provisional decision. So, that's what I've considered here.

I recognise that Mr and Mrs M have concerns about the way in which their Fractional Club membership was sold, but I remain unpersuaded that there was an actionable misrepresentation by the Supplier at the Time of Sale for the reason they seem to allege.

I say that because, other than the allegation itself, they didn't and still haven't described what they were told, by whom and in what context. While they did mention this point when speaking over the phone to our Senior Investigator, they weren't able to expand on it besides saying they were told they would 'lose' their existing European Collection points. And, in their response to my provisional decision, they only repeated this brief statement. This is in no way a criticism of Mr and Mrs M, as I recognise that the sale in question took place a long time ago. I say this to explain why I'm not sufficiently persuaded that it's likely such a misrepresentation was made at the Time of Sale.

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 M by the Supplier at the Time of Sale, I do not think there was an actionable misrepresentation by the Supplier for the reason(s) they allege.

For these reasons, therefore, I do not think the Lender is liable to pay Mr and Mrs M any compensation for the alleged misrepresentation 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 M a right of recourse against the Lender. So, it isn't necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, the Lender is also liable.

As I explained in my provisional decision, although the PR didn't make an explicit Section 75 claim that there was a breach of Mr and Mrs M's Purchase Agreement by the Supplier, what they've said still seems to me to be the suggestion that the sale of the Allocated Property in the future may be jeopardised by the Supplier's internal restructure. And, Mr and Mrs M haven't clarified this or provided any further comments in this regard in response to my provisional decision.

I can understand why Mr and Mrs M might fear that, when the time comes for the Allocated Property to be sold, they will not receive their share of the sales proceeds if there's a risk that the Supplier cannot keep its business going. However, I'm aware that Mr and Mrs M relinquished their Fractional Club membership in December 2016 because they say they could no longer afford it at that stage. I note Mr and Mrs M have said in their response to my provisional decision that they relinquished their membership because they had retired and were in their late sixties by that stage. And, they could no longer afford or justify paying the costs of membership especially when holidays were available on other websites without being a member of a timeshare.

I acknowledge their comments here, but to be clear, I was not questioning Mr and Mrs M's decision to relinquish their membership or their reasons for doing so. I only noted their relinquishment and made reference to it in terms of how it relates to the above allegation of breach of contract.

And, in any event, it would still seem the case that any breach of contract (if that occurs) lies in the future and is uncertain.

Overall, therefore, for the above reasons, I do not think the Lender is liable to pay Mr and Mrs M 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 M was misrepresented or breached by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and the outcome in this complaint. But Mr and Mrs M also said that they were told at the Time of Sale that, when the Allocated Property is sold, they would be given their share plus a profit.

It is not in dispute, and I am satisfied, that Mr and Mrs M'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."

Yet Mr and Mrs M suggest that the Supplier breached that prohibition. So, for completeness, that is what I have considered here.

However, as I outlined in my provisional decision, as a possible breach of Regulation 14(3) does not fall neatly into a claim under Section 75 of the CCA, I must turn to another provision of the CCA if I am to consider this aspect of Mr and Mrs W's complaint and arrive at a fair and reasonable outcome. And that provision is Section 140A. Neither Mr and Mrs M nor their PR has disputed this approach in their response to my provisional decision.

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."*

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 M'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*, 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.

What's more, the scope of that responsibility extends to both acts and omissions by the Supplier as the Supreme Court in *Plevin* made clear when it referred to 'acts or omissions' when discussing Section 56. And as Section 56(3)(b) says that an applicable agreement can't try to relieve a person from liability for 'acts or omissions' of any person acting as, or on behalf of, a negotiator, it must follow that the reference to 'omissions' would only be necessary because they can be attributed to the creditor under Section 56.

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.

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

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

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

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

So, having considered the entirety of the credit relationship between Mr and Mrs M and the Lender along with all of the circumstances of this complaint afresh, I do not think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A.

Were Mr and Mrs M pressured into purchasing Fractional Club membership at the Time of Sale?

In their conversation with our Senior Investigator, Mr and Mrs M suggested that they were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale.

I acknowledge that they may have felt weary after a sales process that went on for a long time. But 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 Fractional Club membership when they simply did not want to. And they haven't provided any further comments in this regard in response to my provisional decision as to how exactly they were pressured.

They were also given a 14-day cooling off period[2] and they have not provided a credible explanation for why they did not cancel their membership during that time. From what they've had to say, it also seems they were aware from previous sales meetings they had attended that they could refuse to purchase and leave if they wanted to. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs M made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

I'm not persuaded, therefore, that Mr and Mrs M's credit relationship with the Lender was rendered unfair to them under Section 140A for this reason. But, as mentioned above, there is another reason why it's suggested their credit relationship with the Lender was unfair to them. And that's the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

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

As I have already said, Mr and Mrs M seem to suggest that the Supplier breached Regulation 14(3) of the Timeshare Regulations.

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*

[2] I'm aware that Mr and Mrs M dispute this, so I've addressed the point below.

transaction in which money or other property is laid out in the expectation or hope of financial gain or profit" at [56]. I will use the same definition in this complaint.

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

In other words, the Timeshare Regulations did not ban the sale of 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 M as an investment in breach of Regulation 14(3), I have to be persuaded that the Supplier 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.

I accept that it's *possible* that Fractional Club membership was marketed and sold to them as an investment in breach of Regulation 14(3) given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Club membership without breaching the relevant prohibition.

So, I have taken all of that into account. However, on my reading of the evidence provided, I remain unpersuaded it's more likely than not that Fractional Club membership was sold to Mr and Mrs M as an investment and I'll explain why.

The Letter of Complaint said:

"*Our clients are requesting a refund of their loan amount plus interest paid for their 'investment'…they were told that the Resort would be sold in December 2027 and they would recoup their financial outlay PLUS a percentage of the profits from the sale.*"

No further explanation was provided beyond this brief statement as to who told them that, using what statements or information and in what context.

As I've already mentioned, one of our Senior Investigators spoke to Mr and Mrs M recently (in May 2024) and, as part of that conversation, he discussed this point.

Mr and Mrs M were asked about what made them decide to purchase Fractional Club membership, and they said that it was "*decided for them*" because they were told that they would simply lose what they had acquired as part of their European Collection membership if they didn't become Fractional Club members. They also briefly mentioned that purchasing Fractional Club was an investment.

Our Senior Investigator asked Mr and Mrs M to explain what they meant by some of those comments. They explained that they had 7,000 European Collection points and the '*only way forward was to change [them] to fractional [points], but it would cost them more money*'. They also said that they would get some money back as Fractional Club members.

Mr and Mrs M were then asked to explain what they understood by being told that Fractional Club membership was an investment. Mr and Mrs M said it was '*for a particular property and should it be sold then they would get a fraction of the money it sold for*'. They also said that

they were trading in 7,000 European Collection points and "*when the [Allocated] property was sold, they would get reimbursed a fraction of the money that the property was sold for*".

Our Senior Investigator asked Mr and Mrs M if there was anything the sales agents said to them at the Time of Sale that made them think Fractional Club membership was an investment. Mr and Mrs M said that they were told that "*they would get money back*".

Our Senior Investigator then followed that up by asking Mr and Mrs M if there was anything that was said to them by the Supplier that gave them the confidence that Fractional Club membership was an investment. Mr and Mrs M said: "*only that if they didn't change the 7,000 points to fractional then they would lose what they'd already paid out and couldn't go any further with holidays unless they took out the fractional points*".

Mr and Mrs M were then asked to clarify whether they thought the money they would get from the sale of the Allocated Property would be in addition to what they had paid for Fractional Club membership or simply that it would be a percentage, by which they would receive a smaller amount of money than what they paid for their membership. Mr and Mrs M said they understood it to be only a portion.

Mr and Mrs M's recollections and understanding of the sales presentation at the Time of Sale show that they understood how their share in the Allocated Property worked and that they were told by the Supplier that, when the Allocated Property is sold, they would simply receive their share of the proceeds of that sale.

Indeed, Mr and Mrs M told our Senior Investigator that they were told by the Supplier (and understood) that their share in the Allocated Property would not lead to a financial gain.

In response to my provisional decision, Mr and Mrs M said:

> "*The adviser informed us, that when the properties were eventually sold, because the price of the property would go up, thus making us a profit. It was an investment for us and we would only gain.*"

I acknowledge they've said this, but this has been said at a late stage. If this was something they remembered from the Time of Sale, it's difficult to explain why this wasn't included in the Letter of Complaint and why they didn't explain this during the above conversation with our Service's Senior Investigator when asked.

Indeed, some of what they've said in response to my provisional decision appears to be in direct contradiction to what they said in the aforementioned conversation. For example, in the previous conversation Mr and Mrs M were asked if there was anything that was said to them by the Supplier that gave them the confidence that Fractional Club membership was an investment. Mr and Mrs M said: "*only that if they didn't change the 7,000 points to fractional then they would lose what they'd already paid out and couldn't go any further with holidays unless they took out the fractional points*". They didn't mention what they've now said the salesperson told them regarding the price of the property going up and making them a profit.

Mr and Mrs M also said in that previous conversation, that they understood what they would receive from the sale of the Allocated Property would only be a portion, which was a smaller amount of money than what they paid for their membership. And they told our Senior Investigator that they were told by the Supplier (and understood) that their share in the Allocated Property would not lead to a financial gain. So, it's difficult to explain why they've only now said that they thought they would be making a profit and they would 'only gain' if this was something they remembered from the Time of Sale. And again, they still haven't provided much colour or context to their testimony beyond the brief statement above.

And with all of that being the case, in the absence of persuasive evidence to suggest otherwise, I find that it is unlikely that the Supplier led them to believe that membership offered them the prospect of a financial gain (i.e., a profit).

But even if I am wrong to conclude that, on this occasion, Fractional Club membership was unlikely to have been sold in that way given what I have already said about Mr and Mrs M's recollections of the sales process at the Time of Sale, I am not currently persuaded that would make a difference to the outcome in this complaint anyway.

Was there an unfair relationship between the Lender and Mr and Mrs M?

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.

I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in *Carney* and *Kerrigan* (respectively) on causation.

In *Carney*, HHJ Waksman QC said the following in paragraph 51:

"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"

And in *Kerrigan*, HHJ Worster said this in paragraphs 213 and 214:

"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court ***may*** *make an order* ***if*** *it determines that the relationship is unfair to the debtor. […]*

[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

So, 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 M and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) (deemed to be something done by the Lender under section 140(1)(c) of the CCA) lead them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

But as I've already said, I remain unpersuaded by the evidence provided that the Supplier more likely than not led them to believe that the Fractional Club membership was an investment from which they would make a financial gain nor was there any sufficiently persuasive indication that they were induced into the purchase on that basis.

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 M's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with their purchase 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 M and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

Other concerns

Mr and Mrs M also said that they weren't given a cooling off period for their purchase.

However, I can see the 14 day cooling off period was available to them and that this was clearly set out on the face of the loan agreement, signed by Mr and Mrs M. What they've had to say also suggests that copies of the relevant documentation were sent to their home following the sale. Mr and Mrs M didn't provide any further comments in this regard in response to my provisional decision.

So, for the reasons I've explained, I don't think this is a reason to uphold the complaint either.

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 M 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.

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 M's 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 set out above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M and Mrs M to accept or reject my decision before 27 September 2024.

Fiona Mallinson
Ombudsman