DRN-5037155

The complaint

Mr M'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 claims under Section 75 of the CCA.

What happened

Mr M, along with his wife purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 11 September 2012 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 747 fractional points at a cost of £9,649 (the 'Purchase Agreement'). On 9 July 2013 they purchased a further 1,240 points at a cost of £22,294. This was funded by another lender and is not the subject of this complaint.

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 £9,649 from the Lender in Mr M's name (the 'Credit Agreements'). As the loan was in Mr M's name, he is the eligible complainant.

Mr M – using a professional representative (the 'PR') – wrote to the Lender on 27 March 2018 (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, which the Lender failed to accept and pay.

2. A breach of contract by the Supplier giving him a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.

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.

4. The decision to lend being irresponsible because the Lender did not carry out the right creditworthiness assessment.

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

Mr M 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 needed to buy the fractional timeshare in order to exit their membership which was not true.

Mr M 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 Mr M.

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

Mr M says that the Supplier breached the Purchase Agreement because there is no guarantee that they will receive their share of the net sale proceeds of the Allocated Property.

Mr M also says that he has no control over the management fees charge by the Supplier.

As a result of the above, Mr M 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 Mr M.

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

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

1. The Supplier failed to ascertain if Mr M could afford the loan and failed to review other financial products making the loan unfair.

2. The contractual terms allowed the Supplier to terminate the agreement if they failed to pay maintenance fees as concluded in the case of Link Financial Ltd v Teresa North Wilson.

3. The Supplier breached EU Law during the sale (although nothing further was specifically referred to).

4. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations

The Lender dealt with Mr M's concerns as a complaint and issued its final response letter in August 2018, rejecting it on every ground.

Mr 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 M disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

Mr M wrote to this service to say that the claim and the complaint lodged on his behalf by PR was generic. In brief, he reinforced some of the claims made by PR and made the following additional points:

1. They had made a prior trial purchase and had been persuaded to upgrade to the fractional product to obtain better access to holiday accommodation. He said they had been told they would have priority treatment.

2. They had been told they were purchasing an investment.

3. Sales staff had not taken into account the need to travel during school holidays when making their promises about availability. He said availability had been an issue for them. As had been the ability to get upgrades.

4. They had been subjected to a hard sell by the Supplier.

5. They believed they were purchasing a share in a property which would be a secure and profitable investment.

6. Not all properties had the level of services and support he had expected, for example some pools did not have lifeguards.

7. The costs of holidays increased since they no longer had free travel from the airport to the accommodation provided.

8. The quality of accommodation was not always up to the same standard.

9. The Supplier had made administrative errors.

10. Package holidays were better value for money.

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

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

• The Consumer Protection from Unfair Trading Regulations 2008 (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).

• Patel v Patel [2009] EWHC 3264 (QB).

• 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').

I issued a provisional decision as follows:

"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.

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

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 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 M at the Time of Sale, the Lender is also liable.

This part of the complaint was made for several reasons that I set out at the start of this decision. They include the suggestion that Fractional Club membership had been misrepresented by the Supplier because Mr M and his wife were told that they were buying an interest in a specific piece of "real property" when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr M and his wife'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 Mr M might question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.

As for the rest of the Supplier's alleged pre-contractual misrepresentations, while I recognise that Mr M and his wife have concerns about the way in which their Fractional Club

membership was sold, they have not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the other reasons they allege. And I say that because on balance, I'm not persuaded that by the allegation that the Supplier told the Consumer that they had to buy fractional membership in order to exit their contract. Mr M has not said that they were actively seeking to end the trial contract which was only set up to run for a short period and did not attract any ongoing fees or further payments. I see from the Supplier's records they took four holidays during the trial including the one in which they purchased the fractional product. I have also noted that between July 2011 and September 2018 they took 12 holidays. So far from taking out Fractional Club membership to end an alternative one, it seems they were interested in taking holidays with the Supplier.

Nor do I think that they were misled about the end date. This is clearly set out in the documentation which was provided. The FAQs document states:

'In the event that a sale is not achieved for the property in question within eighteen months of the Sale Date, or earlier by agreement, the Vendor will arrange a general meeting of Owners in that property at which time all those Owners will decide whether or not to continue using the Property and under what terms. Following this, and until the Property is sold, the developer or Manager will arrange rentals and the proceeds from these, after deduction of costs including any outstanding Management Charges, will be distributed among the Owners in that property pro rata to the number of Fractions held."

What's more, as there's nothing else on file that persuades there were any false statements of existing fact made to Mr M and his wife 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 M any compensation for the alleged misrepresentations of the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

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

I've already summarised how Section 75 of the CCA works and why it gives Mr 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.

Mr M says that they could not holiday where and when they wanted to – which, on my reading of the complaint, suggests that he 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 M states that the availability of holidays is subject to demand. It also looks like they made use of their fractional points to holiday on 12 occasions between July 2011 and September 2018. I accept that they may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

Mr M and his wife also say that the Supplier breached the Purchase Agreement because there is no guarantee that they will receive their share of the net sale proceeds of the Allocated Property. I understand that they are saying that they fear that, when the time comes for the Allocated Property to be sold, they 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.

I cannot see that the Supplier has breached the contract with regard to management fees. It did not offer to give them control over the fees charged. The fees for the coming year were set out in the agreement and I gather further details were included in other documentation which I have not seen.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mr 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 M and his wife 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 M 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.

As Section 140A of the CCA is relevant law in the context of this complaint, I do have to consider it. So, in arriving at a fair and reasonable outcome to this complaint, it will be helpful to consider whether an unfair credit relationship is likely to have come into existence between Mr M and the Lender.

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 M and his wife'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 v British Credit Trust Limited [2014], 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.”

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 v Patel [2009] EWHC 3264 (QB) (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.

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

When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale; and

2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;

3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;

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

I have then considered that on the fairness of the credit relationship between Mr M and the Lender.

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

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

They include the allegation that the Supplier misled Mr M and carried on unfair commercial practices which were prohibited under the CPUT Regulations for the same reasons they gave for his Section 75 claim for misrepresentation. But given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.

The PR says that the right checks weren't carried out before the Lender lent to Mr M. 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 M was actually unaffordable before also concluding that he 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 Mr M. If there is any further information on this (or any other points raised in this provisional decision) that the Mr M wishes to provide, I would invite them to do so in

response to this provisional decision.

Mr M says that he and his wife 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. They were also given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel their membership during that time. Moreover, they did go on to upgrade their Fractional Club membership – which I find difficult to understand if the reason they went ahead with the purchase in question was because they were pressured into it. And with all of that being the case, there is insufficient evidence to demonstrate that Mr M and his wife 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 M'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 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?

The Lender does not dispute, and I am satisfied, that Mr 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."

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 M and his wife's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that 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 M and

his wife 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 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.

There is evidence in this complaint 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 M and his wife, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr M and his wife as an investment.

With that said, 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. And while that was not alleged by either Mr and Mrs H nor their PR when they first complained about a credit relationship with the Lender that was unfair to them, 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.

But, having considered everything, I don't think I need to make a firm finding on that point. I say that because, for the reasons I'll come on to, I don't think there was an unfair debtor-creditor relationship even if Fractional Club membership was sold as an investment.

Was there an unfair relationship between the Lender and Mr 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 M and the Lender that was unfair to him 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 him to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

So, while PR now argues that the Supplier marketed and sold Fractional Club membership to Mr M and his wife as an investment, in light of Mr M's more recent recollections following the outcome of Shawbrook & BPF v FOS, I don't recognise that assertion in the original claim and complaint.

Indeed, Mr M's initial Letter of Complaint was put together much closer to the Time of Sale and is, in my view, better evidence of what their concerns about the sales process at that time and why they were unhappy with it than their very recent recollections. The first time this point was raised was in August 2023 when PR wrote to say the timeshare had been sold as an investment. That email gave no reason why it considers that to have been the case and seems to have been driven by the Shawbrook & BPF v FOS case. It does, however, make reference to EU law and this leads me to believe PR was aware of the relevant Timeshare Regulations at the time.

In the original complaint letter no reference is made to the timeshare being sold as an investment and neither does the complaint form. In it there is a manuscript note which I presume was written by Mr M which states the timeshare was mis sold and is not fit for purpose. The reasons given are that he was told to buy it to gain more availability and to exit his Fractional Club membership. He also complained that the resorts were not exclusive and he couldn't go where he wanted to go. So neither PR nor Mr M suggested that the timeshare was sold as an investment when they made the claim to Mitsubishi or when a complaint was submitted to this service.

And as there was no suggestion in Mr M's initial claim about the sales process at the Time of Sale that the Supplier led him to believe that the Fractional Club membership was an investment from which he would make a financial gain nor was there any indication that he was 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 his wife'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 M and the Lender was unfair to him even if the Supplier had breached Regulation 14(3).

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

Mr M complains that the end date was not clear cut, there was no guarantee of the sales proceeds and the contract unfairly allows increases in maintenance fees. He also says that the quality was variable and he was promised priority. He says he was also told he was acquiring an investment.

Before I consider whether the Supplier was in breach of anything, it is important to note that I must consider what real-world consequences, in terms of harm or prejudice to Mr M which have flowed from the alleged breach(es), because those consequences are relevant to assessment of unfairness under Section 140A. For example, the judge attached importance to the question of how an unfair term had been operated in practice: see Link Financial v Wilson [2014] EWHC 252 (Ch) at [46].

That said I am unable to identify and prejudice or unfairness the alleged breaches have led to in the complaint.

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 M and his wife when they purchased membership of the Fractional Club at the Time of Sale. But they and PR suggest that the Supplier failed to provide them with all of the information they needed to make an informed decision.

PR also says that the contractual terms governing the ongoing costs of Fractional Club membership and the consequences of not meeting those costs were unfair contract terms under the UTCCR.

One of the main aims of the Timeshare Regulations and the UTCCR was to enable consumers to understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. And if a supplier's disclosure and/or the terms of a contract did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, that may lead to the Timeshare Regulations and the 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.

Given the facts and circumstances of this complaint, I am not persuaded that the Supplier's alleged breaches of the Timeshare Regulations, the CPUT Regulations and the CRA are likely to have prejudiced Mr M and his wife's purchasing decision at the Time of Sale and rendered his credit relationship with the Lender unfair to him for the purposes of section 140A of the CCA. And I say this because:

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 M 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 M 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.

Overall, I concluded that based on the evidence and arguments I had received I was not minded to uphold the complaint."

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.

Neither party has responded to my provisional decision and so I have been given no grounds which would cause me to alter it.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 24 October 2024.

Ivor Graham
Ombudsman