DRN-5204467

The complaint

Mr B and Miss F'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 B and Miss F purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 19 June 2016 (the 'Time of Sale 1'). They entered into an agreement with the Supplier to buy 900 fractional points at a cost of £17,823 (the 'Purchase Agreement 1'). But after trading in their existing trial membership of the timeshare, they ended up paying £14,527 for membership of the Fractional Club.

Mr B and Miss F paid for their Fractional Club membership by taking finance of £18,748 from the Lender in both of their names (the 'Credit Agreement 1'). This also consolidated their previous lending.

On 3 October 2016 (the 'Time of Sale 2'), Mr B and Miss F made a further purchase of Fractional Club membership, 'upgrading' their existing agreement. They purchased 1,200 fractional points at a cost of £25,610 (the 'Purchase Agreement 2'). But after trading in their existing membership, they ended up paying £7,088.

Again, Mr B and Miss F paid for their Fractional Club membership by taking finance of £25,544 from the Lender in both of their names (the 'Credit Agreement 2'). This also consolidated their previous lending.

Fractional Club membership was asset backed – which meant it gave Mr B and Miss F 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 B and Miss F – using a professional representative (the 'PR') – wrote to the Lender on 12 September 2018 (the 'Letter of Complaint') to complain about:

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

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

Mr B and Miss F say that the Supplier made a number of pre-contractual misrepresentations at the Times of Sale – namely that the Supplier:

1. told them that they could sell their membership whenever they wanted to and that they could sell the points they had if they did not wish to use them for holidays, when that was not true.

2. told them that Fractional Club membership had a guaranteed end date, when that was not true.
3. told them that they were buying an interest in a specific piece of "real property" when that was not true.
4. told them that Fractional Club membership was an "investment" when that was not true.
5. told them that the Supplier's holiday resorts were exclusive to its members and that they would have priority when booking, when that was not true.

Mr B and Miss F say that they have a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr B and Miss F.

(2) Section 140A of the CCA: the Lender's participation in unfair credit relationships

The Letter of Complaint set out several reasons why Mr B and Miss F say that the credit relationships between them and the Lender were unfair to them under Section 140A of the CCA. In summary, they include the following:

1. The contractual terms which set out that membership could be terminated where Mr B and Miss F failed to pay the annual management fees were unfair contract terms under the Consumer Rights Act 2015 ('CRA').
2. There was no warning given to Mr B and Miss F of the risks involved, in particular, the obligation to pay annual management fees over the long term.
3. They were pressured into purchasing both Fractional Club memberships by the Supplier.
4. The decisions to lend were irresponsible because the Lender didn't carry out the right creditworthiness assessments and the loans were unaffordable.

Mr B and Miss F did not receive a response to the complaint from the Lender within the timeframe required by the Regulator, so they referred the complaint to the Financial Ombudsman Service.

The Lender subsequently dealt with Mr B and Miss F's concerns as a complaint and issued its final response letter on 6 December 2018, rejecting it on every ground.

The complaint was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

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

At this stage, the PR provided comprehensive further comments regarding the product being sold to Mr B and Miss F as an investment, with this being another reason why they felt the credit relationship between them and the Lender was unfair under S140A of the CCA.

I considered the matter and issued a provisional decision on 20 November 2024. I've summarised that decision below:

- In relation to Mr B and Miss F's complaint about the Lender's handling of their Section 75 claims for misrepresentations, I wasn't ultimately persuaded that there was an actionable misrepresentation by the Supplier at either of the Times of Sale for any of the reasons they'd alleged. So, I didn't think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claims in question.
- I wasn't persuaded that either of the credit relationships were unfair to Mr B and Miss F for the reasons–relating to the checks carried out by the Lender at the Times

of Sale, or that there was undue pressure by the Supplier at the Times of Sale.

The PR also alleged that at the Times of Sale, the Supplier marketed and sold Fractional Club membership to Mr B and Miss F as an investment in breach of Regulation 14(3) of the Timeshare Regulations and this was also something which rendered the credit relationship between them and the Lender unfair to them under Section 140A. In relation to this point:

- Overall, based on the evidence available, I provisionally concluded that even if the Supplier had marketed or sold Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I was not persuaded that Mr B and Miss F's decision to purchase Fractional Club membership at the Times of Sale were motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I thought the evidence suggested 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 did not think either of the credit relationships between Mr B and Miss F and the Lender were unfair to them even if the Supplier had breached Regulation 14(3).
- I also didn't think the credit relationships were rendered unfair under Section 140A for the reasons alleged relating to unfair terms in the Purchase Agreements and not being given sufficient information at the Times of Sale in relation to the risks involved and the obligation to pay annual management charges over the term of the membership.

So, overall, given the facts and circumstances of this complaint, I concluded my provisional decision by saying I didn't think the Lender acted unfairly or unreasonably when it dealt with Mr B and Miss F's Section 75 claims, and I wasn't persuaded that the Lender was party to a credit relationship with them under either of the Credit Agreements that was unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I could see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

The Lender did not respond to my provisional decision. The PR did respond and asked to see all of the submissions the Lender had provided to us – this was provided to them.

The PR provided further comments they wished to be considered in relation to some aspects of the complaint.

The legal and regulatory context

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

I will again refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I remain 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 CRA.
- 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).

- *Scotland v British Credit Trust [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 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.

And having done that, and having reconsidered everything in light of the PR's latest submissions, I've reached the same overall conclusion as I did in my provisional decision. I do not uphold this complaint.

But before I explain why, I want to again 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 Times of Sale

As I explained 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 B and Miss F could make against the Supplier. As outlined above, this complaint involves two purchases, so in effect there are two separate claims here. However, as the complaint points and evidence for both are the same, I again don't see any point in repeating my findings twice. So, while considering each claim separately, I've set out my findings here largely as one.

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 remain satisfied that Section 75 applies, if I find that the Supplier is liable for having misrepresented something to Mr B and Miss F at either of the Times 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 B and Miss F were told that they were buying an interest in a specific piece of "real property" when that was not true. However, as I explained in my provisional decision, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr B and Miss F's share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while the PR might, in their original submissions, have questioned the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.

The PR said the Supplier told Mr B and Miss F that Fractional Club membership had a guaranteed end date when that was not true. Given that Mr B and Miss F only have contractual rights in relation to the Allocated Property associated with Purchase Agreement 2, their complaint here must relate to Time of Sale 2. But in any event, I still can't see that what the Supplier said here was actually untrue. I've still not seen anything which makes me think that the Allocated Property would not be able to be sold at the conclusion of the contract period. As I explained in my provisional decision, the Terms and Conditions generally set out that the title to the property is held by independent trustees, the sale of the Allocated Property can only be carried out by the Trustees on or after the proposed sale date, and the Allocated Property cannot be removed from the trust before that sale date. What's more, the sale date can only be delayed by the unanimous written consent of all fractional owners, in which Mr B and Miss F are included.

In addition, the PR also said in the Letter of Complaint that the Supplier told Mr B and Miss F that Fractional Club membership was an 'investment' when that was not true. But, for reasons I'll go on to explain below, Mr B and Miss F's memberships plainly did have an investment element to them.

As for the rest of the Supplier's alleged pre-contractual misrepresentations, while I recognise that Mr B and Miss F have concerns about the way in which their Fractional Club memberships were sold, they still have not persuaded me that there was an actionable misrepresentation by the Supplier at either of the Times of Sale for the other reasons they allege. And I say that because beyond the bare allegations, they haven't provided any evidence to support them such as what exactly they were told, by whom and in what context, including in response to the provisional decision. I also note that Mr B and Miss F don't describe such statements being made by the Supplier at either Time of Sale in their testimony.

What's more, as there's nothing else on file that persuades me there were any false statements of existing fact made to Mr B and Miss F by the Supplier at either of the Times of Sale, I still do not think there was an actionable misrepresentation by the Supplier for the reasons they allege.

For these reasons, therefore, I do not think the Lender is liable to pay Mr B and Miss F 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 claims 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 contracts entered into by Mr B and Miss F were misrepresented 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 B and Miss F also say that the credit relationship(s) between them and the Lender were unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales processes at the Times of Sale that they have concerns about. It is those concerns that I explore here.

As outlined above, this complaint involves two purchases, with two associated credit relationships. These can and must be considered as separate events and I have done so here. However, as the complaint points and evidence for both are the same, I again don't see any point in repeating my findings twice. So, while considering each credit relationship as a separate event, I've set out my findings here largely as one.

As I explained in my provisional decision, 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 B and Miss F and the Lender was unfair.

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 sales of Mr B and Miss F's memberships 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.

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

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

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.

As I explained in my provisional decision, I have considered the entirety of the credit relationships between Mr B and Miss F and the Lender, along with all of the circumstances of the complaint, and I still do not think the credit relationships between them were 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 Times 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 Times 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 Times of Sale;
4. The inherent probabilities of the sale given its circumstances.

I have then considered the impact of these on the fairness of the credit relationships between Mr B and Miss F and the Lender.

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

Mr B and Miss F's complaint about the Lender being party to unfair credit relationships was also made for several reasons, all of which I set out at the start of this decision.

The PR says that the right checks weren't carried out before the Lender lent to Mr B and Miss F. In response to this point, I said in my provisional decision that even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I made no such finding), I would have to be satisfied that the money lent to Mr B and Miss F was actually unaffordable before also concluding that they lost out as a result, and then consider whether the credit relationship with the Lender was unfair to them for this reason. Neither the PR nor Mr B and Miss F made any further submissions on this point, so I am not persuaded that the loans were unaffordable for Mr B and Miss F.

Mr B and Mis F also suggest that they were pressured by the Supplier into purchasing Fractional Club membership at the Times of Sale. I acknowledge, as I did in my provisional decision, 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 presentations 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 information on this point in response to the provisional decision. On both Times of Sale they were also given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel either of their memberships during that time. Moreover, they did go on to upgrade their Fractional Club membership at the Time of Sale 2– which I still find difficult to understand if the reason they went ahead with the purchase in question was because they were pressured into it at the Time of Sale 1. And with all of that being the case, there remains insufficient evidence to demonstrate that Mr B and Miss F made either of the decisions 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 B and Miss F's credit relationships with the Lender were rendered unfair to them under Section 140A for any of the reasons above. But, as I explained previously, there is another reason, perhaps the main reason, why they say their credit relationship with the Lender was unfair to them. And that's the suggestion that 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 Times of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations?

The Lender does not dispute, and I remain satisfied, that Mr B and Miss F'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 (and Mr B and Miss F) say that the Supplier did exactly that at the Times 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.

There was an Allocated Property in relation to both Fractional Club memberships. And Mr B and Miss F's share in both of the Allocated Properties 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, as I explained in my provisional decision, 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 either or both Fractional Club memberships were marketed or sold to Mr B and Miss F 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 the memberships 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 B and Miss F, 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 relating to both sales that state that Fractional Club membership was not sold to Mr B and Miss F as an investment.

But with that said, I recognised in my provisional decision, and continue to do so, that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. And, as I did in my provisional decision, I accept that it's *possible* that Fractional Club membership was marketed and sold to Mr B and Miss F 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.

I acknowledge that in response to my provisional decision, the PR said they thought the evidence in this case showed that it was not only possible that it was marketed and sold to Mr B and Miss F as an investment at the Times of Sale, but probable.

The PR asserts in their response that I made a finding in my provisional decision that the memberships were not marketed or sold as an investment. But this is incorrect – I made no such finding.

Again, as I explained in my provisional decision, I didn't think it necessary to make a formal finding on that particular issue because, even if the Supplier did breach Regulation 14(3) at the Time of Sale, I didn't think that made a difference to the outcome in this complaint anyway. And I remain of that opinion.

This is because even if the Supplier had breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, this is not the end of the matter or where the assessment of unfairness ends. And, I must stress here that it is for me to determine this complaint on its individual facts and circumstances – making a decision as to what is, in my opinion, fair and reasonable in light of them.

<u>Were the credit relationships between the Lender and Mr B and Miss F rendered unfair?</u>

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 still seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr B and Miss F and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) which, having taken place during its antecedent negotiations with Mr B and Miss F, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender) led them to enter into either or both of the Purchase Agreement(s) and the Credit Agreement(s) is an important consideration.

As I said in my provisional decision, it's possible that Mr B and Miss F were interested in both holidays and the investment element, which wouldn't be surprising given the nature of the product at the centre of this complaint.

But I also said in my provisional decision that, even if they were, having taken the opportunity to set out what affected their enjoyment of their Fractional Club membership and set out their reasons for wanting to relinquish it, Mr B and Miss F have described issues of poor quality of accommodation which decreased over time, issues with availability, and not getting the value and quality they expected regarding holidays.

For example, in their witness statement, they said:

> "*We are still fractional members but have not used any points since the holiday last year which we complained about and have no bookings for the future with them.*
>
> *The events described have been stressful in terms of the money outgoings since my job situation changed, and more so since we had our holiday in October 2017 and realised what a bad deal we were getting, so that no only were we paying out all this money, we were not getting anything like the value/quality expected.*
>
> *[…]*
>
> *My maintenance fees increased from 777 Euros to 999 Euros when we upgraded. We were not told there would be any increase per year in fees.*
>
> *I emailed the company advising that following our 2 trial holiday weeks, in Sunningdale, none of the accommodation we have stayed in has met the expectations or quality expected during the various sales pitches when we signed up. This was a key component in our decision to join FPOC. Another key component of our decision to join was the range of destinations and accommodations we could choose from to have 2 or 3 weeks of holiday per year. However, this factor was not as we were promised.*"

So, they've described the quality of accommodation as "*a key component in their decision to join*" and said another key component was '*the range of destinations and accommodations we could choose from*'.

And, they've also said Miss F's job situation had changed since they made the purchase, and they were unhappy with the increasing maintenance fees.

As noted above, following the provisional decision, the PR asked to see a copy of the Lender's submissions which, amongst other things, highlighted what the Supplier's sales notes from each time of sale said. These were shared with the PR and to be clear, I have considered all available evidence when reaching my decision, as I did when reaching my provisional decision.

In relation to the Time of Sale 1, the notes say "*reason to purchase wanted to upgrade as like [the Supplier] and want to have more holidays with [the Supplier]*".

And, in relation to the Time of Sale 2, the notes say "*the clients wanted to have more points and it is a good deal*".

The PR provided some further comments on the sales notes, questioning their provenance and reliability. For example, they said the identity of the authors of the notes hasn't been disclosed and some of the timings of the entries seem inaccurate. The PR also said they were concerned that this evidence was being preferred over Mr B and Miss F's detailed testimony.

I acknowledge the comments the PR has made here, but I haven't seen anything which makes me think the comments recorded in the sales notes are not what Mr B and Miss F told the Supplier at the Times of Sale. And, the notes do suggest to me that it was the holidays, and increasing their points in order to take those holidays that were the reasons for Mr B and Miss F's purchases here.

But in any event, as I've outlined above and below, I have considered Mr B and Miss F's testimony and relied on that evidence in reaching my decision.

On that point, in their response, the PR also provided a copy of some further comments from Miss F.

In this, I note she has said:

> "*Numerous times in our original witness statement we confirm and refer to the investment element of the product/membership, and can confirm that this was a key part of our decision making process.*
>
> *The benefits of the holidays we would be able to access because of this investment were also taken into account, but the return on the investment upon the sale of the property, which we were led to believe we fractionally owned, remained a key factor when considering our options.*
>
> *We were also led to believe throughout that the money we were paying for fractional ownership would also give us access to very high quality accommodation, a lot of choice of timings and locations of holidays, with multiple holidays at this level per year. We were also given the top of the range accommodations for our first few holidays (whilst the sales pitch meetings were ongoing), and only shown the best accommodation at the resorts when given tours of what was available, and were told that this was standard/minimum standard we would be receiving ongoing [sic]. This made it seem like a good investment with good value in terms of the short term benefits of high quality holidays before the eventual financial return on the investment.*
>
> *[…]*

As explained in our original witness statement the remaining holidays we took were in low level accommodation, with dates and destinations being very limited, and the points that came with our investment not corresponding with what was shown to us in the sales presentations."

I also note from Miss F's covering email to the PR to which these comments were attached, she has said "*let me know if there is anything else that could be useful to include. (Though having looked back through our original witness statement, I don't think there was anything key missing.)*"

I acknowledge the comments Miss F has now provided, but in my view, the original witness statement remains the best evidence I have of what they remember from the Times of Sale, why they made their purchases and why they're unhappy with their membership now. I say this because it was put together much closer to the Times of Sale and when the original complaint was made.

It's also difficult to explain why the comments Miss F has now provided weren't included in the original witness statement, particularly if, as she now asserts, the investment element of the membership was an important and motivating factor to their purchasing decisions.

I also note that Miss F has said she doesn't think there was anything key missing from her original witness statement. And, on my reading of these further comments, Miss F does still refer in some detail back to the reasons originally given for why they were unhappy with their membership i.e., not getting what they expected in terms of holidays.

So, for all of the above reasons, I remain of the view that their purchases were largely motivated by the prospect of holidays, rather than the investment element.

On balance, therefore, even if the Supplier had marketed or sold either or both of the Fractional Club memberships as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I remain unpersuaded that Mr B and Miss F's decision to purchase either of the Fractional Club memberships at the Times of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I still think the evidence suggests they would have pressed ahead with their purchases whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationships between Mr B and Miss F and the Lender were unfair to them even if the Supplier had breached Regulation 14(3).

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

As I said in my provisional decision, 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 B and Miss F when they purchased membership of the Fractional Club at the Times of Sale. But they and the PR said that the Supplier failed to provide them with all of the information they needed to make an informed decision.

The PR also says that the contractual terms allowing the Supplier to terminate membership where Mr B and Miss F failed to pay their annual management fees were unfair.

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

Unfair term(s)

Mr B and Miss F said that the Purchase Agreement(s) contains unfair contract terms (under the CRA) in relation to the Supplier's ability to terminate membership where they failed to pay their annual management charges.

As I explained in my provisional decision, in order to conclude that a term in the Purchase Agreement rendered the credit relationship(s) between Mr B and Miss F and the Lender unfair to them, I'd have to see that the term was unfair under the CRA, and that the term was actually operated against Mr B and Miss F in practice.

In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mr B and Miss F, have flowed from such a term, because those consequences are relevant to an assessment of unfairness under Section 140A. For example, the judge in *Link Financial* v *Wilson* [2014] EWHC 252 (Ch) attached importance to the question of how an unfair term had been operated in practice: see [46].

As a result, I don't think the mere presence of a contractual term that was/is potentially unfair is likely to lead to an unfair credit relationship unless it had been applied in practice.

Having considered everything that has been submitted, it still seems unlikely to me that the contract term(s) cited by Mr B and Miss F have led to any unfairness in the credit relationships between them and the Lender for the purposes of Section 140A of the CCA. I'll explain.

In response to the provisional decision, the PR provided a copy of a 'notice of impending cancellation' the Supplier issued to Miss F dated 30 April 2019.

I note that this was issued after the original complaint was made to the Lender where they complained about the relevant unfair term. And, from what's been provided, the membership was only suspended temporarily at that point and the purpose of the aforementioned notice was only to make Miss F aware of this and that there was an outstanding balance of management fees. And, that the membership might be cancelled if the relevant fees remained unpaid, but that Mr B and Miss F could apply for reinstatement of their membership anytime within the next five years. The PR has not said that any cancellation actually proceeded to happen, and I haven't seen any evidence that is the case either.

So, I still cannot see that the relevant terms in the Purchase Agreement(s) were actually operated in an unfair way against Mr B and Miss F or that this caused an unfairness in the credit relationship which requires a remedy.

The provision of information at the Time of Sale

Mr B and Miss F also said that they weren't given sufficient information about the risks involved in their purchases, in particular, the obligation to pay annual management charges over the term of the membership.

But the PR hasn't explained what the particular risks are that they're referring to here or why these cause the credit relationships to be unfair. And, they haven't provided anything further in relation to this point in response to the provisional decision. Again, in relation to the annual management charges, it seems Mr B and Miss F were likely told about these at the Times of Sale and that these would be payable for the length of the membership term.

I say this because the Information Statement generally provided at the Times of Sale (which

it still seems likely Mr B and Miss F would have received given the other documents that I can see were provided to them) explained that members would be required to contribute to the repair and maintenance of the Allocated Property by way of an annual management charge, payable whether weeks are used or not. And, that these charges will be allocated among members in a fair manner according to the number of points held. The Information Statement also generally explains that these are payable annually in advance and are subject to increase and decrease as determined by the costs of managing the project.

So, while it's possible the Supplier didn't give Mr B and Miss F sufficient information, in good time, regarding the annual management charges in order to satisfy its regulatory responsibilities at the Times of Sale, I haven't seen enough to persuade me that this, alone, rendered Mr B and Miss F's credit relationships with the Lender unfair to them.

Moreover, as I still haven't seen anything else to suggest that there are any other reasons why the credit relationship(s) between the Lender and Mr B and Miss F were unfair to them because of an information failing by the Supplier, I'm not persuaded they were.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I still don't think the credit relationships between the Lender and Mr B and Miss F were 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 B and Miss F's Section 75 claims, and I am not persuaded that the Lender was party to a credit relationship with them under either of the Credit Agreements 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 given, I do not uphold Mr B and Miss F's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Miss F to accept or reject my decision before 13 January 2025.

Fiona Mallinson
Ombudsman