

The complaint

Mr and Mrs E'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 claims under Section 75 of the CCA.

What happened

Mr and Mrs E purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 3 February 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,200 fractional points at a cost of £16,348 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs E 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 E paid for their Fractional Club membership by taking finance of £16,348 from the Lender in both of their names (the 'Credit Agreement').

From the information available, Mr and Mrs E subsequently decided to trade in their Fractional Club membership in order to purchase further fractional points on 7 July 2014, but this purchase was then cancelled shortly afterwards and did not go ahead.

Mr and Mrs E – using a professional representative (the 'PR') – wrote to the Lender on 17 September 2018 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them 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 them 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.

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

Mr and Mrs E say that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

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

Mr and Mrs E 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 and Mrs E.

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

Although not expressed in these exact terms, Mr and Mrs E have raised some more general concerns with their membership which suggest that they think the Supplier breached the Purchase Agreement.

Mr and Mrs E say that they found it difficult to book the holidays they wanted, when they wanted. And, the Supplier was unhelpful when they tried to do so.

They've also said there was a lack of exclusivity, with non-members also being able to book the same resorts for significantly less cost.

As a result of the above, Mr and Mrs E say that they have a breach of contract claim against the Supplier, 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 and Mrs E.

(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 and Mrs E say that the credit relationship between them and the Lender was unfair to them under Section 140A of the CCA. In summary, they include the following:

1. They did not receive a copy of the Information Statement prior to entering into the Purchase Agreement or if they did, they weren't given adequate time to review it.
2. The contractual terms setting out (i) the duration of their Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of their membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
3. They were pressured into purchasing Fractional Club membership by the Supplier.
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.
5. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
6. No adequate explanation was given as to the features of the agreement which may have made the credit unsuitable for them or have a significant adverse effect which they would be unlikely to foresee, especially given the length of the term, their ages, high interest rate and total charge for credit.

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

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

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

I considered the matter and issued a provisional decision on 28 November 2024. In that decision, I said:

“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 and Mrs E 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 E 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 and Mrs E 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 and Mrs E'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 question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.

Mr and Mrs E also said they were told the Fractional membership was an investment when that was not true. But, for reasons I'll go on to explain below, Mr and Mrs E's membership plainly did have an investment element to it.

Lastly, Mr and Mrs E also said the Supplier told them that membership had a guaranteed end date when that was not true. No further evidence has been provided beyond the bare allegation made here, but in any event, I can't see that what the Supplier said here was actually untrue. I've 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. 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 and Mrs E are included.

As there's nothing else on file that persuades there were any false statements of existing fact made to Mr and Mrs E by the Supplier at the Time of Sale, I 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 and Mrs E 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 and Mrs E 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 and Mrs E say that they could not holiday where and when they wanted to – which, on my reading of the complaint, suggests that they consider 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. I'm aware that some of the sales paperwork generally provided by this Supplier at the Time of Sale states that the availability of holidays was/is subject to demand. It also looks like they made use of their fractional points to holiday on around four occasions in 2014. And, they didn't request any bookings for 2015. They asked for, and were offered, different booking options for a holiday in 2016 which they then did not take. 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 and Mrs E also said there was a lack of exclusivity to their membership, but they haven't provided any supporting evidence, or explained what they were promised in this regard at the Time of Sale. But, in any event, I can't see that this meant they didn't receive what they were entitled to under the Purchase Agreement.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mr and Mrs E 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 E 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 and Mrs E also say that the credit relationship between them 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 they have concerns about. It is those concerns that I explore here.

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 and Mrs E 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 sale of Mr and Mrs E'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.

However, an assessment of unfairness under Section 140A isn’t limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in Patel (which was recently approved by the Supreme Court in the case of Smith), that determining whether or not the relationship complained of was unfair had to be made “having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination” – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

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

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

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

I have considered the entirety of the credit relationship between Mr and Mrs E 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 the impact of these on the fairness of the credit relationship between Mr and Mrs E and the Lender.

¹ The Court of Appeal’s decision in *Scotland* was recently followed in *Smith*.

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

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

They include the allegation that the Supplier misled Mr and Mrs E and carried on unfair commercial practices which were prohibited under the CPUT Regulations including the same reasons they gave for their 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 and Mrs E. 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 and Mrs E 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. Again, from the information provided, I am not satisfied that the lending was unaffordable for Mr and Mrs E. If there is any further information on this (or any other points raised in this provisional decision) that Mr and Mrs E wish to provide, I would invite them to do so in response to this provisional decision.

Mr and Mrs E say 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. 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 Fractional Club membership and then cancelled that purchase shortly afterwards within the cooling off period – 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 and Mrs E 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 E's credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above. But 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 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 and Mrs E'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 the PR says that the Supplier did exactly that at the Time of Sale. And, in their witness statement, Mr and Mrs E said:

"Back at the office timeshare was never mentioned, it was all about this being a holiday club. We were told that we would own a small part of a property, a Fraction as he called it. I did not think this was timeshare because we were not buying weeks but points.

We were told this was an investment and it would rise in value. We were told that we could get out at any time and get rid of it...If we kept it then we would get a lump sum in 15 years for our retirement. They key to us saying yes was that we could cancel after a year if we did not like it."

And, this is the reason the Investigator in this case originally upheld the complaint. 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 and Mrs E'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 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 E as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

I'm aware that there were usually disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs E as an investment.

But, 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. So, 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.

Nonetheless, it is not 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 am not persuaded that makes a difference to the outcome in this complaint anyway.

Was the credit relationship between the Lender and Mr and Mrs E rendered unfair?

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 E 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 and Mrs E, 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 the Purchase Agreement and the Credit Agreement is an important consideration.

It's possible that Mr and Mrs P 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, having taken the opportunity to set out why they wish to relinquish their membership and why they're now unhappy with it, they don't mention the investment element. Instead, they've said they are unhappy with it as a holiday product:

We then tried to book holidays in summer and winter 2015. We did not want to go to Spain or Tenerife. When we tried to book 2 or 3 bed apartments we were only offered studios. We could never get anything that was suitable for us.

They were very unhelpful when we have tried to book holidays and we feel that they penalised us for only being two people who want a two-bedroom apartment.

[...]

[Mr E] was more concerned about our liability as he is self-employed and we were struggling to get any availability we wanted. We called [the Supplier] and said we wanted to cancel our Membership. We were told we could cancel but that we would then still be liable for the loan. It was then we realised that this monthly payment was for a loan and not just a payment for the holidays/Timeshare.

[...]

We now wish to relinquish our timeshare because this does not do what we signed up for. We were lied to that we could get out and cancel any time. We told the salesman at the point of sale that we were going to give this a try for a year and if we did not like it we wpi;d [sic] cancel.

[...]

In 19 years [Mr E] will be retired and we never thought that we would still have this Membership. Our holiday needs will be very different from what they are now. In reality [the Supplier] type of holiday is not fit for purpose now as we can never get what we want.

I also note that from what they've said, Mr and Mrs E purchased the membership on the basis that they thought they could try it out (almost like a trial membership) and then cancel it within a relatively short time and have the money they'd paid so far refunded to them. They've said this "prompted us to say yes. We had some holidays planned so we felt we would give it a try". And, they've said "The key to us saying yes was that we could cancel after a year if we did not like it" which doesn't suggest the investment element was material to their purchasing decision as it's difficult to explain why they would be interested in being able to cancel the purchase after a year if they bought it on the basis of the prospect of a profit at the end of the membership term.

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 E'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 E and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

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

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mr and Mrs E when they purchased membership of the Fractional Club at the Time of Sale. But they and the PR say 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 governing the duration of Fractional Club membership and the obligation to pay management charges for that duration 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 UTCCR 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 and Mrs E say that the Purchase Agreement contains unfair contract terms (under the UTCCR) in relation to the duration of membership and the obligation to pay management charges for that duration.

To conclude that a term in the Purchase Agreement rendered the credit relationship between Mr and Mrs E and the Lender unfair to them, I'd have to see that the term was unfair under the UTCCR, and that term was actually operated against Mr and Mrs E in practice.

*In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mr and Mrs E, have flowed from such a term, because those consequences are relevant to an assessment of unfairness under Section 140A. Indeed, the judge in the very case that this aspect of the complaint seems based on (*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 seems unlikely to me that the contract term(s) cited by Mr and Mrs E have led to any unfairness in the credit relationship between her and the Lender for the purposes of Section 140A of the CCA. I say this because I cannot currently see that the relevant terms in the Purchase Agreement were actually operated against Mr and Mrs E, let alone unfairly. The PR hasn't explained why exactly they feel these term(s) cause an unfairness and as I've said, I can't see that these term(s) have been operated in an unfair way against Mr and Mrs E in any event.

The provision of information at the Time of Sale

Mr and Mrs E also say that they weren't given adequate time to review the standard Information Statement before entering into the Purchase Agreement. But, from the information available, they were given this document to review at the same time as all of the other sales documentation.

The letter of complaint also says Mr and Mrs E weren't given a transparent explanation as to the features of the loan agreement which may have made it unsuitable for them or have a significant adverse effect which they would be unlikely to foresee, especially given the length of the term, their ages and high interest and total charge for the credit provided.

But the PR hasn't explained what the particular risks or features are that they're referring to here, or why these would have had an adverse effect on Mr and Mrs E. They also haven't described what they feel should have been explained or what information should have been given that wasn't. They've mentioned the length of the loan, their ages and the interest rate but haven't given any reason as to why these are unfair in this particular case or why these cause the credit relationship to be unfair.

So, while it's possible the Supplier didn't give Mr and Mrs E sufficient information, in good time, on the above elements of their membership, in order to satisfy its regulatory responsibilities at the Time of Sale, I haven't currently seen enough to persuade me that this, alone, rendered Mr and Mrs E's credit relationship with the Lender unfair to them.

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 and Mrs E was unfair to them 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 and Mrs E 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."

So, overall, given the facts and circumstances of this complaint, I did not think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs E's Section 75 claims, and I was 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 could see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

Neither the Lender nor the PR or Mr and Mrs E responded, or provided any further evidence or arguments they wished to be considered.

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.

As neither party has provided any new evidence or arguments, I don't believe there is any reason for me to reach a different conclusion from that which I reached in my provisional decision (outlined above). I do wish to stress that I have considered all the evidence and arguments afresh before reaching that conclusion.

My final decision

For these reasons, I do not uphold Mr and Mrs E's complaint.

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

Fiona Mallinson
Ombudsman