DRN-5210379

The complaint

Mr and Mrs M complain that First Holiday Finance 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

I issued a provisional decision on this case on 15 November 2024, a copy of which is appended to, and forms a part of, this final decision. In my provisional decision I set out the background to, and my provisional findings, on Mr and Mrs M's complaint, so it's not necessary for me to go over these again in detail. However, in brief summary:

- Mr and Mrs M had purchased membership of a timeshare (the 'Fractional Club') from a particular timeshare provider (the 'Supplier') on 12 July 2017, for £11,518. The purchase was financed by a loan from the Lender.

- Mr and Mrs M had complaints during their membership about the fact it could only be used to take holidays every other year, and about the Supplier cancelling one of their bookings in 2020 during the coronavirus pandemic.

- Mr and Mrs M later complained to the Lender in December 2021 or January 2022, about misrepresentations and breaches of contract by the Supplier giving rise to a claim under section 75 of the CCA; about the Lender being a party to an unfair credit relationship with Mr and Mrs M under section 140A of the CCA; and about the credit agreement with the Lender being unenforceable due to it having been arranged by an unregulated broker.

In my provisional decision I said I was not minded to uphold Mr and Mrs M's complaint. I could summarise my reasoning very briefly as follows:

- I did not think the Supplier had misrepresented the Fractional Club membership to Mr and Mrs M by falsely claiming it was an investment, or that it had told Mr and Mrs M it would buy back their membership, or that they would have guaranteed year-round availability of specific accommodation.

- While I acknowledged parts of the Supplier's business had gone into liquidation, I'd not seen evidence to show that this would have meant Mr and Mrs M's membership could not be used in the way intended or that they wouldn't receive a share in the proceeds of the Allocated Property when it was sold at the end of the membership term, so there had been no breach of contract in relation to these things.

- I'd seen no evidence the cost of flights was included in Mr and Mrs M's holiday rights under their membership, and insufficient evidence that they'd needed to borrow from subsequent years' holiday rights in order to holiday in Florida as the Supplier had told them they'd be able to. This meant I was unable to conclude a breach of contract had occurred in relation to those matters either.

- I found the credit broker which had arranged the credit agreement with the Lender had not been unauthorised or unregulated by the appropriate authorities at the time, so Mr and Mrs M's complaint on this point was not well founded.

- I was not convinced that any allegedly unfair terms within the purchase agreement with the Supplier, had rendered the credit relationship between Mr and Mrs M, and the Lender, unfair.

- While I thought it was a possibility that the Supplier had committed a technical breach of Regulation 14(3) of the Timeshare Regulations 2010 by marketing the Fractional Club membership to Mr and Mrs M as an investment, I was unconvinced this had had a material impact on their decision to purchase the membership. As a result, I found the Supplier's possible breach had not rendered the credit relationship between Mr and Mrs M and the Lender unfair. The reasons I gave for being unconvinced of the impact on Mr and Mrs M were as follows:

    - There had been no indication of Mr and Mrs M's motivations for purchasing the Fractional Club membership in the original complaint made by their professional representative ('PR').

    - A much later witness statement, produced by Mr and Mrs M following an unfavourable assessment from our Investigator, did not appear to me to point towards the possibility of their purchase being an investment, as having been very important to them.

    - Mr and Mrs M's witness statement, and their contact with the Supplier after the purchase in July 2017, had been focused mainly on the holiday-related benefits of the Fractional Club membership and their disappointment at the product's (and the Supplier's) performance in this regard.

    - It had appeared Mr and Mrs M had begun the process of exchanging their Fractional Club membership to another type of membership which had no investment aspect (albeit they cancelled this purchase allegedly due to their dissatisfaction with the Supplier cancelling a holiday booking). This suggested investing with the Supplier in the sense of making a financial return, was not important to them.

I asked the parties to the complaint to let me have any further submissions before I made my decision final. The Lender said it accepted the provisional decision. PR, on Mr and Mrs M's behalf, disagreed with the provisional decision. PR said that she had not shown Mr and Mrs M the provisional decision, but had obtained their comments regarding the cancelled 2020 purchase. I could summarise the points made by PR as follows:

- Information from the Supplier, received via the Lender, could not be relied upon as being complete and accurate. For example:

    - PR believed the Supplier (and/or the Lender) had selectively provided screenshots of notes on Mr and Mr M's account to support their own narrative and interpretation of what had happened at the Time of Sale and subsequently.

    - The Supplier hadn't provided transcripts or videos of the cancelled 2020 sale, which had taken place over a video call, or related phone calls.

- The testimony of Mr and Mrs M should be preferred over that of the Supplier, which

had sold Fractional Club memberships as investments to tens of thousands of consumers, committing criminal offences in doing so.

- It wasn't surprising that Mr and Mrs M's contact with the Supplier after the Time of Sale had focused on holiday-related questions and issues, and that was because the investment aspect of the product would not be relevant until such time as the investment was due to crystallise, years later. This didn't necessarily mean that the product being an investment was unimportant to them.

- It had been wrong of me to conclude that the investment element needed to be the primary reason for Mr and Mrs M to make their purchase, for me to conclude the credit relationship between them and the Lender had been rendered unfair. It was enough that Mr and Mrs M had been influenced by the prospect of the Fractional Club membership being an investment.

- Mr and Mrs M's statements showed that investment did play an important part in the sales process which had convinced them to go ahead with the purchase. It had been material to their decision-making process.

PR also supplied a second witness statement from Mr and Mrs M covering only the cancelled 2020 purchase.

In this statement Mr and Mrs M explained that they had complained to the Supplier in 2020 because they had been left without accommodation during the coronavirus pandemic due to nobody informing them the Supplier was not operating. They noted that they'd made complaints previously due to issues with getting the holidays they wanted.

Mr and Mrs M went on to say they were asked to attend a video meeting with the Supplier in September 2020. The connection and the sound quality had been poor, but it transpired that the Supplier was not offering any discussion of their complaint or compensation of their wasted costs. Instead, the Supplier said they had experienced problems because they were not full members. The Supplier offered to upgrade their membership to what was described as a full membership, while preserving their investment, for what Mr and Mrs M believed was £230. Mr and Mrs M said they initially agreed to sign up, but after calling back a few days later to clarify some points, realised it was not what they had been led to believe and they decided to withdraw from the agreement.

The case has now been returned to me to review once more.

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.

Having done so, I've arrived at the same conclusions I did in my provisional decision, for broadly the same reasons. However, I will address the submissions made by PR on behalf of Mr and Mrs M.

My provisional findings regarding most parts of Mr and Mrs M's complaint have not been challenged by either party. This includes my findings that the Supplier did not misrepresent the Fractional Club membership to Mr and Mrs M, that it had not been in breach of contract, and that the Credit Agreement had not been arranged by an unregulated or unauthorised broker. Having reviewed the evidence again, I see no reason to depart from my findings on the unchallenged points and so they remain as they were in my appended provisional decision.

PR has focused on the question of whether or not the Supplier breached Regulation 14(3) of the Timeshare Regulations by selling or marketing Fractional Club membership to them as an investment and, if it did, whether this played a material part in Mr and Mrs M's decision to proceed with their purchase of the Fractional Club membership.

I'll say first that I agree with PR that investment does not need to be the only, or the most important, reason for Mr and Mrs M having purchased the Fractional Club membership, for the credit relationship between them and the Lender to potentially be rendered unfair by any breach by the Supplier of Regulation 14(3). I said in my provisional decision that it needed to be material to their decision which, in practical terms, means I'd need to be satisfied they'd not have proceeded with the purchase had the Supplier not marketed the product to them as an investment.

It's apparent, following PR's recent submissions, that Mr and Mrs M and the Supplier have different accounts of what happened in 2020 when Mr and Mrs M almost purchased a different product from the Supplier. The Supplier says they didn't go ahead with this purchase due to their dissatisfaction with how their complaint regarding losing their summer 2020 booking had been dealt with. Mr and Mrs M say they didn't go ahead because they found it was a lot more expensive than they'd initially been led to believe. They also say the Supplier had presented this change of product as a solution to the problems they were having with getting the holidays they wanted, but also that it would preserve and increase their investment.

PR says, in essence, that the Supplier can't be trusted. But, whichever account of events is correct in relation to the interactions between the Supplier and Mr and Mrs M in 2020, this was not the only reason why I was unconvinced that the prospect of the 2017 purchase being an investment had a material impact on Mr and Mrs M's purchasing decision. There was no indication of what had motivated Mr and Mrs M's purchase in PR's original complaint submissions, and I considered their much later witness statement did not give the impression that the prospect of the membership having been a profitable investment was important to them, albeit they did say the Supplier had referred to this as a feature of the product. The witness statement (and contact with the Supplier) is, in my view, very much focused on the problems Mr and Mrs M had with the holiday-related aspects of the product.

I take PR's point that it's only natural Mr and Mrs M would have focused on holiday-related issues in correspondence with the Supplier, due to the investment-related benefits only coming due later on. However, in the Letter of Complaint in late 2021 or early 2022, one of the points made by PR on Mr and Mrs M's behalf was that the Supplier had told them the Fractional Club membership was an investment, when this wasn't true. The December 2023 witness statement does not refer to any dissatisfaction about having been told the product was an investment. I think, had the prospect of the product being an investment been a material consideration in Mr and Mrs M's decision to go ahead with their 2017 purchase, and they'd later (as the Letter of Complaint states) discovered this wasn't the case, this would have come across in their later witness statement. But it has very little prominence, and I remain unconvinced that – if the Supplier did in fact breach Regulation 14(3) when selling the Fractional Club membership to Mr and Mrs M – that they'd have decided *not* to go ahead and purchase the product.

It follows that my findings remain the same on this point as in my provisional decision – that the credit relationship between Mr and Mrs M and the Lender was not rendered unfair by any possible breach by the Supplier of the relevant part of the Timeshare Regulations.

My final decision

For the reasons explained above, and in my appended provisional decision, I do not uphold

Mr and Mrs M's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M and Mrs M to accept or reject my decision before 10 January 2025.

Will Culley
Ombudsman

COPY OF PROVISIONAL DECISION

I've considered the relevant information about this complaint.

Having done so, I've arrived at the same conclusions as our Investigator, but I've explained my reasons in more detail. I've issued this provisional decision to allow all parties a chance to make further submissions.

The deadline for both parties to provide any further comments or evidence for me to consider is 29 November 2024. Unless the information changes my mind, my final decision is likely to be along the following lines.

The complaint

Mr and Mrs M complaint is, in essence, that First Holiday Finance 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.

Background to the complaint

Mr and Mrs M purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 12 July 2017 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,500 fractional points at a cost of £11,518 (the 'Purchase Agreement'). These points were 'bi-annual', meaning they were replenished every other year for Mr and Mrs M to exchange for holiday accommodation with the Supplier.

Fractional Club membership was asset backed – which meant 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 making a deposit payment of £500 and taking finance of £11,018 from the Lender joint names (the 'Credit Agreement'). Under the terms of the Credit Agreement, Mr and Mrs M were expected to make 144 monthly payments of £157.02.

Mr and Mrs M appear to have expressed some concerns directly with the Supplier in 2018 in relation to the bi-annual nature of their membership and how this worked in practice. It's unclear if or how these concerns were resolved. I understand Mr and Mrs M also complained to the Supplier in 2020 about a booking that was cancelled due to the coronavirus pandemic.

Mr and Mrs M – using a professional representative (the 'PR') – wrote to the Lender on either 30 December 2021 or 11 January 2022 (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.
4. The Credit Agreement being unenforceable because it was not arranged by a credit broker regulated by the Financial Conduct Authority (the 'FCA') to carry out such an activity.

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

Mr and Mrs M says 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 was an "investment" which would appreciate in value and generate a considerable return, when that was not true.
2. told them that they could sell the membership back to the Supplier or sell it at a profit, when this was not true.
3. told them they could use their apartment at any time of the year, when this wasn't true either.

Mr and Mrs M says 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 M.

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

Mr and Mrs M says that the Supplier breached the Purchase Agreement because it went into liquidation in December 2020 and will not have to pay for its wrongdoing.

As a result of the above, Mr and Mrs M says 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 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 and Mrs M says 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. Fractional Club membership was marketed and sold to them as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. The contractual terms outlining circumstances in which Mr and Mrs M could forfeit their membership to the Supplier, were unfair contract terms under the Consumer Rights Act 2015 ('CRA').

The Lender dealt with Mr and Mrs M's concerns as a complaint and issued its final response letter in February 2022, rejecting it on every ground.

Mr and Mrs M then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits. Our Investigator noted that there had been no direct testimony from Mr and Mrs M for her to consider.

Mr and Mrs M disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. In the meantime, PR produced a witness statement drafted by Mrs M on behalf of herself and Mr M, dated 20 December 2023, which made the following key points:

- They had been introduced to the Supplier when they won a free holiday to the Costa de Sol.

- They were expected to attend a presentation as part of the holiday, which they did. They were shown beautiful apartments and were asked lots of questions about how much they spent on holidays each year. They were asked where they wanted to holiday and they told the Supplier they wanted to holiday in Florida.

- The Supplier's salesperson had offered them the opportunity of owning part of a property. They could "afford two or three holidays" but it would also be an investment which, once paid in full, they could reinvest or sell and essentially get their money back.

- They had been disappointed with the membership because although they did get to holiday in Florida with the Supplier, the flights were more expensive than expected and they'd needed to use points from future years to fund the holiday, and not "bonus" points offered by the Supplier as part of the deal to enter the Purchase Agreement.

- Everything had seemed so good, so they decided to go ahead and make the purchase.

PR also said it was sure that the Supplier had marketed the Fractional Club membership as an investment, and whether this was Mr and Mrs M's primary motivation for the purchase, or just a supporting one, didn't matter. PR also expressed concern that a lack of direct testimony was being used to deny Mr and Mrs M's complaint.

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R 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 refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:

- The CCA (including Section 75 and Sections 140A-140C).
- The law on misrepresentation.
- The Timeshare Regulations.
- The CRA.
- 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 provisionally 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, 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 and Mrs M could make against the Supplier.

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

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 M were told the membership was an investment when that was not true. I think it's clear there was an investment element to the Fractional Club membership, in that it involved Mr and Mrs M acquiring a share in the proceeds of the future sale of a specific apartment. While, like any investment, this could result in Mr and Mrs M ending up with more or less than they put into it, I don't think it was a misrepresentation for the Supplier to have described it as an investment. I'm also unconvinced that, if the Supplier gave an *opinion* on the future value of the investment, that this would have amounted to an actionable misrepresentation. In order for it to be so, it would need to be shown that this was not in fact the Supplier's opinion, which I think in practice would be difficult to prove.

To have *marketed* the product as an investment would have been prohibited however, for reasons I'll explain later in this decision.

As for the rest of the Supplier's alleged pre-contractual misrepresentations, while I recognise that Mr and Mrs M 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 a document they signed and at the Time of Sale, they had initialled next to a statement that said that the Supplier would not buy back the membership. In light of this, I'm unable to agree that the Supplier falsely represented to them that they could sell the membership back to it.

- I think it's clear enough from the paperwork Mr and Mrs M signed at the Time of Sale that they were not buying a right to stay in a specific apartment.

- The same paperwork signed by Mr and Mrs M stated that the availability of holidays was subject to demand, so it seems unlikely to me that Mr and Mrs M entered the Purchase Agreement on the basis of representations that they'd be guaranteed year-round availability of specific accommodation.

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

For these reasons, therefore, I do not think the Lender is liable to pay Mr and Mrs M any compensation for the alleged 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 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 and Mrs M say that although they were able to holiday with the Supplier in Florida as they'd explained they wanted to at the Time of Sale, the flights were more expensive than they expected and they had to use a future year's points allocation rather than bonus points they had been given to use for this purpose.

Mr and Mrs M's membership entitled them to an allocation of points redeemable for holiday accommodation. It didn't entitle them, as far as I can see, to flights. The cost of flights would be determined by the market and not something the Supplier would have control of, so I fail to see how this amounts to a breach of contract by the Supplier. The Supplier doesn't appear to deny that it warranted to Mr and Mrs M that they'd be able to holiday in Florida using a combination of their first points allocation and bonus points granted at the Time of Sale. It does however deny that Mr and Mrs M had to use a *future* year's points allocation to holiday in Florida, insisting that the bonus points were in fact used to go on this holiday.

I've seen no other evidence pointing either way on this issue, and I feel I'm currently unable to say that there's sufficient evidence the circumstances surrounding Mr and Mrs M's Florida booking represented a breach by the Supplier of the Purchase Agreement. Mr and Mrs M are of course free to provide further submissions on this point.

Mr and Mrs M also say that the Supplier breached the Purchase Agreement because it went into liquidation. I can see that certain parts of the Supplier's business became insolvent, and I can understand why the PR is alleging that there was a breach of the Purchase Agreement as a result. However, neither Mr and Mrs M nor the PR have said, suggested or provided evidence to demonstrate that this means they are no longer:

1. members of the Fractional Club;
2. able to use their Fractional Club membership to holiday in the same way they could initially; and
3. entitled to a share in the net sales proceeds of the Allocated Property when their Fractional Club membership ends.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mr and Mrs M any compensation for a breach of contract by the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

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

I have already explained why I am not persuaded that the contract entered into by Mr and Mrs M was misrepresented (or breached) by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Mr and Mrs M also says 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 the Mr and Mrs M 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 M’s membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were “any other thing done (or not done) by, or on behalf of, the creditor” under s.140(1)(c) CCA.

Antecedent negotiations under Section 56 cover both the acts and omissions of the Supplier, as Lord Sumption made clear in *Plevin*, at paragraph 31:

“[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are “deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity”. The result is that the debtor’s statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor’s agent.’ […] *Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor’s responsibility would be engaged only by its own acts or omissions or those of its agents.”*

And this was recognised by Mrs Justice Collins Rice in *Shawbrook & BPF v FOS* at paragraph 135:

“*By virtue of the deemed agency provision of s.56, therefore, acts or omissions ‘by or on behalf of’ the bank within s.140A(1)(c) may include acts or omissions of the timeshare company in ‘antecedent negotiations’ with the consumer*”.

In the case of *Scotland & Reast*, the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that “*negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law”* before going on to say the following in paragraph 74:

“[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose

of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[1]

So, the Supplier is deemed to be Lender's statutory agent for the purpose of the pre-contractual negotiations.

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 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 the impact of these on the fairness of the credit relationship between Mr and Mrs M and the Lender.

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

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

These include the allegation that Fractional Club membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

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

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 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.

As I've already explained earlier in this decision, Mr and Mrs M'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 M 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.

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 and Mrs M, 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 which Mr and Mrs M signed, that state that the Supplier made no representations as to the future price or value of the Fractional Club membership.

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. Indeed, that is what PR said happened, and Mrs M in her December 2023 witness statement said the same. So I accept that it's *possible* that Fractional Club membership was marketed and sold to Mr and Mrs M 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 have taken all of that into account. But even if I were to conclude that, on this occasion, membership was likely to have been sold as an investment in contravention of the Timeshare Regulations, I am not currently persuaded that would make a difference to the outcome in this complaint anyway.

Was the credit relationship between the Lender and Mr and Mrs M 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 M 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 M, 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.

In other words, I would need to be able to conclude that the Supplier's breach played a *material* part in Mr and Mrs M's purchasing decision and that they'd not have entered the Purchase Agreement, if the breach hadn't occurred.

Prior to our Investigator issuing her assessment, we had no sense from Mr and Mrs M of what had motivated their decision to purchase the Fractional Club membership. PR's Letter of Complaint was unfortunately somewhat generic in nature, and I've not found it to be of much assistance in that regard. I've now carefully read the witness statement which was supplied by Mrs M, via PR, after the Investigator's assessment. In this, Mrs M does refer to the investment potential of the product, but I don't get the impression from the statement that this played an important part in her and Mr M's decision to purchase the Fractional Club membership. The witness statement is more focused, in my view, on disappointment at not getting the kind of holiday-related benefits Mr and Mrs M had expected.

This appears to be supported by notes taken by the Supplier over the course of Mr and Mrs M's membership. It appears, for example, that when asked to submit any questions they had about the membership, all of Mr and Mrs M's questions were related to holidays. It also appears Mr and Mrs M made two complaints to the Supplier in 2018 and 2020 – both relating to the holiday benefits of the product.

The Supplier also says that Mr and Mrs M entered negotiations in 2020 to change their Fractional Club membership to a type of membership which had no investment aspect at all and that, while they did not ultimately go ahead, this was because they were dissatisfied with how they had responded to their 2020 complaint. The notes I've seen appear to be consistent with this narrative. It would appear unusual, if the investment component of the Fractional Club membership was important to Mr and Mrs M, that they were to later enter negotiations to trade it in for a membership without an investment component. This suggests to me that Mr and Mrs M were primarily motivated by the prospect of holiday-related benefits and not any investment potential of the Fractional Club membership.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Mrs M's decision to purchase Fractional Club membership at the Time of Sale was materially motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr and Mrs M and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

The provision of information by the Supplier at the Time of Sale – and the potential inclusion of unfair contract terms

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 M when they purchased membership of the Fractional Club at the Time of Sale. But they and PR say that the contractual terms governing the consequences of not meeting the ongoing costs of Fractional Membership (such as management charges) were unfair contract terms under the CRA.

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.

I've read the relevant terms relating to the Fractional Club membership, the management charges and other costs, and the potential consequences for Mr and Mrs M of not paying these. I've not analysed the position in detail regarding whether any of these terms were *unfair* under the CRA and I make no formal findings on this, but I think it's possible that terms which could lead to Mr and Mrs M forfeiting their membership and Fractional Club rights for non-payment of management fees had the *potential* to operate in an unfair way.

But given the facts and circumstances of this complaint, I am not persuaded that the Supplier's alleged breaches of and the CRA are likely to have prejudiced Mr and Mrs M's purchasing decision at the Time of Sale and rendered their credit relationship with the Lender unfair to them for the purposes of section 140A of the CCA. I say this because I understand the Supplier has not invoked the relevant terms regarding the forfeiture of the membership in Mr and Mrs M's case, and that it does not, in practice, use these terms in this way. So I don't think the presence of these terms alone in Mr and Mrs M's agreement with the Supplier means the credit relationship between them and the Lender was 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 M 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 M was unfair to them for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

The complaint about the Credit Agreement being unenforceable because it was arranged by a credit broker that was not regulated by the FCA to carry out that activity

Mr and Mrs M says that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that the Lender wasn't and isn't permitted to enforce the Credit Agreement as a result.

However, having looked at the Financial Ombudsman Service's internal records and the FCA register, I can see that the company named on the Credit Agreement as the credit intermediary was at the Time of Sale, authorised by the FCA. And in the absence of any evidence to suggest that its permissions did not cover credit broking, I am not persuaded that the Credit Agreement was arranged by an unauthorised credit broker.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs M Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

If there is any further information on this complaint that Mr and Mrs M wish to provide, I would invite them to do so in response to this provisional decision.

My provisional decision

For the reasons explained above, I am not minded to uphold Mr and Mrs M's complaint. The deadline for responses to this provisional decision is 29 November 2024.

Will Culley
Ombudsman