Provisional decision	
Complaint by:	[redacted]
Referred to as:	The estate of Mr M
Complaint about:	Shawbrook Bank Limited
Complaint reference:	18999796[redacted]
Date of decision:	9 October 2024

I've considered the relevant information about this complaint.

Based on what I have seen so far, I intend to reject the complaint brought on behalf of the estate of Mr M. Having considered everything, I've decided to issue a provisional decision to give both parties the opportunity to provide any further comments before I issue a final decision.

I'll look at any more comments and evidence that I get by 23 October 2024. But unless the information changes my mind, my final decision is likely to be along the following lines.

The complaint

The estate of Mr M's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by being party to an unfair credit relationship with the late Mr M under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA').

What happened

The late Mr M purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 11 January 2013 (the 'Time of Sale 1'). He entered into an agreement with the Supplier to trade in 8,000 of his existing 'European Collection' points for 8,000 fractional points at a cost of £4,400 (the 'Purchase Agreement 1'). A conversion price for his European Collection points of £1 per point was given.

Fractional Club membership was asset backed – which meant it gave the late Mr M more than just holiday rights. It also included a share in the net sale proceeds of a property named on his Purchase Agreement (the 'Allocated Property') after his membership term ends.

The late Mr M paid for his Fractional Club membership by taking finance of £4,400 from the Lender in his sole name (the 'Credit Agreement 1').

The late Mr M subsequently made another purchase of Fractional Club membership from the Supplier on 16 September 2013 (the 'Time of Sale 2'). He entered into an agreement with the Supplier to again trade in 6,000 of his existing 'European Collection' points for 6,000 fractional points at a cost of £3,564 (the 'Purchase Agreement 2'). Again, a conversion price for his European Collection points of £1 per point was given.

The late Mr M paid for this Fractional Club membership by taking finance of £7,946.42 from the Lender in his sole name (the 'Credit agreement 2'). This loan also consolidated his previous one.

The late Mr M – using a professional representative (the 'PR') – wrote to the Lender on 17 November 2016 (the 'Letter of Complaint') to complain about:

- 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.

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

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

1. He was pressured into purchasing Fractional Club membership by the Supplier.
2. The decision(s) to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with the late Mr M's concerns as a complaint and issued its final response letter on 19 January 2017, rejecting it on every ground.

The late Mr M's PR then referred the complaint to the Financial Ombudsman Service on his behalf. At this stage, they added a new point to the complaint. Namely, that the Lender had paid the Supplier an undisclosed commission.

On 22 March 2022, the late Mr M's PR informed our Service that Mr M had passed away and therefore the complaint is now being brought by the late Mr M's estate.

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

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

At this stage, the PR added a new point of complaint. They said they felt it was clear that the Fractional Club membership(s) were sold to the late Mr M as an investment and this was fundamental to his purchase(s). They referred to the judgment in a Judicial Review of one of the lead decisions previously issued by this Service (*R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd; 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*')) and said they felt that the complaint should therefore be upheld as a result.

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 Sections 140A-140C).
- The Timeshare Regulations.
- The Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').

- The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations').
- Case law on Section 140A of the CCA – including, in particular:
    - The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') (which remains the leading case in this area).
    - *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*').
- Case law on secret and 'half-secret' commission – including, in particular:
    - *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299 ('*Hurstanger*')
    - *McWilliam v Norton Finance (UK) Ltd (in liquidation*) [2015] EWCA Civ 186 ('McWilliam')
    - *Wood v Commercial First Business Ltd & ors* and *Business Mortgage Finance 4 plc v Pengelly* [2021] EWCA Civ 471 ('*Wood and Pengelly*')

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

The estate of Mr M says that the credit relationship(s) between him and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Times of Sale that the late Mr M had 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(s) between the late Mr M and the Lender was unfair. As I have said, there were two purchases which are the subject of this complaint, each with an associated credit agreement, so each must and will be considered as individual events. However, the evidence provided by the late Mr M and the PR is identical for each, so I see no purpose in this provisional decision to repeat my findings twice. So, while treating them as individual events, I will set out my findings as one.

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 the late Mr M's membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

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

"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.' […] *Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are*

there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."

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

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

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

"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[1]

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

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

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

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."

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

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 relationships between the late Mr M and the Lender along with all of the circumstances of the complaint and I do not think either of the credit relationship between them were likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. The Supplier's sales and marketing practices at the Times of Sale; and
2. The provision of information by the Supplier at the Times of Sale, including the contractual documentation and disclaimers made by the Supplier;
3. Evidence provided by both parties on what was likely to have been said and/or done at the Times of Sale;
4. The inherent probabilities of each of the sales given its circumstances.

I have then considered the impact of the above on the fairness of the credit relationships between the late Mr M and the Lender.

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

The estate of Mr M'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.

The PR says that the right checks weren't carried out before the Lender lent to the late Mr M. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to the late Mr M was actually unaffordable before also concluding that he lost out as a result and then consider whether either of the credit relationships with the Lender were unfair to him for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for the late Mr M. If there is any further information on this (or any other points raised in this provisional decision) that the estate of Mr M wishes to provide, I would invite them to do so in response to this provisional decision.

The estate of Mr M says that he was pressured by the Supplier into purchasing Fractional Club membership at the Times of Sale. I acknowledge that he may have felt weary after a sales process that went on for a long time. But the late Mr M said little about what was said and/or done by the Supplier during his sales presentation(s) that made him feel as if he had no choice but to purchase Fractional Club membership when he simply did not want to. Indeed, it's not something that was specifically mentioned in his witness statement at all. He was also given a 14-day cooling off period with both sales and no credible explanation has been provided for why he did not cancel his membership during that time. Moreover, he did go on to make his second purchase of Fractional Club membership – which I find difficult to understand if the reason he went ahead with the first purchase was because he was pressured into it. And with all of that being the case, there is insufficient evidence to demonstrate that the late Mr M made the decision to purchase Fractional Club membership because his ability to exercise that choice was significantly impaired by pressure from the Supplier.

The PR also argues that the Supplier breached its fiduciary duty to the estate of Mr M by receiving commission from the Lender that it did not disclose. And that the Supplier failed to follow the guidance in relation to disclosure of commission in the Office of Fair Trading's

guidance for credit brokers and intermediaries (OFT1388) (the 'OFT CBG').[2] And both of these things are additional reasons why the relationships between the Lender and the late Mr M were unfair.

The PR cites *Hurstanger* and *McWilliam* – which I've considered. But based on what I've seen so far in this complaint, I am not persuaded that the Supplier, when acting as a credit broker, was under a duty to provide information, advice or a recommendation on an impartial or disinterested basis (as was found in *Wood & Pengelly*, a case relating to secret commission). Nor am I persuaded that the Supplier owed the estate of Mr M a fiduciary duty as the Court of Appeal held a broker did in *Hurstanger* – a case which involved the payment of 'half-secret' commission. With that being the case, the remedies that might be available at law in relation to the payment of secret or half-secret commission are not, in my view, available to them on this occasion.

It's possible that that the Supplier, when acting as a credit broker, failed to follow the guidance in relation to payments of commission in the OFT CBG. But even if the Supplier did, I am not persuaded that makes a difference to the outcome in this complaint anyway. I say this because the amounts of commission paid by the Lender to suppliers (like the Supplier) was, on average, 0-4.6%[3] of the amount borrowed and unlikely to be much more than 10%. In light of those likely levels of commission, I am not persuaded that the late Mr M would have acted differently at the Times of Sale even if the Supplier had disclosed the existence of commission in keeping with the OFT CBG.

And on that basis, I am not persuaded that any non-disclosure and payment of commission and, in turn, any breaches of the credit broker's regulatory obligations, are likely to have rendered the late Mr M's credit relationships with the Lender unfair for the purposes of Section 140A given the circumstances of this complaint.

I'm not persuaded, therefore, that either of the late Mr M's credit relationships with the Lender were rendered unfair to him under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why the estate of Mr M says his credit relationships with the Lender were unfair to him. And that's the suggestion that Fractional Club membership was marketed and sold to him as an investment in breach of prohibition against selling timeshares in that way.

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

The Lender does not dispute, and I am satisfied, that the late Mr M's Fractional Club memberships met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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[2] The estate of Mr M's complaints about the Lender's alleged payment of undisclosed commission to the Supplier and its breach of fiduciary duty and failure to follow the OFT CBG fall directly under the Financial Ombudsman Service's jurisdiction. So, they're complaints that are both part of and separate to the complaint about an unfair credit relationship under Section 140A of the CCA. *But as I don't think either of those complaints should succeed for the same reasons why I don't think the credit relationships between the Lender and the late Mr M were rendered unfair because of commission that was paid but went undisclosed, it isn't necessary to repeat them.*

[3] The Lender provided the Financial Ombudsman Service with information on its commission rates – which I accept in confidence under DISP 3.5.9 [R]. But, in keeping with that rule, one of the Lender's Managing Directors (who is a FCA Approved Person) confirmed, in summary, the information I have included in the paragraph above.

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 Times 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 Times of Sale. So, that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In *Shawbrook & BPF v FOS*, the parties agreed that, by reference to the decided authorities, "an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit" at [56]. I will use the same definition.

The late Mr M's share in the Allocated Property clearly, in my view, constituted an investment as it offered him the prospect of a financial return – whether or not, like all investments, that was more than what he 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 the late Mr 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 him as an investment, i.e. told him or led him to believe that Fractional Club membership offered him 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 the late Mr M, the financial value of his share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to the late Mr M as an investment.

With that said, while this allegation was not made by either the late Mr M nor his PR when he first complained about a credit relationship with the Lender that was unfair to him, I accept that it's *possible* that Fractional Club membership was marketed and sold to him 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 also acknowledge that the two purchases in question here were on a 'like-for-like' basis i.e. the late Mr M did not acquire any additional points and therefore additional holiday rights as part of either transaction. So, this suggests that acquiring more holiday rights was not central to his purchases and there was some other reason he bought them.

So, I have taken all of that into account. However, I've also considered the evidence that's been provided by the late Mr M and the PR. As mentioned above, the PR did not make any such allegation in the original Letter of Complaint.

Exchanging points with the Supplier for fractional points gave members two main benefits – a shorter membership term and an interest in the sale proceeds of the Allocated Property.[4] The witness statement is signed by the late Mr M but not dated, however the PR say it was drafted before the Letter of Complaint. The following comments were made insofar as they relate to the allegation of the membership(s) being sold as an investment:

> "*I confirm that we entered the fractional membership as were advised a shorter withdrawal period when the property was sold & my fractional points were repaid to me as a percentage of profit from the property sale.*
>
> *I have not used the product for holidays as I became disillusioned with [the Supplier] and decided to seek a reduction in my points hoping to dispose of the European Collection points and retain my fractional points given the financial return.*"

I've taken these comments into account, but beyond the bare allegation, little is said here about what the late Mr M was told, by whom and in what context to add colour and context to the allegation made. The comments also don't explain how exactly each of the memberships were sold as an investment at each of the Times of Sale being complained about. The brief recollections which refer to being told about the shorter term associated with Fractional Club membership and receiving a percentage of any profit from the sale of the Allocated Property also appear to simply relate to a factual description of how the product worked, rather than Mr M saying that he was led to believe he would make a profit on what he paid for the memberships on the sale of the properties. I also note that in his own words, the late Mr M identifies the shorter membership term associated with Fractional Club membership being a feature and benefit, which indicates that this may have been a reason for him to purchase it. Something that fits with his later dealing with the Supplier.

I note that the late Mr M also mentioned in his witness statement that he previously sought a reduction of his points, and the PR has provided copies of the emails in relation to this between the late Mr M and the Supplier. The late Mr M originally got in touch in August 2014 to enquire about this. He didn't differentiate between his different types of membership in this email, only that he wanted to withdraw and if possible, reduce his points so that the annual management fees would be more manageable as he was struggling to afford these at that time. He said [my emphasis] "*to reduce my points holding to a more manageable level so that I am more able to comfortably pay the management fees and still be able to enjoy relaxation*".

The Supplier explained to the late Mr M that they could consider surrender and/or a reduction of points in relation to his European Collection membership if relevant evidence was provided of the relevant grounds for doing so. But they explained that this wasn't possible with Fractional Club membership due to the shorter membership term already associated with it. And, that if he wanted to surrender those membership(s), he would need to sell them on the open market.

The late Mr M replied and confirmed that he wanted to reduce his European Collection points (at that time 40,000) to 10,000 points. And, to keep his fractional points to his existing

[4] There was also a rental scheme through which members could 'rent out' their holiday entitlement, however I can't see there is any allegation or evidence this was something the late Mr M was interested in.

14,000, making "*24,000 points total holding. I would rather retain membership if possible as I still enjoy my vacations with [the Supplier]*" (my emphasis).

I acknowledge that the late Mr M said in his witness statement (which was put together later) that he wished to keep his fractional points "*given the financial return*". But the contemporaneous evidence from the time i.e. the emails I've referred to above, doesn't support this. I say this because in these emails he didn't mention anything about the investment element of the Fractional Club membership or explain to the Supplier this is the reason he wanted to keep it. Originally, it seems he wanted to see if it was possible to surrender both his European Collection and Fractional Club memberships and/or reduce points in both which is difficult to explain if he thought his fractional points were an investment which he was going to get a return or profit from. It seems that the late Mr M only kept them after the Supplier's explanation that surrender was not possible with the fractional points, rather than because he saw them as an investment. Again, from what's been said in these emails, the late Mr M didn't differentiate between the two types of memberships he held in this sense, referring to European Collection and Fractional Club together as a "*total holding*". Further, it's clear from what he said (highlighted above) that the holiday element of the membership was important to him and was ultimately the reason he still wanted to keep some of the points.

Further, if Fractional Club membership had been marketed and sold as an investment by the Supplier at the Times of Sale, it is difficult to understand why the PR made no mention of it in the Letter of Complaint.[5] And with that being the case, in the absence of persuasive evidence to suggest otherwise, I find that it is unlikely that the Supplier led him to believe that membership offered him the prospect of a financial gain (i.e., a profit), given the evidence provided.

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

Were the credit relationship(s) between the Lender and the late Mr 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. […]"

[5] Our Investigator also asked the PR to provide a copy of the call recording of the late Mr M's original conversation with them where he explained his complaint, but the PR said it would not be practical to obtain this recording. So, I am not able to say on what basis the late Mr M was unhappy with Fractional Club membership, beyond what was set out in the Letter of Complaint.

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 the late Mr M and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) which, having taken place during its antecedent negotiations with the late Mr 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) lead him to enter into each of the Purchase Agreements and the associated Credit Agreements is an important consideration.

Looking at the Letter of Complaint, as I've already outlined, it didn't include the allegation of the memberships being sold as an investment. As noted above, in the witness statement provided, the late Mr M also identified a shorter membership term being a benefit. And, the late Mr M said in discussions with the Supplier that he wanted to "*still be able to enjoy relaxation*" and "*I would rather retain membership if possible as I still enjoy my vacations with [the Supplier]*".

So, again, I can't say the evidence suggests that any investment element in the Fractional Club membership was important to him choosing to take them out or was factored into his thinking a year or so later when he tried to give them up. Rather, the late Mr M identified a separate reason why Fractional Club membership were attractive to him – the shorter 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 the late Mr M's decision to purchase Fractional Club membership at the Times of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests he would have pressed ahead with his purchases whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think either of the credit relationships between the late Mr M and the Lender was unfair to him even if the Supplier had breached Regulation 14(3).

Conclusion

In conclusion, given the facts and circumstances of this complaint, I am not persuaded that the Lender was party to a credit relationship with him under the Credit Agreements that was unfair to him 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 the estate of Mr M.

If there is any further information on this complaint that the estate of Mr M wishes to provide, I would invite them to do so in response to this provisional decision.

My provisional decision

For the reasons given, I intend to reject this complaint.

Fiona Mallinson
Ombudsman