DRN-4339597

The complaint

Mr M's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

What happened

Mr M was an existing member of a timeshare arrangement, having bought 10,000 European Collection ('EC') points from a timeshare provider (the 'Supplier') on 21 May 2014 for £8,500. Mr M paid for this purchase by taking finance of £8,500 (the 'Initial Agreement') from the Lender in his sole name. This Initial Agreement required Mr M to make 120 monthly payments of at least £125.44 (he could make additional payments to settle the agreement early if he wished). This purchase of EC points and the Initial Agreement are not the subject of this complaint and are set out here for background information only.

Whilst retaining his EC points, Mr M purchased a further membership of a timeshare (the 'Fractional Club') from the Supplier on 18 March 2015 (the 'Time of Sale'). He entered into an agreement with the Supplier to buy 5,500 fractional points at a cost of £6,775 (the 'Purchase Agreement').

Fractional Club membership was different - it was asset backed – which meant it gave 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.

Mr M paid for his Fractional Club membership by taking finance of £15,356 from the Lender in his sole name (the 'Credit Agreement'). This finance consolidated the Initial Agreement loan that the Lender had given Mr M for his purchase of the EC points. The Credit Agreement had a duration of 120 months, and if not repaid earlier, required Mr M to make 120 monthly payments of £222.24.

Mr M – using a professional representative (the 'PR') – wrote to the Lender on 14 May 2018 (the 'Letter of Complaint'). The letter set out Mr M's complaints about the entirety of his relationship with the Supplier, but specifically in relation to his purchase of the Fractional Club and the associated Credit Agreement, he complained to the Lender about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. 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.
3. The decision to lend being irresponsible because the Lender did not carry out the right creditworthiness assessment.

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

Mr M says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

- Told him that buying 5,500 Fractional Club points would allow him to access better quality accommodation – this was not true.
- Told him that Fractional Club membership was an "investment in property" and an "investment for my future" when that was not true.
- Told him that the Allocated Property would be sold at the end of his membership term – that was not true.

Mr M says that he has a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr M.

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

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

- Fractional Club membership was marketed and sold to him as an investment in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
- The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.
- The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender did not respond to Mr M's complaint within eight weeks, so on 21 August 2018 Mr M referred his complaint to the Financial Ombudsman Service, and along with the purchase documentation, he submitted a witness statement dated 15 March 2018 which set out his recollections of his entire relationship with the Supplier and the finance supplied by the Lender.

On 30 October 2018, having dealt with Mr M's concerns as a complaint, the Lender issued its final response letter, rejecting it on every ground.

Mr M confirmed to our Service that he did not agree with this outcome, and his complaint was assessed by an Investigator who, having considered the information on file, upheld it on its merits.

The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr M at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of that breach on his purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr M was rendered unfair to him for the purposes of section 140A of the CCA.

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

On 4 October 2024 I issued a Provisional Decision (the 'PD') on this complaint, upholding it. In the PD I set out that I thought the Supplier had sold and/or marketed the Fractional Club to Mr M as an investment in breach of Regulation 14(3) of the Timeshare Regulations. And I thought the impact of that breach on his purchasing decision was such that it rendered his resultant credit relationship with the Lender unfair to him for the purposes of Section 140A of the CCA. I then went on to say how I thought the Lender should calculate and pay fair compensation to Mr M.

Mr M agreed with the findings in my PD and had nothing to add. The Lender responded at length, disagreeing with my provisional findings. It said, in summary:

- The PD was premised on a material error of law in its approach to the prohibition under Regulation 14(3) of the Timeshare Regulations and erred in its application of that prohibition to the underlying documentation in support of the Fractional Club sale.
- The error(s) above undermined the approach to Mr M's witness testimony; and
- The PD was premised on a material error of law in its approach to the legal test to determine the existence of an unfair relationship.

The Lender then went on to set out how it thought the PD erred in its approaches above. While I don't intend to repeat its submissions here in detail, the Lender said, in summary:

- It is inevitable that the customer would have been told about the return (of monies) following the sale of the Allocated Property as that is a feature of the product, as are the holiday rights and term of the product.
- There is nothing inherent in the nature of Fractional Club which contravenes Regulation 14(3).
- The wording of the PD is inconsistent with the definition of an "*investment"* as set out in ('*Shawbrook & BPF v FOS*')[1]. The PD errs in conflating the two meanings of the word 'return' – a 'return' on investment (the measure of profit) and being told some money would be 'returned' upon the sale (no connotation of investment or profit). The customer being told that some money would be 'returned' upon sale of the Allocated Property does not breach Regulation 14(3).
- It is not appropriate for the Ombudsman to make inferences about the conduct of the sale based on generic assumptions about Fractional Club, rather than assess the evidence on this specific complaint.
- It was wrong of the Ombudsman to make inferences on the balance of probabilities about how such a sale would have been conducted.
- The Ombudsman incorrectly interprets the disclaimers in the sales paperwork as indicative of an intention to promote an investment, and the Ombudsman makes incorrect assumptions about how the product was sold.
- The Ombudsman is not entitled to rely on generic features of fractional products and conclude that a specific customer must have been sold a specific product as an investment.

[1] Set out below in the Legal and Regulatory Context section

- Selling an investment requires the prospect of a financial gain/profit, and the corresponding motive on the part of the consumer. Referring to the prospect of a residual return does not satisfy this test.

The Lender continued by making submissions regarding the Fractional Club documentation and the Supplier's sales process:

- The documentation in relation to the Fractional Club sale is unobjectionable and does not breach Regulation 14(3).
- The disclaimers referenced show that the Fractional Club should not be seen as an investment, and Mr M confirmed he understood this at the Time of Sale.
- There is no evidence that the Fractional Club sale involved marketing or selling it as an investment to Mr M. It has been seen in other similar complaints that the Supplier delivered extensive training to its staff to ensure that their Fractional Club memberships were not sold/marketed as investments.
- The Ombudsman should give some weight to the decision of HHJ Beech in *Gallagher v Diamond Resorts* (Europe) Limited[2] where it was found that the Supplier's training would have included a prohibition upon selling Fractional Club as an investment in property.
- The 'prospect of a financial return' does not make something an 'investment' as the latter requires the intention of acquiring more than the initial outlay, and the training material emphasised customers' expectation of receiving only a small part of their initial outlay.
- The question the Ombudsman should have asked was: is there sufficiently clear, compelling evidence that the timeshare product was marketed or sold as an investment (i.e. for intended financial profit or gain as against the initial outlay)? That is not the question asked or answered in the PD. The only reasonable answer is that the underlying sales documentation provides no reason to consider there was any such marketing or sale.

It then assessed the witness statement from Mr M:

- The veracity of the testimony is not considered in the PD, meaning it is given undue weight and in places is misinterpreted altogether.
- There is no evidence to support the conclusion that the Fractional Club was sold to Mr M as an investment other than his statement, which was prepared 3 years after the sale and following a cold call from the PR's representatives.
- The statement is inaccurate: 1 – the presentations have not taken place in bars; 2- the sales representatives are specifically trained to ensure that Fractional Club is not described as an investment; and 3 – the sales representatives do not have details about the Allocated Property – its location and price – available for presentations.
- The Ombudsman has said that the Supplier *told* Mr M that he would make a profit, but Mr M has not said this in his statement.
- The reasoning used by the Ombudsman to show Mr M's motivation to make the Fractional Club purchase runs contrary to Mr M's own evidence and is based solely on the statement and the erroneous interpretation of 'investment' and of the disclaimer language in the documentation.

[2] See below in the legal and regulatory context

- Mr M had a previous complaint about a non-fractional purchase rejected by another Ombudsman, who found Mr M's allegations about that sale were not made out. Mr M's present complaint is similarly unsubstantiated and based on generic allegations typical of the complaints bought by the PR. This context should be borne in mind by the Ombudsman.
- Any reliance on Mr M's testimony is unsafe.

And finally, the Lender made submissions regarding the legal test applied in the PD when assessing if the relationship is unfair:

- The test to be applied, as stated in *Carney v NM Rothschild and Sons Ltd*[3], was whether there was a "material impact on the debtor when deciding whether or not to enter the agreement".
- The Ombudsman has erred here, and applied a different test – reversing the burden of proof. It is necessary to assess whether there is sufficient evidence of a material impact on the decision to enter the agreement, not to start from the position, as the Ombudsman has done, that the prospect of a financial gain existed, but that this was not insignificant enough for it not to render the relationship unfair.
- The lack of evidence showing the Fractional Club was sold as an investment (as opposed to the prospect of a financial return) means there is no breach of Regulation 14(3) to impact on the fairness of the creditor relationship.

The Lender concluded its response to the PD by saying that there is no clear, compelling evidence that the Fractional Club was sold to Mr M as an investment.

As the deadline for responses to my PD has now passed, the complaint has come back to me to reconsider. Before I come to my findings, I'll set out what I still consider to be the relevant legal and regulatory context.

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 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*').

[3] See below

- 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*').

I have also taken into account:

- *Gallagher v Diamond Resorts (Europe) Limited* (9 February 2021, County Court at Preston).
- *Prankard v Shawbrook Bank Limited* (8 October 2021, County Court at Cardiff).

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time – which, in this complaint, includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code').

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

And having done that, and having read and considered all of the reasons the Lender gave for why it disagreed with my PD, I am satisfied that this complaint should be upheld. I think that because it is more likely than not that the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr M as an investment. And, in the circumstances of this complaint, this breach rendered the credit relationship between Mr M and the Lender unfair to him for the purposes of Section 140A of the CCA.

However, and as both parties are aware, 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, while I recognise that there are a number of aspects to Mr M's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the Supplier misrepresented the Fractional Club membership to Mr M, and all of the other alleged reasons there was an unfair debtor-creditor relationship, save for the allegation that the membership was sold as an investment. This is because, even if those aspects of the complaint ought to succeed, the redress I'm proposing puts Mr M in the same or better position than he would be if the redress was limited to those other matters.

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?

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 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 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."[4]

So, the Supplier is deemed to be the 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 M and the Lender along with all of the circumstances of the complaint. When coming to my conclusion, and in carrying out my analysis, I have looked at:

1. The Supplier's sales and marketing practices at the Time of Sale;
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.

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

I have then considered the impact of these on the fairness of the credit relationship between Mr M and the Lender. And having done so, and having considered everything that has been submitted in response to my PD, I remain persuaded that the credit relationship between them was likely to have been rendered unfair to Mr M for the purposes of Section 140A. I will explain why.

The Supplier's breach of Regulation 14(3) of the Timeshare Regulations

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

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling Fractional Club membership 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 Mr M says that the Supplier did exactly that at the Time of Sale – saying the following in his witness statement:

> *"I went to the meeting and again complained about the accommodation. They told me what I should convert to* [Fractional Club] *and become a silver member and then I would get a much better standard of accommodation.*
>
> *I was told that by buying 5500 more points it would upgrade me to silver status so that I get better allocation of accommodation (despite it supposedly being all the same standard!)*
>
> *I was told that with [the Fractional Club] that this was now an "investment In property". This was an "Investment for my future" and the property would be sold in 13 and half years and the implication was that I would get my money back and make a profit. It was implied that this would be a good investment for my future as in 13 years I would be thinking more about retirement.*
>
> *I was also told that this was "bricks and mortar". I was shown a picture of the resort in Bulgaria and that "my apartment was on the second floor".*
>
> *I was shown lots of facts and figures on how the fractional system would pay for itself and how the proposed property value increases would benefit me."*

Mr M alleges, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because:

(1) There were two aspects to his Fractional Club membership: holiday rights and a profit on the sale of the Allocated Property.

(2) He says it was implied by the Supplier that he would get his money back or more during the sale of Fractional Club membership.

(3) He was told by the Supplier that Fractional Club membership was the type of investment that would increase in value.

The term "investment" is not defined in the Timeshare Regulations. In *Shawbrook & BPF v FOS*, the parties agreed that, by reference to the decided authorities, "*an investment is a*

transaction in which money or other property is laid out in the expectation or hope of financial gain or profit" at [56]. I will use the same definition.

Mr M'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, like I said in my PD, 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, and as the Lender pointed out in response to the PD, 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 M 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.

I acknowledge, as I did in the PD, that there is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr M, 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 Mr M as an investment.

For example, the second page of the Purchase Agreement was titled "*Terms and Conditions"*, the first of which read:

> *"You should not purchase Your […] Fractional Points as an investment in real estate. The Purchase Price paid by You relates primarily to the provision of memorable holidays for the duration of Your ownership. You are at liberty to dispose of Your […] Fractional Points at any time prior to the Sale Date in accordance with Rule 7 of the Rules of the Owners Club."*

Further, there was a document titled "*Key Information"*, an extract of which read:

> "**Exact nature and content of the right(s):**
>
> *Between six to nine months before the Proposed Sale Date, [the Trustee] will appoint two independent valuers to value the Property and will then take steps to sell the Property at the best achievable market price. You must bear in mind that your […] Fractional Points (and the purchase price paid by you for those points) relates primarily to the acquisition by you of many years of wonderful holidays. We are sure that you will get a great deal of pleasure from your holidays. Your decision to purchase […] Fractional Points should not be viewed by you as a financial investment."*

Finally, there was another document titled "*Customer Compliance Statement/Declaration to Treating Customers Fairly"*, which included the following:

> *"5. We understand that the purchase of our […] Fractional Points is an investment in our future holidays, and that it should not be regarded as a property or financial investment.*

We recognize that the sale price achieved on the sale of the Property in the Owners Club (and to which our […] Fractional Points have been attributed) will depend on market conditions at that time, that property prices can go down as well as up and that there is no guarantee as to the eventual sale price of the Property.

6. We understand that the Property referenced on our Purchase Agreement will be sold as soon as possible on or after the Proposed Sale Date. However, we realise that it may not be possible to source a buyer immediately, and that in the event that the sale is affected on or after the Proposed Sale Date, we will be required to pay our Dues each year until the Property is sold."

Mr M signed to say he understood both of these points.

However, as I said in my PD, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And there are a number of strands to Mr M's allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that membership of the Fractional Club was expressly described as an *"investment*" in several different contexts and (2) that membership of the Fractional Club could make him a financial gain and/or would retain or increase in value.

So, I have considered:

(1) whether it is more likely than not that the Supplier, at the Time of Sale, sold or marketed membership of the Fractional Club as an investment, i.e. told Mr M or led him to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered him the prospect of a financial gain (i.e., a profit); and, in turn

(2) whether the Supplier's actions constitute a breach of Regulation 14(3).

And for reasons I'll now come on to, given the facts and circumstances of this complaint, I think the answer to both of these questions is 'yes'.

How the Supplier marketed and sold the Fractional Club membership

There is little information available in relation to this Supplier in terms of training or sales materials which might give an indication as to how they sold or marketed this particular membership to Mr M. So, I have considered Regulation 14(3) of the Timeshare Regulations, how that provision is to be interpreted and whether, based on the evidence available, I think Mr M's sale breached that provision.

When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that *'[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).*" And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.

So, if a supplier *implied* to consumers that future financial returns (in the sense of possible profits) from a timeshare were a good reason to purchase it, I think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment.

Indeed, if I'm wrong about that, I find it difficult to explain why, in paragraphs 77 and 78 followed by 100 of S*hawbrook & BPF v FOS*, Mrs Justice Collins Rice said the following:

"[…] I endorse the observation made by Mr Jaffey KC, Counsel for BPF, that, whatever the position in principle, ***it is apparently a major challenge in practice for timeshare companies to market fractional ownership timeshares consistently with Reg.14(3). […] Getting the governance principles and paperwork right may not be quite enough.***

The problem comes back to the difficulty in articulating the intrinsic benefit of fractional ownership over any other timeshare from an individual consumer perspective*. […]* ***If it is not a prospect of getting more back from the ultimate proceeds of sale than the fractional ownership cost in the first place, what exactly is the benefit?*** *[…] What the interim use or value to a consumer is of a prospective share in the proceeds of a postponed sale of a property owned by a timeshare company – one they have no right to stay in meanwhile – is persistently elusive."*

"[...] although the point is more latent in the first decision than in the second, it is clear that both ombudsmen viewed fractional ownership timeshares – simply by virtue of the interest they confer in the sale proceeds of real property unattached to any right to stay in it, and the prospect they undoubtedly hold out of at least 'something back' – as products which are inherently dangerous for consumers. ***It is a concern that, however scrupulously a fractional ownership timeshare is marketed otherwise, its offer of a 'bonus' property right and a 'return' of (if not on) cash at the end of a moderate term of years may well taste and feel like an investment to consumers who are putting money, loyalty, hope and desire into their purchase anyway.*** *Any timeshare contract is a promise, or at the very least a prospect, of long-term delight. [...] A timeshare-plus contract suggests a prospect of happiness-plus. And a timeshare plus 'property rights' and 'money back' suggests adding the gold of solidity and lasting value to the silver of transient holiday joy." (emphasis my own)*

So, I'm not persuaded that the prohibition in Regulation 14(3) was confined to, for example, using the word 'investment' when promoting or selling a timeshare contract. I think that the prohibition may capture the promotion of investment features incorporated into a timeshare to persuade consumers to purchase, including leading a consumer to expect a financial gain from the timeshare. After all, Mrs Justice Collins Rice said in S*hawbrook & BPF v FOS*, at 76 (when discussing an ombudsman's approach to Regulation 14(3))*:*

"*[…] He was entitled in other words to be highly sensitive to the* ***overt and covert*** *messaging – that is, the fine calibration of the encouragement given – by the seller in a case like this. There was nothing wrong with an approach which had the absolute prohibition in Reg.14(3) within the ombudsman's field of vision from the outset as he looked at the evidence for the true nature of the transaction that was done here. Indeed, he was required as a matter of law to do so." (emphasis my own)*

I've also thought about how Fractional Club Membership would have been presented to Mr M. Without specific details about the sale or how the Supplier normally sold its products, I've considered the inherent probability of the allegation when assessing whether I find that thing did or did not happen.

And I am satisfied I am able to do that. After all, as I said in my PD, in *Onassis v. Vergottis* [1968] 10 WLUK 101, Lord Pearce referred to the need to look at "probabilities", as well as contemporaneous documents and admitted or incontrovertible facts, when weighing the credibility of a witness's evidence (at p.431). In *Armagas Ltd v. Mundogas* SA (The Ocean Frost) [1986] 2 W.L.R. 1063, Goff LJ also referred to looking at "the overall probabilities" when ascertaining the truth (at p.57). And in *Gestmin SGPS S.A. v. Credit Suisse* (UK) Limited [2013] EWHC 3560, Leggatt J suggested (at para.22) that factual findings should be based on "*inferences drawn from the documentary evidence and known or* ***probable*** *facts*" (my emphasis). Here, I think it is inherently more probable that a timeshare product with an

investment element is sold in a way promoting that element, and therefore risking a breach of Regulation14(3), compared with the sale of a product without the possibility of a monetary return.[5]

The Lender, in its response, said Mr M has not said that the Supplier told him he would make a profit. And I agree. But Mr M has said that it was implied by the Supplier that he would get his money back and make a profit on the Fractional Club at the end of the contract - I have taken that to mean when the Allocated Property was sold. The Allocated Property was plainly a major part of the product's features and, in this instance, in my view, is a justification for its cost to Mr M. And as the Lender has said, it is not a breach of Regulation 14(3) to merely describe the nature of the product and how it worked. But in the circumstances of this complaint, it wouldn't have made much sense if the Supplier included this feature in the product without relying on it to promote the sale, given Mr M paid a large sum for what was only a relatively small increase in holiday rights, whilst retaining his EC points with their associated holiday entitlement.

The Lender has said that the Fractional Club gave Mr M a 55% increase in his holiday rights, with the added benefit of a shorter term, and this was the reason for his purchase, not that it was an investment. But I don't think that was the likely reason for Mr M's purchase – this was not a product where he was converting or trading in his existing membership. He was retaining his existing membership (with the extended term and holiday rights). He already had 10,000 EC points when the Supplier persuaded him to purchase membership of the Fractional Club. And as I've said, this wasn't an occasion where Mr M traded in his EC points towards the purchase, he retained his EC points. This Fractional Club membership was an *additional* purchase.

I think it is immaterial that Mr M obtained additional holiday rights with the Fractional Club purchase, because if that is what he wanted, he could have just increased his EC points holding to achieve that objective. It's difficult to understand why he would make the purchase of the Fractional Club, and the holiday entitlement that came with it, had that been all he was interested in. I maintain, that if Mr M had wanted to improve the standard of accommodation or the number of holidays he could get with his membership, he could have just purchased some additional EC points.

Indeed, the Supplier has said that Mr M's existing 10,000 EC points meant that he was on the '*Standard membership'* tier which was for up to 14,999 EC points. It has said the other tiers were as follows:

Silver membership:	*15,000 – 29,999 points*
Gold membership:	*30,000 – 49,999 points*
Platinum membership:	*50,000+ points*

I said in my PD that I was unable to say for sure, but from what I could see, Fractional Club points cost approximately the same as EC points. After all, Mr M purchased 10,000 EC points for a purchase price of £12,000, and 5,500 Fractional Club points had cost him £6,775. The Lender has not countered my position on this in its response to my PD, so I am satisfied that Fractional Club points and EC points were approximately equivalent in value. So, I cannot see an alternative plausible explanation for why, if Mr M had merely wished to increase his points, he would not have simply upgraded his EC membership.

The Lender has said that the Supplier included specific disclaimers to show that it didn't present Fractional Club Ownership as an investment – I have set these out above. But, it's

[5] This is different to saying that it is more likely than not that a product with an investment element is sold as an investment, simply due to that investment element. For the avoidance of doubt, I make no such finding.

ultimately difficult to explain why it was necessary to include such disclaimers if there wasn't a very real risk of the Supplier marketing and selling membership as an investment, given the difficulty of articulating the benefit of fractional ownership in a way that distinguishes it from other timeshares from the viewpoint of prospective members, especially when a customer such as Mr M could just have increased his holiday rights by upgrading his existing membership, which he retained. And as I've said, Mr M already had EC points membership, so I think it's reasonable to assume there was likely some discussion at the Time of Sale as to why he should purchase this new type of membership in particular, compared to increasing the number of EC points he already had, if all he was trying to do was to improve his access to holiday rights. In other words, some discussion of why Mr M ought to purchase the Fractional Club in the way that he did.

So, in my view, there had to be some other benefit which motivated his purchase which was specific to fractional membership. This could only realistically be the investment element in the form of the Allocated Property and/or the shorter duration the membership offered. I acknowledged in my PD that fractional membership offered a shorter term. But, based on what I've seen, and having considered everything that the Lender has said here, I don't think that was a significant standalone reason for his purchase. Mr M has said the term was attractive to him as he was looking to retire around the end date, but he only thought that given what he was told about the investment opportunity, and that he thought that could help him with his retirement plans. So, while attractive, I don't think a shorter membership term alone was the driver here. I could understand this if he was *not* retaining his EC membership and the longer term that came with it, but he *did* retain it. What seems most likely, was it was a combination of the shorter term with the prospect of a financial gain at the end of it, which it seems he expected as a result of the way Fractional Club membership was sold to him. And the length of the term suited him when considering his retirement plans.

The Lender has called into question how much weight I can place on Mr M's testimony – it says that there is no evidence to support the conclusion that Fractional Club was sold to Mr M as an investment other than in his witness statement, which was prepared three years after the Time of Sale and following a cold-call from a representative of the PR. It has also cited that the Supplier's presentations never took place in bars, and that the details of the Allocated Property were not available to the Supplier during the presentation. Whilst of course being mindful that there are likely to be some errors, which is understandable given the passage of time and that memories fade, I think that Mr M provides consistent testimony that the Fractional Club was sold to him as an investment. And I find it difficult to understand how Mr M would have remembered being told specific details of which apartment he was purchasing a fraction of (that it was on the second floor), had he not been told that by the Supplier. And this is supported by the contents of the Letter of Complaint to the Lender. Taking all of this evidence together, I remain satisfied that I am able to place weight on, and rely on, the contents of the statement, whilst remaining cognisant of any possible material errors. I find Mr M has been consistent from the start of this complaint that Fractional Club membership was sold to him as an investment.

And the Lender goes on to repeat that Mr M has not said anywhere that the Supplier told him he would make a profit from the purchase. But I think the Lender is taking too narrow a view here. As I said above, if a supplier *implied* to consumers that future financial returns (in the sense of possible profits) from a timeshare were a good reason to purchase it, I think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment. After all, even if the specific word *"profit"* was not used by the Supplier, Mr M has said the Supplier told him *"how the fractional system would pay for itself and how the proposed property value increases would benefit me".* This, I think, when taken in the context of a standalone purchase being made *in addition* to an existing timeshare membership, is persuasive evidence that a profit, if not explicitly set out, was suggested to Mr M by implication.

Further, I find it fanciful that the Supplier would not have highlighted the possible returns available to Mr M when selling Fractional Club membership to him. And as Mr M was laying out a considerable sum to join, whilst retaining his existing EC membership, I think it's clear that he expected to get a significant sum back – after all he could simply have increased his holding of EC points for a similar financial outlay, so it seems common sense that the return was an important factor in the sale. Further, Mr M has said from the outset of his complaint that he was led to believe he would make a profit at the end of the agreement. I think that belief fits with what he did at the Time of Sale – make a significant additional purchase for a number of extra holiday rights (which could have been obtained by an increase in his EC points holding) plus an interest in the sale proceeds of the Allocated Property. In my view, therefore, it is more likely than not that the Supplier's salesperson positioned Fractional Club membership as an investment that may lead to a financial gain (i.e., a profit) in the future, whether explicitly or implicitly – I fail to see for what other reason he would have bought the Fractional Club membership.

So, overall, when I consider Mr M's evidence as a whole, and in combination with the circumstances of what happened, which in my view adds credence to the allegation made, I remain of the opinion as set out in my PD – I don't find Mr M either implausible or hard to believe when he says he was told that Fractional Club was an "investment in property" and an "investment for my future". On the contrary, I think that's likely to be what Mr M was led by the Supplier to believe at the relevant time. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

Was the credit relationship between the Lender and the Consumer rendered unfair?

Having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr M and the Lender under the Credit Agreement and related Purchase Agreement.

As the Supreme Court's judgment in *Plevin* makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in *Carney* and *Kerrigan* (respectively) on causation.

In *Carney*, HHJ Waksman QC said the following in paragraph 51:

"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"

And in *Kerrigan*, HHJ Worster said this in paragraphs 213 and 214:

"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court ***may*** *make an order* ***if*** *it determines that the relationship is unfair to the debtor. […]*

[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr M and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3)[6] led him to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On my reading of Mr M's testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when he decided to go ahead with his purchase. That doesn't mean he was not interested in holidays. His own testimony demonstrates that he quite clearly was, which is not surprising given the nature of the product at the centre of this complaint. But Mr M's purchasing history shows he initially bought a trial membership, and then upgraded this to the EC membership in 2014, so, if buying more holiday rights was the only or even the main reason he made the purchase of the Fractional Club, I'm unsure why he would not simply have increased his holding of EC points. This suggests there had to be some other reason he purchased the Fractional Club membership, as well as the prospect of holidays. And Mr M has said as much in his statement:

> *"I purchased because the value of the building on the Fractional system would far outweigh the price that I would be paying for it when it is sold in 12 years' time so would see a good return on what I had payed [sic]."*

This persuades me that Mr M was motivated to make the purchase of the Fractional Club due to the implication that the Allocated Property would be worth more when sold than he was putting into it (i.e., a profit). So, I'm persuaded from what Mr M has said that the Supplier's breach of Regulation 14(3) was material to the decision he ultimately made. Mr M has not said or suggested, for example, that he would have pressed ahead with the purchase in question had the Supplier not led him to believe that Fractional Club membership was an appealing investment opportunity. And as he faced the prospect of borrowing and repaying a substantial sum of money while subjecting himself to long-term financial commitments, had he not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I have not seen enough to persuade me that he would have pressed ahead with his purchase regardless.

As I've said, given that it was, on the balance of probability, likely that the sale of Fractional Club was pitched as an investment in breach of Regulation 14(3), and I think it likely that the potential for a financial return (i.e. a profit) was an important driver for Mr M in his purchase of the Fractional Club membership, this is the basis upon which I have decided that the associated credit relationship under the Credit Agreement with the Lender was rendered unfair to him as a result.

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr M under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. And with that being the case, taking

[6] (which, having taken place during its antecedent negotiations with 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)

everything into account, I think it is fair and reasonable that I uphold this complaint.

Putting things right

Having found that Mr M would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable to put him back in the position he would have been in had he not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr M agrees to assign to the Lender his Fractional Points or hold them on trust for the Lender if that can be achieved.

I set out in the PD how I thought the Lender ought to calculate and pay fair compensation to Mr M. The Lender did not comment on what I had said it needed to do, and Mr M accepted it. With that being the case, and having reconsidered everything afresh, I see no need to depart from what I said in my PD in relation to how Mr M ought to be compensated.

So, here's what I think needs to be done to compensate Mr M with that being the case – whether or not a court would award such compensation:

(1) The Lender should refund Mr M's repayments to it under the Credit Agreement, less the amount that he would have had to pay under the Initial Agreement.

(2) Cancel any outstanding balance related to the Credit Agreement in so far as it relates to the Fractional Club membership. Mr M will still remain responsible for repaying the outstanding balance in so far as it relates to his EC membership purchased in 2014. This should be calculated using the same interest rate that was applicable to the Initial Agreement.

(3) In addition to (1), the Lender should also refund the annual management charges Mr M paid as a result of the Fractional Club membership.

(4) The Lender can deduct

   i. The value of any promotional giveaways that Mr M used or took advantage of as a result of his Fractional Club membership purchase; and
   ii. The market value of the holidays* Mr M took using his Fractional Points.

   (the 'Net Repayments')

   *I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays (if any) Mr M took using his Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect his usage.

(5) Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.

(6) The Lender should remove any adverse information recorded on Mr M's credit files in connection with the Credit Agreement.

(7) If Mr M's Fractional Club membership is still in place at the time of this decision, as long as he agrees to hold the benefit of his interest in the Allocated Property for the

Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify him against all ongoing liabilities as a result of his Fractional Club membership.

**HM Revenue & Customs may require the Lender to take off tax from this interest. If that's the case, the Lender must give Mr M a certificate showing how much tax it's taken off if he asks for one.

My final decision

My final decision is that I uphold this complaint against Shawbrook Bank Limited and require it to calculate and pay fair compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 25 December 2024.

Chris Riggs
Ombudsman