DRN-4507768

The complaint

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

Background to the complaint

Mr and Mrs S purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 2 May 2013 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,050 fractional points at a cost of £14,479 (the 'Purchase Agreement').

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

Mr and Mrs S paid for their Fractional Club membership by taking finance of £14,479 from the Lender in both their names (the 'Credit Agreement').

Mr and Mrs S – using a professional representative (the 'PR') – wrote to the Lender on 17 September 2019 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under section 75 of the CCA, which the Lender failed to accept and pay.
2. 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 (1) the Lender did not carry out the right creditworthiness assessment and (2) the money lent to them under the Credit Agreement was unaffordable for them.

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

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

1. told them that Fractional Club membership had a guaranteed end date when that was not true;
2. told them that they were buying an interest in a specific piece of "real property" when that was not true;
3. told them that Fractional Club membership was an "investment" when that was not true because it is worthless;
4. told them that the Supplier's holiday resorts were exclusive to its members when that was not true.

Mr and Mrs S say that they have a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under section 75 of the CCA, they have

a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs S.

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

1. The contractual terms setting out (i) the duration of their Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of their membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
2. 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.
3. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mr and Mrs S's concerns as a complaint and issued its final response letter on 6 November 2019, rejecting it on every ground.

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

The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr and Mrs S at the Time of Sale in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'). And given the impact of that breach on their purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr and Mrs S was rendered unfair to them for the purposes of section 140A of the CCA.

The Lender disagreed with the Investigator's assessment and argued that this complaint had been brought too late under our time limits, and so our service had no jurisdiction to consider it. I wrote a decision in which I said that the complaint about the Lender declining a section 75 claim and the complaint about an unfair relationship under section 140A of the CCA were within our service's jurisdiction.

This decision is about the merits of this complaint.

I wrote a provisional decision which read as follows.

My provisional decision

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 to 140C).
- The law on misrepresentation.
- The Timeshare Regulations.
- The UTCCR.
- The CPUT Regulations.
- Case law on section 140A of the CCA – including, in particular:

    - The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') (which remains the leading case in this area).
    - *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
    - *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*').
    - The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*').
    - *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
    - *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
    - *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').

Good industry practice – the RDO Code

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

What I've decided – and why

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

Having done that, I currently think that this complaint should be upheld because the Supplier breached regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr and Mrs S as an investment, which, in the circumstances of this complaint, rendered the credit relationship between them and the Lender unfair to them for the purposes of section 140A of the CCA.

However, 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, while I recognise that there are a number of aspects to Mr and Mrs S's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the Allocated Property did not have a guaranteed sale date and that ownership did not entail owning a share of real property, and the section 75 claim generally, because even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs S in the same or a better position than they 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 and Mrs S and the Lender was unfair.

Under section 140A of the CCA, a debtor-creditor relationship can be found to have been or to be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by section 12(b) of the CCA as *"a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]"*. And section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to *"finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."*

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr and Mrs S'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.140A(1)(c) CCA.

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

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

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

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

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

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

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

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

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

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

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

I have considered the entirety of the credit relationship between Mr and Mrs S and the Lender along with all of the circumstances of the complaint and I think the credit relationship between them was likely to have been rendered unfair for the purposes of section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale;
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; and

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

4. The inherent probabilities of the sale given its circumstances.

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

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs S'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 and Mrs S say that the Supplier did exactly that at the Time of Sale – saying the following during the course of this complaint:

"They kept using the word "investment" and saying how we would get our money back."

"We would get back our share of what we owned. They said we would get back "at least what we had invested". There was "no guarantee of a profit but we would not lose anything"."

"We liked the idea about the ownership of property. We would get some good holidays … and we could get our money back or maybe make a profit."

Mr and Mrs S allege, therefore, that the Supplier breached regulation 14(3) at the Time of Sale because:

(1) There were two aspects to their Fractional Club membership: holiday rights and a profit on the sale of the Allocated Property.
(2) They were told by the Supplier that they would get their money back or more during the sale of Fractional Club membership.

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

Mr and Mrs S's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr and Mrs S as an investment in breach of regulation 14(3), I have to be persuaded that it was

more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs S, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs S as an investment. For example, in the document titled *Member's Declaration,* paragraph 5 (which has been initialled by Mrs S in the margin) said:

"We understand that the purpose of our Fraction is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that CLC makes no representation as to the future price or value of the Fraction."

However, 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 and Mrs S'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 them 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 and Mrs S or led them to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered them 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

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives – including a document called "2011 Spain PTM FPOC 1 Practice Slides Manual" (the '2011 Fractional Training Manual').

As I understand it, the 2011 Fractional Training Manual was used throughout the sale of the Supplier's first version of a product called the Fractional Property Owners Club – which I've referred to and will continue to refer to as the Fractional Club. It isn't entirely clear whether Mr and Mrs S would have been shown the slides included in the Manual. But it seems to me to be reasonably indicative of:

(1) the training the Supplier's sales representatives would have got before selling Mr and Mrs S Fractional Club membership; and
(2) how the sales representatives would have framed the sale of Fractional Club membership to Mr and Mrs S.

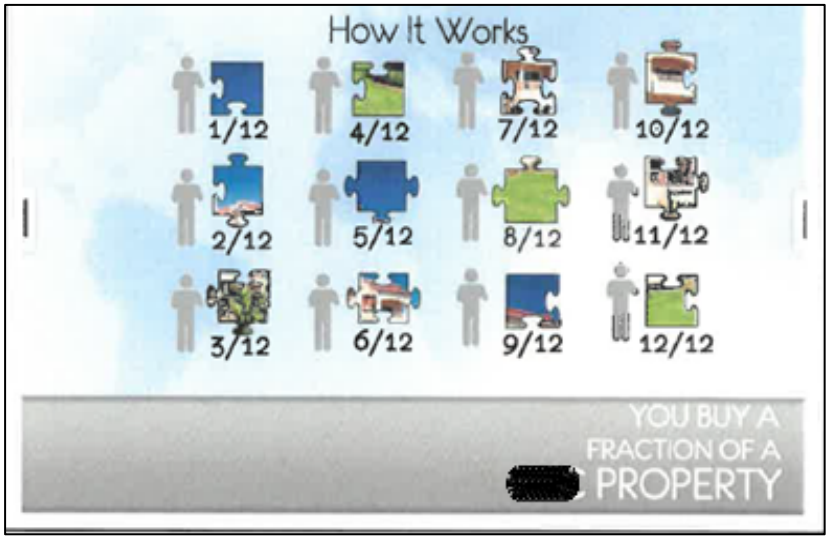
Having looked through the manual, my attention is drawn to page 6 (of 41) – which includes the following slide on it:

This slide titled "*Why Fractional?*" indicates that sales representatives would have taken Mr and Mrs S through three holidaying options along with their positives and negatives:

(1) *"Rent Your Holidays"*
(2) *"Buy a Holiday Home"*
(3) *The "Best of Both Worlds"*

It was the first slide in the 2011 Fractional Training Manual to set out any information about Fractional Club membership and I think it suggests that sales representatives were likely to have made the point to Mr and Mrs S that membership combined the best of (1) and (2) – which included choice, flexibility, convenience and, significantly, an investment they could use, enjoy and sell before getting money back.

The manual then moved on to two slides (on pages 7 and 8) concerned with how Fractional Club membership worked:



I'm aware that the Supplier says that 90 to 95% of its time during its sales presentations was focused on holidays rather than the sale of an allocated property. Having looked through the 2011 Fractional Training Manual, it seems to me that there were 10 slides on how Fractional Club membership worked before the slides moved onto to sections titled "Peace of Mind", "Resort Management" and "Which Fractional". And as 5 of the 10 slides look like they focused on holidays, there seems to me to have been a fairly even split during the Supplier's sales presentations between marketing membership of the Fractional Club as a way of buying an interest in property and as a way of taking holidays.

However, even if more time was spent on marketing membership of Fractional Club membership as a way of taking holidays rather than buying an interest in property, since the slides above suggest, in my view, that the Supplier's sales representatives would have probably led prospective members to believe that a share in an allocated property was an investment (after all, that's what the slide titled "Why Fractional?" expressly described it as), I can't see why the Supplier wouldn't have been in breach of regulation 14(3) in those circumstances.

I acknowledge that there was no comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mr and Mrs S the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in regulation 14(3).

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))."* [2] And in my view that

[2] The Department for Business Innovation & Skills *"Consultation on Implementation of EU Directive 2008/122/EC on Timeshare, Long-Term Holiday Products, Resale and Exchange Contracts (July 2010)",* page 14. https://assets.publishing.service.gov.uk/media/5a78d54ded915d0422065b2a/10-500-consultation-directive-timeshare-holiday.pdf

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.

Mr and Mrs S say, in their own words, that the Supplier positioned membership of the Fractional Club as an investment to them. And as I've said before, the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members – including Mr and Mrs S. And as the slides clearly indicate that the Supplier's sales representative was likely to have led them to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e., a profit) in the future, I don't find them either implausible or hard to believe when they say that they were told the following:

"They kept using the word "investment" and saying how we would get our money back." (Paragraph 14.)

"We would get back our share of what we owned. They said we would get back "at least what we had invested". There was "no guarantee of a profit but we would not lose anything"." (Paragraph 15.)

"We liked the idea about the ownership of property. We would get some good holidays … and we could get our money back or maybe make a profit." (Paragraph 19.)

On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mr and Mrs S were 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 Consumers 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 and Mrs S and the Lender under the Credit Agreement and the 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 and Mrs S and the Lender that was unfair to them and warranted relief as a result, then an important consideration is whether the Supplier's breach of regulation 14(3) (having regard to section 56(2)) led them to enter into the Purchase Agreement and the Credit Agreement.

Their witness statement is dated 23 August 2017, which is more than four years after the Time of Sale. I start by acknowledging that not all of this witness statement is entirely reliable, since Mr and Mrs S were clearly mistaken about some details. They say that their Allocated Property would be sold after ten years, when in fact the proposed sale date was 31 December 2027, which meant they would have it for fourteen and a half years. However, although they were mistaken about the precise duration of their membership, they were still correct in their recollection that it was for a considerably shorter term than usual because they were taking it over from a previous owner. (They may also be mistaken about the previous owner's reason for selling, but that strikes me as too peripheral to the sale to undermine the credibility of their account as a whole.) Mr and Mrs S also misunderstood what share of the sale proceeds they would receive, believing that because there were 14 owners that meant they would get one fourteenth of the proceeds (which comes to 7.14%), whereas in fact their share was based on the number of weeks they owned (two out of 52, or 3.85%). However, it isn't clear from their statement whether this is what they believe they were actually told, or if this is just what they inferred when they were told that there were 14 owners of the Allocated Property, so this does not necessarily mean that they have forgotten what the salesman said. Overall, I do not find the shortcomings I've described above to be so serious that I should discount what Mr and Mrs S have said about their reasons for making their purchase. Although they couldn't remember some of the details about the product, I think that they would still have been able to remember with reasonable clarity what it was that motivated them to buy it.

In paragraph 21 Mr and Mrs S go on to say:

"We had been in the meeting for 4 hours and we were tired and hungry. She talked about the documents but we did not really follow everything. We were in a bit of a daze."

I've thought about whether this undermines their testimony. However, this does not mean that they didn't take in what was said to them in the first two or three hours of the presentation. And in paragraph 14, which I've already quoted, they say that they were told repeatedly (not just once) that the product was an investment and that they would get their

money back. So I think that is unlikely to be inaccurate (especially taking into account what I have already said about the training material).

And so I think that I can still rely on paragraph 19, in which they say:

"We liked the idea about the ownership of property. We would get some good holidays … and we could get our money back or maybe make a profit."

On my reading of Mr and Mrs S's testimony in the round, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. That doesn't mean they were not interested in holidays. Their own testimony demonstrates that they quite clearly were, and that is not surprising given the nature of the product at the centre of this complaint. But as Mr and Mrs S say (plausibly in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit as that share was one of the defining features of membership that marked it apart from the more 'standard' type of timeshare which they had rejected three years before – in 2010 they had bought a non-fractional timeshare and then withdrawn from that purchase a few days later. And with that being the case, I think the Supplier's breach of regulation 14(3) was material to the decision they ultimately made.

Mr and Mrs S have not said or suggested, for example, that they would still have pressed ahead with the purchase in question had the Supplier not led them to believe that Fractional Club membership was an appealing investment opportunity. On the contrary, they had previously turned down a timeshare without an investment element. And as they faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I'm not persuaded that they would have pressed ahead with their purchase regardless.

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs S under the Credit Agreement and related Purchase Agreement for the purposes of section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint.

Fair compensation

Having found that Mr and Mrs S 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 them back in the position they would have been in had they not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr and Mrs S agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

[*I then set out in detail what I thought would be fair redress, which I need not repeat here.*]

Responses to my provisional decision

Mr and Mrs S accepted my provisional decision; Shawbrook did not. It argued that I had

given too much weight to Mr and Mrs S's witness statement, and that I had made errors of law in connection with regulation 14(3) and section 140A. In summary, it made the following points in support of those arguments:

1. I had not given sufficient weight to the disclaimers in the contemporaneous sales documents.

2. The Supplier denied that Mr and Mrs S would have seen the slides in the training manual.

3. Mr and Mrs S's witness statement was questionable for a number of reasons:

   (a) It did not appear to be written in their own words, but to be the work of the PR, and indeed the entire part of their complaint concerning their club membership being sold as an investment appears to have been driven by the PR. The witness statement was dated 2017, four years after the Time of Sale and two years before the claim was brought, yet no explanation has ever been provided for why it was not provided to the creditor when the claim was brought, or why it was not provided to our service until nearly four years after the PR referred this complaint.

   (b) There was an entry in the Supplier's contact notes, dated 13 August 2015, saying that Mr S had emailed the Supplier to say that he and Mrs S wanted to sell their membership as they could no longer afford the annual management fees. He had also asked what the consequences would be if he stopped paying the fees. This was likely to be the real reason why they had wanted to exit their membership.

   Then on 20 January 2016, Mr S had made a phone call in which he had said that his circumstances had changed and he needed to get out of the timeshare. He also said that the PR was *"going down the miss sold angle re investment"* [*sic*]. Notably, there was no mention in that note of Mr S saying that this was how the product had been sold to him. Shawbrook said this is a hallmark of many such complaints brought by various claims management companies.

   (c) Meanwhile, in response to Mr S's email in 2015, the Supplier had told Mr S that he and Mrs S had to keep paying the fees, and that the Supplier would not buy the membership back from them. But it had also put him in touch with a third party who could find them a buyer. A potential buyer was eventually found, and then on 23 April 2016 Mr S sent another email to the Supplier saying that he would ask the PR to take no further action *"if all goes well."* He also said in that email:

   "I only contacted [the PR] in desperation after approaching [the Supplier] to ask if I could get out of my contract and was told no."

   However, the sale later fell through because the management fees were in arrears (there is a note to this effect in the Supplier's contact notes, dated 25 May 2016). This history suggests that the Supplier's promise that the product was a good investment had never been Mr and Mrs S's real concern.

   (d) I was wrong to infer that Mr and Mrs S had cancelled their purchase of a non-fractional timeshare in 2010 (or 2011) because it had not contained an investment element, and to conclude from that that they had bought a fractional timeshare in May 2013 because it *did* contain an investment element. An entry in the Supplier's contact notes dated 6 April 2011 says:

   "Spoke to Mr- said it is all financial. He has been trying to get a promotion at work - not happening. Also found out his driveway is not part of his property as the previous

owner built on council land and would cost £2k to buy. Thinking of starting family so finances might be tight."

Shawbrook also pointed out that in October 2013 Mr and Mrs S had entered into an agreement to purchase an upgraded fractional timeshare and had then pulled out within the 14-day cancellation period. It was therefore likely that they had purchased the Fractional Club membership for the purpose of going on holiday, rather than as an investment, and that they had sought to exit because of a change in their financial circumstances.

(e) Because of all of the above points, the Lender concluded that it would not be safe for me to rely on the witness statement, as it had been prepared with the assistance of the PR, and that the complaint point about the timeshare being sold as an investment had originated with the PR. The Lender provided three examples of ombudsmen's decisions in other cases where findings had been made about the veracity of the witness statements. The Lender asked me to reconsider the evidence and to change my findings.

4. Turning to the law: the Lender acknowledged that I had set out in my provisional decision that regulation 14(3) does not prohibit the selling of a timeshare which is an investment *per se,* only the selling and marketing of it as such, but it argued that I had then lost sight of this in my subsequent findings. In the Lender's words, I had fallen into error *"by conflating two different meanings of the word 'return': (i) a 'return on investment', which is normally understood to mean the measure of* **profit** *(the return) on the original investment; and (ii) a customer being told that some money will be 'returned' upon sale, which carries no connotation of investment or profit. The former is what must not be marketed under the Timeshare Regulations; the latter is an inherent feature of fractional products and does not automatically breach Regulation 14(3)."* [Emphasis in original.]

   Failing to describe how the product works (by failing to explain that the Allocated Property will be sold and the proceeds returned to the owners) would probably contravene regulation 12, which requires key information to be provided to consumers.

5. I had applied the wrong test for deciding whether an unfair relationship existed. In *Carney,* the court had held that the test was whether there was a *"material impact on the debtor when deciding whether or not to enter the agreement"*. But I had applied a different test, saying: *"had they not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I'm not persuaded that they would have pressed ahead with their purchase regardless."* This had reversed the burden of proof.

The Lender asked me to find that the credit relationship had not been unfair.

My findings

I will begin with the Lender's last point. Section 140B(9) of the CCA says:

"If … the debtor or a surety alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary."

So, if Mr and Mrs S litigated their claim in court, the burden of proof is indeed reversed. That was Parliament's choice when enacting the relevant sections of the CCA. But here, I am concerned with a complaint that the Lender was a party to an unfair credit relationship with Mr and Mrs S, so I am not dealing with a legal claim. Rather, it was my findings based on the evidence available to me in my provisional decision that:

(i) it was more likely than not that the Supplier's breach of regulation 14(3) that I found to have happened was a material, important and motivating factor when they decided to go ahead with their purchase of Fractional Club membership; and
(ii) had the Supplier not breached regulation 14(3), I found it more likely than not that Mr and Mrs S would not have bought Fractional Club membership.

My findings were based on the evidence before me and on the balance of probabilities. In doing so, I did not place a burden on the Lender to disprove anything, nor did I think about, for example, any rebuttable presumptions on what Mr and Mrs S would have done had there not been a breach.

On the Lender's other point of law, I appreciate the distinction it seeks to make between the different usages of the word 'return', but I believe I made it quite clear in my provisional decision that I was finding that the Supplier had used that word in the former, prohibited sense. In that context, I specifically referred to the times when Mr and Mrs S had described the Supplier telling them that they would make a profit. And, for the avoidance of doubt, I repeat what I said in my provisional decision:

"Mr and Mrs S's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold."

And I make it plain that when I have considered this, I have had clearly in my mind, the definition of investment as "*a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit*".

I now turn to the evidence. From what I know about how the Supplier marketed and sold memberships, like Mr and Mrs S's Fractional Club, the training manual was used by the Supplier when training sales staff at the Time of Sale. And neither the Lender nor the Supplier have provided any other evidence or material that they say was used to either train the sales staff or were shown to prospective customers during the sales presentations, so the training manual remains the best available evidence of how Fractional Club membership was sold at the Time of Sale. So even if Mr and Mrs S were not shown the slides in the training manual,[3] I remain of the view that the contents of the manual, including the slides, are reasonably indicative of (i) the training the Supplier's sales representatives would have got, and (ii) how the sales representatives would have framed the sale of Fractional Club membership to Mr and Mrs S.

I am satisfied that I gave due weight to the disclaimers in the sales documentation. I did not ignore it; I took it into account, but I also do not think it would be fair to regard it as conclusive. When I wrote in my provisional decision that *"weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork",* I did not mean that to be dismissive. The paperwork is certainly relevant and important evidence, but it is also not the only evidence in the case, and if I regarded it as a trump card which the

[3] I acknowledged that this was a possibility in my provisional decision when I said, *"It isn't entirely clear whether Mr and Mrs S would have been shown the slides."* So while this is new information from the Supplier, it does not change my mind.

Lender could use to automatically defeat any claim brought against it under section 140A, then that would not be giving Mr and Mrs S a fair assessment of their own evidence. That is especially the case when the paperwork is presented to potential customers after they had been taken through a sales presentation.

That brings me to their witness statement. I will deal with the Lender's arguments in the same order that I set out above. But before I go through the Lender's arguments, I repeat the point from my provisional decision that just because there are some shortcomings or inconsistencies in Mr and Mrs S's evidence, it does not follow that all of their evidence is unreliable or ought to be discounted. In my experience, inconsistences are a normal part of a person's recollections of past events, and it is my role to consider to what extent their evidence, as a whole, is reliable.

(a) It is, in my experience, rare for a witness statement which has been prepared by a solicitor to be written directly by the witness in their own words. Witness statements are usually professionally drafted by a solicitor (or a paralegal) based on their client's instructions. So I will not infer just from this that anything is amiss or that the PR put words into its clients' mouths. I appreciate the reasons for the Lender's criticism of the delay in serving it, but since the same point could be made about the Lender only now sharing excerpts from the Supplier's contact notes, I will say no more about it.

(b) I agree that Mr S's 2015 email and his 2016 phone call indicate that the claim under the CCA was motivated by the change in his financial circumstances and his resulting inability to afford the annual fees. However, that does not mean that the Fractional Club membership was not sold to him and Mrs S as an investment. It is equally consistent with Mr and Mrs S not yet realising they had cause for complaint that Fractional Club membership had been presented to them in breach or regulation 14(3) until they approached the PR (which they did not do right away). On balance, I do not think the evidence the Lender has now presented means Mr and Mrs S's complaint was in some way suggested or concocted by the PR, as opposed to them only realising they could make such a complaint after they took legal advice.

(c) Similarly, when Mr and Mrs S thought they had a buyer for their club membership, their indication that they would not wish to pursue their claim if they managed to sell it does not, in my view, necessarily mean that they were of the opinion that the product had not been mis-sold or that the investment element had not influenced their decision to purchase; only that getting rid of it would be a satisfactory outcome which would not require further action. Indeed, since the remedy for a mis-sale would usually be to put Mr and Mrs S back in the position they were in before the sale, and selling the timeshare might well achieve that, there may have been little to be gained by continuing with their claim after that had happened.

(d) I accept that the new evidence which the Lender has submitted about the reason for Mr and Mrs S's decision not to purchase a timeshare in 2011 rebuts the inference I drew from that decision in my provisional findings. However, that inference was not central to the reasoning behind my decision overall, but was only a supplementary reason. Without it, the rest of my decision (which I have reconsidered) still stands, and I remain of the view that the breach of regulation 14(3) was material to Mr and Mrs S's decision to buy a timeshare in 2013, for the other reasons I gave.

(e) I have read the ombudsmen's decisions in other cases provided to me by the Lender, but they were each decided on their own facts, and so they do not really assist me in

assessing this complaint, except as examples of sound analysis and drafting.[4]

For all of these reasons, I remain of the view that the witness statement, despite its shortcomings which I identified in my provisional decision, is still evidence of what Mr and Mrs S recall about what was said at their sales presentation and about their decision to purchase. And overall, my decision about what is a fair outcome of this case remains unchanged.

My final decision

My decision is that I uphold this complaint, and I order Shawbrook Bank Limited to put things right in the way I have set out below (whether or not a court would award such compensation):

(1) The Lender must refund Mr and Mrs S's repayments to it under the Credit Agreement, including any sums paid to settle the debt.
(2) In addition to Step (1), the Lender must also refund the annual management charges Mr and Mrs S paid as a result of their Fractional Club membership.
(3) The Lender can deduct:

    (i) The value of any promotional giveaways that Mr and Mrs S used or took advantage of; and
    (ii) The market value of the holidays* Mr and Mrs S took using their Fractional Points.

    (I'll refer to the output of Steps 1 to 3 hereafter as the 'Net Repayments'.)

(4) Simple interest** at 8% per annum must be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.
(5) The Lender must remove any adverse information recorded on Mr and Mrs S credit files in connection with the Credit Agreement.
(6) If Mr and Mrs S Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.

    *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 Mr and Mrs S took using their 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 their usage.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs S to accept or reject my decision before 17 April 2025.

[4] Ombudsman decisions are not like court judgements which set precedents which must be followed, but I have read them anyway since the Lender puts them forward as illustrative of its general point.

Richard Wood
Ombudsman