DRN-4577848

The complaint

Miss K'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 her 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.

The finance agreement at the centre of this complaint was taken out in Miss K's sole name, so she is the only eligible complainant here. However, as the timeshare in question was purchased by Miss K and a Mr H I shall refer to both of them where appropriate in this decision.

What happened

Miss K and Mr H were existing holders of a timeshare membership, having purchased it from a timeshare provider (the 'Supplier') in May 2016. They bought 1,180 fractional points from the Supplier, and having traded in their existing trial membership, they paid £16,533[1] for this membership.

This type of timeshare membership was asset backed – which meant it gave Miss K and Mr H more than just holiday rights. It also included a share in the net sale proceeds of a property named on their Purchase Agreement after their membership term ends.

On 31 August 2017 (the 'Time of Sale') Miss K and Mr H purchased a new membership of the timeshare (here on in referred to as the 'Fractional Club') from the Supplier. They entered into an agreement with the Supplier to buy 1,630 fractional points at a cost of £22,689 (the 'Purchase Agreement'). But after trading in their existing timeshare, they ended up paying £7,349 for this membership of the Fractional Club. And like their previous membership, this Fractional Club membership was asset backed – so in addition to holiday rights, it gave Miss K and Mr H a share in the net sale proceeds of a property named on their Purchase Agreement (the 'Allocated Property') after their membership term ends.

Miss K paid for their Fractional Club membership by taking finance of £19,358 from the Lender in her sole name (the 'Credit Agreement'). This consolidated the outstanding balance of an existing loan Miss K had with another provider.

Miss K – using a professional representative (the 'PR') – wrote to the Lender on 9 March 2023 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving her 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] This purchase was financed by a credit agreement with another business and does not form part of this complaint.

The PR then went on to make general reference to the difficulties Miss K and Mr H had experienced with their Fractional Club membership. These were regarding the difficulty they had experienced when trying to book accommodation, the quality of the accommodation and that the resorts were not exclusive to club members.

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

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

- Told them that Fractional Club membership had a guaranteed end date, specifically after 19 years, after which they would have no further legal liability to the Supplier under, or in respect of, the Scheme, when that was not true.
- Told them that they were buying an interest in a specific piece of "real property" when that was not true.
- Told them that Fractional Club membership was an "investment" when that was not true.

Miss K says that she 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, she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to her.

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

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

- 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 Consumer Rights Act 2015 (the 'CRA').
- 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.
- They did not receive a copy of the Information Statement prior to entering into the Purchase Agreement or, if they did, they did not have adequate time to review the Information Statement before signing the Purchase Agreement.
- They were pressured into purchasing Fractional Club membership by the Supplier.
- The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender did not deal with Miss K's concerns within the eight weeks required by the Regulator, so the PR referred her complaint to the Financial Ombudsman Service.

The Lender then sent its final response to Miss K's concerns on 11 October 2023, rejecting it on every ground.

Miss K didn't accept this, so her complaint was assessed by an Investigator, who having considered everything on file, thought the complaint ought not to be upheld. He didn't think the Lender had been unfair or unreasonable in its handling of Miss K's Section 75 claim, and wasn't persuaded that the Lender was party to an unfair credit relationship with her under

Section 140A of the CCA, nor that the Lender had lent to her irresponsibly.

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

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:

- The CCA (including Section 75 and Sections 140A-140C).
- The law on misrepresentation.
- The Timeshare Regulations.
- The CRA).
- The CPUT Regulations.
- Case law on Section 140A of the CCA – including, in particular:
    - The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') (which remains the leading case in this area).
    - *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
    - *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*').
    - The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*').
    - *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
    - *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
    - *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').

Good industry practice – the RDO Code

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

What I've decided – and why

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

And having done that, I agree with the view of the Investigator, for broadly the same reasons. I am satisfied that this complaint should not be upheld.

But before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

What is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

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

This part of the complaint was made for several reasons which I set out at the start of this decision. They include the suggestion that Fractional Club membership had been misrepresented by the Supplier because Miss K and Mr H were told that the Fractional Club membership had a guaranteed end date. But I can't see that what the Supplier said here was actually untrue. I've not seen anything which makes me think that the Allocated Property would not be able to be sold at the conclusion of the contract period. The Terms and Conditions set out that the title to the property is held by independent trustees, the sale of the Allocated Property can only be carried out by the Trustees on or after the proposed sale date, and the Allocated Property cannot be removed from the trust before that sale date. What's more, the sale date can only be delayed for up to two years by the unanimous written consent of all fractional owners, in which Miss K and Mr H are included.

Miss K says that their Fractional Club membership had been misrepresented by the Supplier because they were told by the Supplier that they were buying an interest in a specific piece of "real property" when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Miss K and Mr H's share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.

Miss K also makes an allegation that the product was sold as an investment, which I address further below. For the reasons I'll explain, had they been told their Fractional Club membership was an investment (and I make no finding on that point here), that would not have been untrue.

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

For these reasons, therefore, I do not think the Lender is liable to pay Miss K any compensation for the alleged misrepresentations of the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

Section 75 of the CCA: the Supplier's breach of contract

I've already summarised how Section 75 of the CCA works and why it gives Miss K a right of recourse against the Lender. So, it isn't necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, the Lender is also liable.

Miss K says that she and Mr H could not holiday where and when they wanted to because they were impossible to book, even in advance – which, on my reading of the complaint,

suggests that she considers that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement. Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork signed by Miss K and Mr H states that the availability of holidays was/is subject to demand, and Miss K says that the Supplier told them this also. And whilst I accept that it is possible that they may not have been able to take certain holidays, I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

Miss K also says that the quality of the available accommodation was not as good as they were led to believe it would be. I understand that the apartment they stayed in during their 'prelude' week was of high quality, but I've not seen anything in the contractual documentation which sets out what Miss K and Mr H could expect in this regard, and how what they actually got meant the Supplier breached the Purchase Agreement.

Miss K says that the Supplier's resorts were not exclusive to members as they had been led to believe they would be. However, I cannot see that the contractual documentation sets out that the resorts will be exclusive, and I cannot see that Miss K and Mr H have found themselves unable to do anything they would otherwise have been able to do, on the grounds that the resorts were not exclusive to members.

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

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

I have already explained why I am not persuaded that the contract entered into by Miss K and Mr H was misrepresented (or breached) by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Miss K also says that the credit relationship between her and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that she has concerns about. It is those concerns that I explore here.

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between the Miss K 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 Miss K and Mr H'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 Miss 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."[2]

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

1. The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale;
2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;
3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;
4. The inherent probabilities of the sale given its circumstances.

I have then considered the impact of these on the fairness of the credit relationship between Miss K and the Lender.

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

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

The PR says that the right checks weren't carried out before the Lender lent to Miss K. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Miss K was actually unaffordable before also concluding that she lost out as a result and then consider whether the credit relationship with the Lender was unfair to

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

her for this reason. Again, from the information provided, I agree with the Investigator in that I am not satisfied that the lending was unaffordable for the Miss K.

The Letter of Complaint also includes the allegation that the Supplier misled Miss K and Mr H and carried on unfair commercial practices which were prohibited under the CPUT Regulations for the same reasons Miss K gave for his Section 75 claim for misrepresentation. But given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.

Miss K says that they were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledge that they may have felt weary after a sales process that went on for a long time. But they say little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to. They were also given a 14-day cooling off period and although Miss K says she had no reason to consider cancelling the contract as she believed what the Supplier had told them, she has not provided a credible explanation for why she did not cancel their membership during that time if they only made the purchase due to the pressure put on them by the Supplier. Moreover, they did go on to upgrade their Fractional Club membership – which I find difficult to understand if the reason they went ahead with the purchase in question was because they were pressured into it. And with all of that being the case, there is insufficient evidence to demonstrate that Miss K made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

I'm not persuaded, therefore, that Miss K credit relationship with the Lender was rendered unfair to her under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why she says her credit relationship with the Lender was unfair to her. And that's the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

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

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

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling membership of the Fractional Club as an investment. This is what the provision said at the Time of Sale:

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

But PR says in the Letter of Complaint, that the Supplier did exactly that at the Time of Sale.

And in a statement dated 16 November 2023, which was shortly before the Investigator sent his view that the complaint should not be upheld, Miss K said, where is relevant:

> *"I was told about the Fractional Property Owners Club, which I was told involved buying a share in an apartment for 19 years, which would then be sold, and the proceeds split between the owners.*

I remember that, on both occasions, the whole presentation was about investing into [the Supplier's] Fractional Property Owners Club [the Fractional Club].

I also recall that when I purchased the second fractional product, on the 31st August 2017, was told that, by upgrading my investment, I would have access to the much nicer apartments, that would offer more facilitates available to me.

I would also get Points, which would enable me have luxury holidays every year, either in the allocated property or I could exchange the Points for holidays elsewhere.

I was told that I was buying an interest in part of a property, which was like buying "bricks and mortar".

I was also told that the fractional scheme was an "investment", in the context of having luxury holidays, all over the world, for 19 years, and then getting money back in the end."

So, that is what I have considered next.

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

Miss K and Mr H'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 Miss K and Mr H 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 Miss K and Mr H, 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 Miss K and Mr H, 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 Miss K and Mr H as an investment.

For example, the Member's Declaration document has 15 statements relating to Miss K and Mr H's Fractional Club purchase. Each of these statements are initialled as having been read by them, and the page signed by both Miss K and Mr H. It states at 5:

"*We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that [the Supplier] makes no representation as to the future price or value of the Fractional Rights which are personal rights and not interests in real estate…*"

And in the Information Statement, it states:

"*The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for the direct purposes of a trade in nor as an investment in real estate. [The Supplier] makes no representation as to the future price or value of the Allocated Property or any Fractional Rights.*"

When read on their own and together, these disclaimers go some way to making the point that the purchase of Fractional Rights shouldn't be viewed as an investment. But they weren't to be read on their own. They had to be read in conjunction with what else the Standard Information Form had to say, which included the following disclaimer:

"*The Vendor, any sales or marketing agent and the Manager and their related businesses (a) are not licensed investment advisers authorised by the Financial Services Authority to provide investment or financial advice; (b) all information has been obtained solely from their own experiences as investors and is provided as general information only and as such it is not intended for use as a source of investment advice and (c) all purchasers are advised to obtain competent advice from legal, accounting and investment advisers to determine their own specific investment needs; (D) no warranty is given as to any future values or returns in respect of an Allocated Property.*"

This disclaimer seems to have been aimed at distancing the Supplier from any investment advice that was given by its sales agents, telling customers to take their own investment advice, and repeating the point that the returns from membership from the sale of the Allocated Property weren't guaranteed.

Yet I think it would be fair to say, that while a prospective member who read the disclaimer in question might well have thought that they would be wise to seek professional investment advice in relation to membership of the Fractional Club, rather than rely on anything they might have been told by the Supplier, it wouldn't have done much to dissuade them from regarding membership as an investment. In fact, I think it would have achieved rather the opposite.

It's also difficult to explain why it was necessary to include such a disclaimer if there wasn't a very real risk of the Supplier marketing and selling membership of the Fractional Club 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.

And in addition, I acknowledge that the Supplier's training material relating to the sale of this version of the Fractional Club left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. And 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.

So, I accept that it's *possible* that their Fractional Club membership was marketed and sold to Miss K and Mr H as an investment in breach of Regulation 14(3) given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Club membership, without breaching the relevant prohibition.

But I do not think it necessary to make a finding on this point because, even if the Supplier did breach Regulation 14(3) of the Timeshare Regulations when it sold the Fractional Club memberships to Miss K and Mr H, given Miss K's recollections of the sales process at the Time of Sale, I am not persuaded that makes a difference to the outcome in this complaint anyway.

Was the credit relationship between the Lender and Miss K rendered unfair?

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

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

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

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

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

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

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

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

Miss K's initial recollections of the Time of Sale, as set out by her PR in the Letter of Complaint were that she and Mr H were told about the advantages of upgrading from their first fractional membership to the Fractional Club. And these advantages were said to be the accommodation they had been shown, which was an upgrade to the apartments that they already had, and that there were better facilities and services available. And this was described as being appealing to Miss K and Mr H. But there was no suggestion that they had

[3] which, having taken place during its antecedent negotiations with Miss K, 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)

purchased Fractional Club because of the prospect of financial gain. From what is said in the Letter of Complaint, which the PR has confirmed was set out as a result of what Miss K told them, their motivation was the improved quality of the accommodation and facilities.

The PR subsequently told the Investigator in October 2023 that Miss K had told it that the Supplier had said Fractional Club was an "investment" in the context of having luxury holidays, all over the world, and getting money back at the end of the term. But again, this does not lead me to think that the Supplier led Miss K and Mr H to think that they would make a profit and therefore that that was what motivated their purchase.

So, there was no suggestion in Miss K's initial recollections of the sales process at the Time of Sale, as set out in the Letter of Complaint, nor in her later submissions, that the Supplier led them to believe that the Fractional Club membership was an investment from which they would make a financial gain. Nor was there any indication that they were induced into the purchase on that basis. On the contrary, from the evidence I have seen I am satisfied that their motivation in purchasing Fractional Club was likely to have been the upgraded quality and facilities of the accommodation available.

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

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

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Miss K and Mr H when they purchased membership of the Fractional Club at the Time of Sale.

The PR says that the contractual terms governing the ongoing costs of Fractional Club membership and the consequences of not meeting those costs were unfair contract terms under the CRA.

One of the main aims of the Timeshare Regulations and the CRA was to enable consumers to understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. And if a supplier's disclosure and/or the terms of a contract did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, that may lead to the Timeshare Regulations and the CRA being breached, and, potentially the credit agreement being found to be unfair under Section 140A of the CCA.

However, as I've said before, the Supreme Court made it clear in *Plevin* that it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A of the CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

In addition, to conclude that a term in the Purchase Agreement rendered the credit relationship between Miss K and the Lender unfair to her, I'd have to see that the term was unfair under the CRA, and that term was actually operated against Miss K and Mr H in practice.

Regarding the duration of the membership, the Information Statement made clear to Miss K and Mr H that the membership lasted for 19 years. I acknowledge that the sale of the Allocated Property could be postponed at the Supplier's discretion, but it could only be postponed for up to two years in limited circumstances which don't seem unusual or unreasonable. So, I don't think the term in relation to the mere duration of the membership is likely to be unfair for the purpose of the CRA.

Similarly, I don't think the term relating to the mere obligation to pay an annual management charge is likely to be unfair for the purpose of the CRA. The Information Statement explains that the charges are budgeted annually and are subject to increase or decrease as determined by the costs of managing the scheme, which doesn't seem unreasonable. And, while I acknowledge that such an increase could be greater than what had been set out, this would be in exceptional circumstances, where there had been an extraordinary increase in costs directly related to the Resort which could not previously have been foreseen.

And therefore, I don't think either of these terms created an unfairness in the relationship between Miss K and the Lender.

The Letter of Complaint also says Miss K and Mr H weren't given a transparent explanation as to the features of the agreements which may have made them unsuitable for them or have a significant adverse effect which they would be unlikely to foresee, especially given the length of the term, the high interest rate and total charge for the credit provided.

But they haven't explained why the particular risks or features are that they're referring to here would have had an adverse effect on Miss K and Mr H. Miss K also hasn't described what she feels should have been explained or what information should have been given about these points that wasn't. The PR has mentioned the length of the loan, the interest rate and the total charge for the credit, but hasn't given any reason as to why these are unfair in this particular case or why these cause Miss K's credit relationship with the Lender to be unfair.

But even if I were to acknowledge the possibility that there were information failings on the part of the Supplier, I don't think this makes a difference here anyway. I can't see that there's been any detriment to Miss K and Mr H or that any of these points are likely to have prejudiced their purchasing decision at the Time of Sale and rendered Miss K's credit relationship with the Lender unfair to her for the purposes of Section 140A of the CCA.

Moreover, as I haven't seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Miss K was unfair to her because of an information failing by the Supplier, I'm not persuaded it was.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Miss K was unfair to her for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

Conclusion

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

direct the Lender to compensate Miss K.

My final decision

I do not uphold this complaint against Shawbrook Bank Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss K to accept or reject my decision before 28 November 2024.

Chris Riggs
Ombudsman