DRN-4832214

The complaint

Ms R complains that Shawbrook Bank Limited ('Shawbrook') was unfair and unreasonable when it declined her claim under sections 75 of the Consumer Credit Act 1974 ('CCA') and when it rejected her complaint that it was party to an unfair debtor-creditor relationship with her as defined by Section 140A of the CCA.

The purchases that are connected to this complaint were made jointly by Ms R and a Mr H, so I will refer to both parties where appropriate in this decision. However, the associated credit agreements were in Ms R's sole name, and as such she is the sole complainant here.

What happened

Ms R and Mr H were existing customers of a timeshare provider (the 'Supplier') and were members of an asset-backed timeshare called the Fractional Property Owners Club ('FPOC') having made their initial purchase in September 2015 ('Property 1').

The terms of the FPOC membership meant that at the end of their projected membership term, they also had a share in the net sales proceeds of a property tied to their membership (the 'Allocated Property'). As their interest in the Allocated Property was limited to a share in its net proceeds, they didn't have any preferential rights to stay in the Allocated Property or use it in any other way.

Under the terms of their initial FPOC membership, Ms R and Mr H could exchange their Fractional Points for holidays from the Supplier every other year.

In April 2016 they traded in their ownership of Property 1 to make their second FPOC purchase ('Property 2'). This new membership allowed Ms R and Mr H to take a one-week holiday every year at a property from the Supplier's portfolio. Both the purchases of Property 1 and Property 2 were financed by a point-of-sale loan from a third-party provider (neither of these loan agreements are part of this complaint).

On 7 June 2016 Ms R and Mr H attended a sales presentation by the Supplier, and as a result they purchased a new FPOC membership ('Property 3'). It is unclear from the documentation provided what the actual purchase price of Property 3 was, but after trading in their ownership of Property 2 they paid a total of £8,645. This was paid for by Ms R taking finance in her sole name from Shawbrook. She entered into a 15-year restricted use Fixed Sum Credit Agreement for £8,645 ('Credit Agreement A'), with the total amount payable, including interest being £17,982.

On 30 May 2017 Ms R and Mr H made a further FPOC membership purchase for a sale price of £31,834 ('Property 4'). They traded in their ownership of Property 3, which was given a trade in value of £24,399, meaning they had to pay £7,435 to complete the purchase of Property 4. Ms R took out a new finance agreement in her sole name with Shawbrook, which consolidated the outstanding finance for the purchases of Property 2 and Property 3. This new Fixed Sum Credit Agreement was for £35,312 repayable over 15 years ('Credit Agreement B'), with the total amount payable including interest being £73,447.20.

On 13 August 2019 Ms R, using a professional representative ('SC') wrote to Shawbrook to complain that she and Mr H had been mis-sold the FPOC membership. She said, in summary, the following misrepresentations had been made:

- In two years she'd had to pay £2,278 in management charges. This hadn't been explained to them.
- They were pressured during the sales process and weren't given the opportunity during the sales process to decide if the FPOC was the right product for them.
- They were told the property would be sold by the end of 2035. She has since discovered that there was no clear indication as to the duty of the trustees to market the property and the sale could be delayed for up to two years.
- It was not explained that her beneficiaries would inherit the management fee liability.
- They had been unable to book holidays where and when they wanted to go due to a lack of availability, and identical holidays were available through travel agents.
- Having to book two years in advance was not the "easy availability" that they were promised.

SC went on to describe how the Fractional product (the FPOC) was an Unregulated Collective Investment Scheme ('UCIS') and that the Supplier was not authorised or regulated to provide investment advice. SC said that the promotion and financing of the FPOC (as it was a UCIS) was therefore unlawful and in breach of the regulations under the Financial Services and Markets Act 2000 ('FSMA'). And as Shawbrook is deemed the principle of the Supplier, Shawbrook is liable for such breaches.

On 16 September 2019 Shawbrook sent Ms R its final response to her complaint, which it did not uphold. It said, as far as is relevant here:

- Ms R and Mr H were provided with the Application and Purchase agreement forms dated 7 June 2016 and 30 May 2017 which they both signed. These set out the costs of the purchases - £8,645 and £7,435 respectively.
- Ms R and Mr H were provided with a 14-day "cooling off" period during which they could cancel their membership without penalty, and this was also included in the Credit Agreement forms.
- The Credit Agreements made clear the amount of credit being provided, the duration of the agreement, the monthly repayment, the fixed rate of interest, the total charge for the credit, the total repayable, and the APR.
- Ms R and Mr H had signed to agree they understood the terms of the credit agreements.
- Ms R and Mr H had not sought to cancel their membership within the "cooling off" period, and were happy to proceed and subsequently upgrade their FPOC membership on the basis given.
- The FPOC membership had a term of 19 years. There was no forced inheritance of the FPOC membership and there was no obligation on next of kin to take ownership.
- Ms R and Mr H were made aware of the conditions of the sale of the property at the conclusion of the membership term.
- Ms R and Mr H were not misled regarding their share of the potential sales proceeds, and there was no evidence that the agreement was sold as an investment which would increase in value.

- Ms R and Mr H were made aware of the management charges for the purchase year, and that they would receive an invoice for the subsequent years on 1 January.
- FPOC membership is a timeshare product and sold in accordance with the Timeshare Regulations. It was not sold as a financial investment, so Ms R and Mr H's membership was therefore not a UCIS.
- FPOC membership provided its own benefits which are not available to the general public. Some unassigned rental properties are available for general use at selected resorts only, but these units are not part of the FPOC inventory.
- Ms R and Mr H had enjoyed 12 weeks of holidays since being members in 2016 and had never raised concerns about availability.

Ms R did not agree, and so on 1 October 2019 SC submitted a complaint to our Service on her behalf. This said, in summary:

- A claim under section 75 CCA is available to Ms R as she was mis-sold the Fractional product, and this was 100% funded by Shawbrook.
- The Fractional product is a UCIS.
- Shawbrook had also breached FSMA by funding a UCIS investment via the Supplier.

An Investigator considered Ms R's complaint, but prior to issuing their findings, they asked Ms R's representative, SC, if they had a witness statement from Ms R and/or Mr H regarding what happened at the Time of Sale(s). SC confirmed that they didn't, nor was any other direct evidence provided from either Ms R or Mr H.

The Investigator decided that Shawbrook had not acted unfairly when it had rejected Ms R's claim under section 75 CCA. She thought this because the purchase price of Property 4 was in excess of £30,000. And this was over the limit set out in the CCA as a requirement for raising a Section 75 claim against a credit provider for any misrepresentation by the supplier of goods or services.

Ms R did not agree. SC said that although the FPOC membership had been shown by the courts to not be a UCIS, Miss R's complaint was that the FPOC membership had been sold as an investment, contrary to Section 14(3) of the 2010 Timeshare Regulations. And SC made reference to the Judicial Review on a decision previously issued by this Service (*R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd; R. (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) (the 'Judicial Review')).

SC concluded that as the FPOC membership was sold as an investment, this rendered the credit relationship between Ms R and Shawbrook unfair to her. So Shawbrook ought to have considered this under section 140A CCA. SC also said that the credit intermediary who had brokered the credit arrangement between Ms R and Shawbrook did not have the required regulatory status to do so. This meant Credit Agreement B was unenforceable.

As no agreement could be reached the complaint was passed to me for a decision.

On 29 April 2024 I issued a provisional decision setting out why I didn't think Ms R's complaint ought to be upheld. In my provisional decision I said the following:

Ms R's Section 75 Complaint

I have seen that Ms R entered into a contract with the Supplier for services financed by a debtor-creditor-supplier agreement, for the purchase of Fractional Rights relating to Property 3 and Property 4. So I am satisfied that elements of the formalities needed for Section 75 CCA apply here to both.

Section 75 says that, in certain circumstances, the borrower (Ms R) under a credit agreement has an equal right to claim against the credit provider (Shawbrook) if there's either a breach of contract or misrepresentation by the Supplier of goods or services (the FPOC Memberships). And, once a claim is made, Shawbrook must properly consider the claim and pay compensation if needed. Ms R's complaint is that Shawbrook did not fairly or reasonably do that.

However, there are certain limitations to bringing a claim under Section 75. One of these is the price of the goods or service. The purchase price must be more than £100 but no more than £30,000.

The purchase price of Property 3 is unclear, and Shawbrook has been unable to provide this when asked. But I can see the trade-in price that it was given less than one year after its purchase was £24,399. So I think it likely that its original purchase price was less than £30,000, and as such Shawbrook was required to consider a claim under Section 75 for this purchase.

However, I can see that the purchase price of Property 4 was over £30,000. As it is the purchase price of the product or service that needs to be taken into account, and this purchase price was in excess of £30,000 a claim under Section 75 relating to the purchase of Property 4 cannot succeed.

But where the purchase price is in excess of £30,000, a claim can be considered under Section 75A CCA. But a claim under 75A can only relate to a 'breach of contract' – misrepresentation isn't included. Looking at Ms R's claim I am satisfied it includes elements which are alleged breaches of contract, so these could be considered under Section 75A.[1]

But as I go on to explain below, whether it be under Section 75 or 75A, I do not think that Shawbrook was unfair or unreasonable when it rejected Ms R's claim.

With regards to the alleged breaches of contract, Ms R has said that she's had to pay £2,278 in management charges, and this hadn't been explained to them at the time of sale. It is unclear whether this figure relates to the ownership of Property 3, Property 4, or a combination of the two. But Ms R has not provided any evidence, either orally or in writing, of what she says they were told during the sales process about how much they were likely to pay in ongoing management charges. In short therefore, I have not seen enough evidence to say, on balance, that the Supplier wasn't entitled to charge these sums under the FPOC Memberships.

Ms R has said she and Mr H were told the property would be sold by the end of 2035. She says she has since discovered that there is no clear indication as to the duty of the trustees to market the property and the sale could be delayed for up to two years. She also says it was not explained that her beneficiaries would inherit the management fee liability.

These points must relate to the Allocated Property that they currently have a fractional share in, so it follows that this part of the claim must relate to Property 4. And as I've already explained, given its sale price exceeded £30,000 a claim under Section 75 for a

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[1] There are other formalities that mean s.75A might not apply, but I've not dealt with them here as I don't think the claim would succeed for other reasons.

misrepresentation cannot succeed. These allegations could be read such that there might be a future breach of contract, but as I can't see either of these issues led to an actual breach, a claim under Section 75A would also likely fail.

Ms R's final point of claim was that they had been unable to book holidays where and when they wanted to go due to a lack of availability, and identical holidays were available through travel agents. She also said that having to book two-years in advance was not the promised "easy availability".

If Ms R and Mr H were unable to enjoy their holidays as they were entitled to under either of their FPOC memberships, then that may be construed as a breach of contract, and remedy may be due. But other than saying they were unable to book any holidays, Ms R has not provided any substance to this complaint. And the Supplier has said Ms R and Mr H have taken 12 weeks of holiday since 2016 and have never raised any concerns to it about holiday availability. So on the evidence provided, I'm not persuaded that there has been a breach of contract in this regard.

There were some alleged misrepresentations that could be considered under s.75 CCA with respect to the first purchase funded by Shawbrook, Property 3, as the purchase price was under £30,000. However, I don't think there is enough to say any of those alleged misrepresentations were made out and I have dealt with those in the section below.

Ms R's complaint that there was an unfair debtor-creditor relationship

When Ms R first complained to Shawbrook, SC said that the claim was for "S75 CCA CLAIM AGAINST THE BANK AND BREACH OF FSMA RULES". Since our investigator issued their view, SC has said that it thought the problems connected with the sale led to an unfair debtor-creditor relationship and pointed to the outcome of the Judicial Review. I note that allegation was never raised with Shawbrook, nor have some of the more recent allegations, such as that the Supplier sold FPOC Memberships to Ms R as an investment. Although I don't think Shawbrook has had the opportunity to consider these allegations, I will deal with them in my provisional decision. I say that as many of the allegations were set out before, albeit not expressed as causing an unfair debtor-creditor relationship, and I can't see that dealing with these issues causes prejudice to Shawbrook. If Shawbrook disagrees and thinks that this is something I shouldn't consider, it can let me know when replying to this provisional decision.

Here SC raised two reasons why there might be an unfair debtor-creditor relationship. SC has said:

- *The FPOC membership was sold as an investment, contrary to Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').*
- *The credit intermediary who had brokered the credit arrangement between Ms R and Shawbrook did not have the required regulatory status to do so – originally it said this was also a breach of FSMA.*

The law on this area makes plain that an unfairness can be caused by a number of different factors, including, but not limited to:

- *the Credit Agreement and the way in which it is enforced; and*
- *anything said or done by the Supplier at the time the credit was arranged and FPOC membership sold.*

In response to our Investigator's view, SC raised the effect of the Judicial Review judgment on Ms R's complaint. SC argued that other Ombudsmen had upheld complaints about the sale of similar timeshares and therefore this complaint should be upheld too.
The Timeshare Regulations prohibited the Supplier from marketing or selling the FPOC membership as an investment. At the Times of Sale, Reg.14(3) said:

> *"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."*

However, Ms R hasn't described in any detail what was said to them, by whom and in what circumstances to support the suggestion in question. Nor has it been alleged that either membership was marketed or sold to them as an investment. Rather it appears SC alleges that the memberships had investment elements to them.

It's also important to note that the judgment in the Judicial Review didn't find that FPOC Memberships, such as Ms R and Mr H's, were inevitably sold as investments. In fact, the judge held (at 66):

> *"My necessary starting point is the ombudsman's explicit acceptance that a fractional ownership timeshare does not inevitably or inherently – purely by virtue of its fractional ownership component – transgress the prohibition in Reg.14(3). That is a point of some importance. Reg.14(3) prohibits the marketing or selling of a timeshare contract as an investment. It does not prohibit the existence of an investment component in a timeshare contract or the marketing or selling of such a product per se."*

The judge went on to say (at 71) it would be an error of law to say that the intrinsic design of FPOC Membership led to a breach of Reg.14(3).

And with that being the case, and based on the evidence I've seen in this complaint, I don't think it's likely the Supplier breached the prohibition on selling timeshares as investments. But even if I'm wrong about that, based on what I've seen, I'm not persuaded that the investment elements of the FPOC memberships were important enough to Ms R and Mr H's purchasing decision(s) to render Ms R's relationship with Shawbrook unfair to her if the memberships had, in fact, been sold as investments. These were Ms R's and Mr H's third and fourth FPOC membership, each 'upgrading' from the previous, so it seems to me likely that the purchases were primarily made to improve the availability and quality of the holidays.

SC has said that the credit intermediary who arranged Credit Agreement A and Credit Agreement B did not have the required regulatory status to do so.

The Supplier in this case was duly authorised and regulated to broker credit arrangements. And the Supplier is named on all the sales documentation that I have seen, except on both Credit Agreements. In the box titled "Name of Credit Intermediary" at the top of both Credit Agreements is not the name of a firm, but what appears to be a location. And as SC has pointed out, the name that appears on the form is not authorised by the regulator.

Having thought about this, I cannot see any reason why the Supplier, who was correctly authorised and regulated to provide credit broking services, would use a credit intermediary who was not authorised.

And in fact, having seen other similar documentation relating to other complaints with our Service which also involve the Supplier where it has also arranged finance, I understand that

the location named on Credit Agreement A and Credit Agreement B was the first line of the Supplier's Spanish address. So I think this is most likely to have been a mistake, and both Credit Agreements were arranged by the Supplier.

In addition to the two matters set out above, some of the alleged misrepresentations could cause an unfairness, so I've briefly considered them here.

Ms R has said they were pressured by the Supplier to purchase the FPOC membership and that they weren't given the opportunity to decide if the product was right for them. I don't have any detailed explanation from Ms R about how exactly they were pressured, and I can see they had a 14-day cooling off period available to them as well for both purchases. I'm also mindful that these two purchases in question were Ms R and Mr H's third and fourth FPOC purchases. So, I think it's a reasonable assumption to make that they were familiar by that stage with how the product worked and with the general sales practices the Supplier used, as well as having time to reflect on their two previous purchases. I also think their past purchasing history shows that they were interested in the Supplier's memberships, so I think it's likely that they bought these memberships for that reason rather than due to a pressured sale.

Conclusion

Overall, subject to any further submissions from either party in response to this provisional decision, I intend to reject this complaint as I don't think that Shawbrook acted unfairly or unreasonably when it declined Ms R's Section 75 claim. I am also not currently persuaded that Shawbrook was party to a credit relationship with Ms R under the Credit Agreement that was unfair to her. And, having taken everything into account, I currently see no other reason why it would be fair or reasonable to direct Shawbrook to compensate Ms R.

The response to my Provisional Decision

Shawbrook did not have anything further to add in response to my provisional decision, but Ms R, through SC, did. It sent a comprehensive response, including a witness statement, setting out where Ms R did not agree with my provisional decision.

Ms R argued that her credit relationship with Shawbrook had been rendered unfair to her because the FPOC membership had been sold to her as an investment, contrary to Reg.14(3). In essence, Ms R disagreed where I had said:

- Ms R had not described in any detail what was said, by whom and in what circumstances to support the suggestion that the FPOC membership had been sold to her as an investment.
- It was not likely that the Supplier had breached the prohibition on selling the timeshare as an investment.
- The investment element of the FPOC membership was not important enough to Ms R and Mr H's purchasing decision to render her credit relationship with Shawbrook unfair to her.

Also Ms R maintained that the credit broker named on both of the Credit Agreements was not authorised by the FCA, and so these Credit Agreements were unenforceable under Section 27 FSMA. And Ms R did not agree with my view that a mistake had been made and the Supplier's address had been entered instead of its name. But Ms R went on to say that even if a mistake had been made, a Regulated Consumer Credit Agreement had to include, amongst other things, the identity and geographical address of the credit broker. And if this was not complied with the agreement would only be enforceable under a court order.

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 when doing that, the Financial Conduct Authority's (FCA) Handbook of Rules and Guidance requires that I take into account the following under Rule 3.6.4 of the Dispute Resolution Rules ('DISP'): relevant law and regulations; the regulator's rules, guidance and standards; codes of practice; and where appropriate, what I consider to have been good industry practice at the relevant time.

SC, on Ms R's behalf, has made a number of detailed points, both in its earlier submissions to our Service and in response to my provisional decision, and has submitted several documents it says relate to the Supplier's sales presentations. I have considered everything that has been submitted. We're an informal dispute resolution service, set up as a free alternative to the courts. In deciding this complaint I've focussed on what I consider to be the heart of the matter, rather than commenting on every issue in turn. This isn't intended as a discourtesy to anyone, rather it reflects the informal nature of our service, its remit, and my role in it.

Where I have found evidence is incomplete, inconclusive, incongruent or contradictory, I have made my decision on the balance of probabilities – what I think is more likely than not to have happened – given the available evidence and wider circumstances.

SC has drawn my attention to previous Ombudsman's decisions where it has been found that the Supplier sold FPOC memberships to customers as investments. When assessing any complaint, the role of an Ombudsman is to assess the evidence, to come to a fair and reasonable outcome on the merits of the specifics of that complaint. Whilst trying to be consistent with previous decisions, the outcome will always be specific to the individual complaint as all circumstances are different. And the outcome I have reached in this case is specific to the circumstances of the sale of the FPOC membership to Ms R and Mr H.

Ms R's Section 75 Complaint

Ms R has not provided any further evidence or arguments to show why Shawbrook was unfair and unreasonable in not accepting her Section 75 claim. As such I see no reason to depart from my provisional findings in this regard. I am satisfied that Shawbrook was not unfair or unreasonable in not accepting Ms R's claim under Section 75 CCA.

Ms R's Complaint that there was an Unfair Debtor-Creditor Relationship

SC has provided a copy of the answers Ms R and Mr H gave to its 'Timeshare Advice Line' on 18 March 2019 in respect of the FPOC purchase made on 30 May 2017. SC says that these answers show that it was sold as an investment, and Ms R and Mr H felt they had to upgrade so as to not lose their investment. This form appears to have been completed by a third-party as a result of questions put to Ms R and Mr H over the telephone. It consists of a number of pre-populated questions which require a yes/no tick box answer. They are as follows[2]:

[2] The answers I have shown were indicated by the relevant box being ticked, except for the 'not sure' answer which was handwritten.

Did the sales representative say any of the following:

Your Timeshare would increase in value:	*Yes*
Your Timeshare is a financial investment:	*Yes*
You could hand Timeshare back at any time:	*Yes*
The management fees would not increase:	*"not sure"*
You would receive rental income:	*No*
Rental income would cover finance and management payments:	*No*
Only exit option was to 'upgrade' (eg fractional):	*Yes*
The resort is only available to members (exclusivity):	*Yes*
Were you told about cancellation rights and withdrawal period:	*Yes*
Was a trade organisation mentioned (RDO):	*Yes*
If yes, did this persuade you to purchase the Timeshare:	*Yes*

So these assist me somewhat in understanding how Ms R and Mr H thought their FPOC membership had been sold to them by the Supplier. But I have no way to understand how these questions were framed, and what Ms R and Mr H actually said in response. So without more I don't think I can fairly place much weight on this.

To support Ms R's position in regards to this aspect of her complaint, she and Mr H have provided a signed witness statement dated 4 May 2024, which followed my provisional decision. This sets out the extent of their relationship with the Supplier from 2015 until their fourth FPOC purchase in 2017, and their current recollections of the sales processes concerned.

In the witness statement, Ms R and Mr H describe their first sales meeting in September 2015[3]. They said:

"The sales rep pitch was that we would be joining the [Supplier] family where we were buying in to an apartment at a beautiful [Supplier] resort where we owned a percentage of the apartment which would provide us with a return on our investment in the future when the apartment was sold. Along with this we would be able to take holidays at the different [Supplier] resorts.

Then we would be shown on the overhead projector, slides showing forecast returns of how much we, along with the other investors in the room, could earn in the future from the Fractional by buying in to one at the seminar.

For us, the key factor which persuaded us to purchase the Fractional was getting a return on the money we invested in the Fractional even though this was several years in the future. Taking holidays at beautiful resorts was a bonus which with hindsight did not materialise. [The Supplier] also sorted the loans to purchase the Fractional."

The witness statement then went on to explain that after the first 2015 sales presentation, which was very long, the subsequent three in the following years were shorter, as the Supplier said Ms R and Mr H were aware of the process and the benefits of the Fractional and were part of the [Supplier] family. It also said:

"…the key sales pitch we were always presented with was that by upgrading our current Fractional we would be getting a larger financial return in the future as the upgraded apartment was better than our previous purchase.

[3] Although this sale is not part of this complaint, I have considered it as it provides evidence of what Ms R and Mr H say regarding their understanding of the FPOC product as a whole as they said each sale was similar in nature.

The base sales pitch was by upgrading our current Fractional we get a better return in the future. [The Supplier] would then put on the overhead projector, slides showing forecast returns which were higher and higher to show how upgrading meant better returns in the future from the money we invested. This was the key reason we kept upgrading our Fractional. The better holidays on offer was just a bonus."

Having considered what Ms R and Mr H have said, I can see it provides detail of their current recollections of the sales processes.

I am aware that some of the Supplier's training material, when taken with other oral representations during the sales presentation, might suggest in some circumstances that FPOC Membership was sold as an investment. And Ms R and Mr H's witness statement, and their initial answers to the questions put to them over the telephone seem to suggest this may be the case. But I explained in my provisional decision that I did not think that this is what happened here, and Ms R and Mr H's further submissions have not persuaded me I was wrong in coming to that conclusion. I'll explain.

Even though the Timeshare Advice Line answers apparently given by Ms R and Mr H in May 2017, which was before their initial complaint was made to Shawbrook, indicate that the Supplier told them that their 30 May 2017 FPOC membership[4] was a financial investment that would increase in value, this was not repeated in their complaint to Shawbrook. This allegation was not made at the outset, and was only made after the judgment in *Shawbrook & BPF v FOS* was handed down, and after my provisional decision was issued to Ms R. Yet that allegation is something I would have expected to see Ms R and Mr H say when the complaint was first made to Shawbrook if the FPOC membership was, as they are now saying, sold as an investment.

I think that had the sale taken place in the way now alleged, that would have been something Ms R relied on in her original complaint. Further, I place little weight on their recent recollections as I doubt their memory of the sale would have improved between Ms R's original complaint and her response to my provisional decision, and there is a real risk their memories have been influenced by the widespread reporting of the judgment in *Shawbrook & BPF v FOS.*

In my view, as the initial complaint is the best evidence I have of what Ms R and Mr H remember of their FPOC purchases, given the facts and circumstances of this complaint, and bearing in mind that I am making this decision on the balance of probabilities (i.e., what I consider most likely to have happened at the time), I'm not persuaded that the Supplier is likely to have breached the prohibition on selling timeshares as investments.

But as I said in my provisional decision, even if I'm wrong to find in this complaint that the Supplier didn't breach Regulation 14(3) at the Time of Sale, I was not persuaded that makes a difference to the outcome in this complaint anyway. And I remain of that view. As the Supreme Court decision 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. And it seems to me, that if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Ms R and Shawbrook that was unfair to her and warranted relief from that unfairness, whether or not the breach caused Ms R and Mr H to enter into the FPOC Purchase Agreement and/or Ms R to enter into the Credit Agreement is an important consideration.

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[4] The 30 May 2017 sales process was the only one named on the Timeshare Advice Line document, however I accept it was likely that the answers related to the way the FPOC was sold generally, and not specifically to 30 May 2017.

Here, Ms R simply did not allege until after the judgment in *Shawbrook & BPF v FOS* was handed down, and until after my provisional decision was sent to her, that the Supplier led her and Mr H to believe that FPOC membership would lead to a financial gain, inducing them to take out FPOC Memberships. Yet that is something I would have expected to see Ms R say if it was important to her or caused her to enter into the FPOC Purchase Agreement and/or the Credit Agreement. And as I said in my provisional decision, these were Ms R's and Mr H's third and fourth FPOC memberships, each 'upgrading' from the previous, so it seems to me likely that the purchases were primarily made to improve the availability and quality of the holidays.

So in the absence of such an allegation, and given Ms R and Mr H's FPOC purchase history, I find that I cannot say that the alleged breach of Regulation 14(3), even if true, was something that warrants relief given the circumstances of this complaint.

SC has maintained, in response to my provisional decision, that the credit intermediary who arranged both Credit Agreement A and Credit Agreement B did not have the required regulatory status to do so, and as such both are rendered unenforceable under Section 27 FSMA. And SC went on to say that even if the broker was duly authorised, and this was just a mistake with the name that was entered onto the credit agreements, that mistake means that the agreements are only enforceable by a court order and that Ms R is entitled to recover any loan repayments made.

When considering all the evidence in this regard, I am assisted somewhat by Ms R and Mr H's recollections as laid down in their witness statement. As I set out above, they said "… *[The Supplier] also sorted the loans to purchase the Fractional."*

And further, they concluded their witness statement with the following paragraph:

"Without [the Supplier] sorting out the loan to purchase each of the Fractional we would not have been able to purchase any of the Fractionals."

As I've said, the Supplier is named on both 7 June 2016 and 30 May 2017 Sale Agreement documents. And the Supplier appears to have been the entity that has completed all of the sale and loan documentation, and Ms R and Mr H have said in their witness statement, in my view clearly, that they understood that the Supplier of the FPOC membership also brokered both Finance Agreement A and Finance Agreement B.

I said before in my provisional decision that I thought there was simply a mistake on the face of Credit Agreement A and Credit Agreement B and SC has not put forward anything to make me change my mind on that. On balance, I think both loans were brokered by the Supplier, and I have seen the Supplier was authorised and regulated at the time to do so by the FCA. It follows, I do not think there was any breach of the relevant law.

But the *name* of the credit broker [the Supplier] was not entered onto either Credit Agreement A or Credit Agreement B, so I need to decide whether this omission has likely rendered the credit relationship between Ms R and Shawbrook unfair to her. And I'm satisfied that it doesn't. There is nothing to suggest that Ms R was unaware of who the broker was for either of the agreements, and I cannot see that it is likely that Ms R would not have entered into either of the credit agreements had the name of the Supplier been correctly entered into the documents. It follows that I do not think this could have led to an unfair debtor-creditor relationship – after all, Ms R got what she expected – FPOC memberships with associated loans from Shawbrook. I do not find she was operating under any mistake or misunderstanding of the agreements she entered into.

Conclusion

I remain satisfied that Shawbrook did not act unfairly or unreasonably when it declined Ms R's Section 75 claim. I am also not persuaded that Shawbrook was party to a credit relationship with Ms R that was unfair to her. And, having taken everything into account, I see no other reason why it would be fair or reasonable to direct Shawbrook to compensate Ms R.

My final decision

I do not uphold Ms R's complaint against Shawbrook Bank Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms R to accept or reject my decision before 2 July 2024.

Chris Riggs
Ombudsman