DRN-4935175

## The complaint

Ms D's complaint is, in essence, that Shawbrook Bank Limited ('Shawbrook') 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.

## What happened

Ms D was an existing member of a timeshare having purchased a trial membership in 2011 from a timeshare provider (the 'Supplier'). Whilst on a promotional holiday as part of her membership, she purchased membership of a timeshare (the 'Fractional Club') from the Supplier on 23 May 2012 (the 'Time of Sale 1'). She entered into an agreement with the Supplier to buy 1,252 fractional points at a cost of £20,544 (the 'Purchase Agreement 1'). But after trading in her existing trial membership, she ended up paying £16,549 for membership of the Fractional Club.

Fractional Club membership was asset backed – which means it gave Ms D more than just holiday rights. It also included a share in the net sale proceeds of a property named on her Purchase Agreement 1 (the 'Allocated Property 1') after her membership term ends.

Ms D paid for her Fractional Club membership by taking finance of £18,214 which consolidated the loan she took to pay for her trial membership, from Shawbrook (the 'Credit Agreement 1'). She paid off Credit Agreement 1 on 21 March 2013.

On 23 May 2013 Ms D purchased a new Fractional Club membership (the 'Purchase Agreement 2') by trading in her existing membership. This revoked all her rights under Purchase Agreement 1. Like her previous Fractional Club membership, Purchase Agreement 2 also included a share in the net sales proceeds of a property (the 'Allocated Property 2'). Ms D bought 1,932 fractional points by taking finance of £12,425 from Shawbrook in her name (the 'Credit Agreement 2'). Ms D cleared Credit Agreement 2 on 15 June 2015.

It seems that Ms D surrendered her Fractional Club membership in 2015 so she no longer has any rights to the future sale proceeds of Allocated Property 2.

Ms D – using a professional representative (the 'PR') – wrote to Shawbrook on 6 August 2018 (the 'Letter of Complaint') to complain about a misrepresentation by the Supplier at the Time of Sale, and a breach of contract, both giving her a claim against Shawbrook under Section 75 of the CCA, which Shawbrook failed to accept and pay.

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

Ms D says that the Supplier made a pre-contractual misrepresentation at both the Time of Sale 1 and Time of Sale 2 – namely that the Supplier:

- Told her that the Allocated Property would be sold at the conclusion of her membership, and she would make a profit on the investment. This was not true.

Ms D says that she has a claim against the Supplier in respect of the misrepresentation set out above, and therefore, under Section 75 of the CCA, she has a like claim against Shawbrook, who, with the Supplier, is jointly and severally liable to Ms D.

(2) Section 75 of the CCA: the Supplier's breach of contract

Ms D says that she found it almost impossible to book the holidays she wanted, when she wanted.

As a result of the above, Ms D says that she has a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, she has a like claim against Shawbrook, who, with the Supplier, is jointly and severally liable to Ms D.

Shawbrook did not send a substantive response to Ms D's claim, so PR complained to our Service. The complaint said that Ms D had upgraded from a trial membership to Fractional Membership in 2012, and then bought more fractional points in 2013. It went on to say that the Supplier had assured Ms D that the points would be sold in 19 years and a large profit would be shared between members, but the Supplier had now reneged on its promise. PR also said that Ms D was 67 and 68 when the loans were agreed, and her age ought to have been taken into consideration.

Shawbrook dealt with Ms D's concerns as a complaint and issued its final response letter on 28 January 2019, rejecting it on every ground. Shawbrook said, in summary:

- Ms D was provided with clear and unambiguous documentation at the point of sale setting out the costs involved.
- Ms D was given a 14 day "cooling off" period which she did not seek to use.
- There was nothing inappropriate in offering on-the-day incentives as Ms D was also given the 14-day withdrawal period.
- Ms D signed each of the Membership Applications, Loan Agreements, Member Declarations and Information Statements, and these set out the likely management charges.
- Ms D was told that at the end of her membership period the Allocated Property will be sold by UK-based trustees, who have a fiduciary duty to obtain the best price for it in the prevailing circumstances.
- Ms D was not misled regarding her share in the potential sales proceeds – there is no evidence that the agreement was sold as an investment which would increase in value, or that it would be sold at a profit.
- Appropriate assessments of Ms D's creditworthiness were completed, and the loans were both considered to be affordable for Ms D.
- The units advertised as available on the web for general booking are from the developer's stock and are not part of the Fractional Membership inventory.

Ms D's complaint was assessed by two different Investigators who, having considered the information on file, both rejected the complaint on its merits.

Ms D disagreed with the Investigators' assessments and asked for an Ombudsman's decision. PR also said that the Fractional Club membership cannot be viewed as a "timeshare contract", but rather as a Collective Investment Scheme ('CIS'), which the Supplier was neither qualified nor authorised to give advice on or sell to Ms D. PR submitted that this then rendered Ms D's associated credit relationship with Shawbrook unfair to her, under Section 140A of the CCA.

Ms D's complaint was passed to me for a decision.

And having considered all the evidence and arguments, I thought Ms D's complaint ought not to be upheld. I set out my initial thoughts in a provisional decision (PD) and invited further submissions from all parties in response.

In my PD I began by setting out:

**The legal and regulatory context**

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4 R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (when 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.
- 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).
    - Patel v Patel [2009] EWHC 3264 (QB).
    - 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 they represented a minimum standard. And 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').

I then went on to consider the merits of Ms D's complaint. I said:

***Ms D's claim under Section 75 of the CCA***

*Ms D has made a complaint about the sale of two separate Fractional Club memberships by the Supplier. She has said that there was a misrepresentation made by the Supplier and that there has also been a breach of contract, and it seems she is saying that this misrepresentation and breach of contract related to both sales. This means there have been, in effect, two claims made to Shawbrook under Section 75 of the CCA, and as such I need to consider the merits of each of these claims individually, and whether Shawbrook dealt with each fairly and reasonably.*

*The CCA introduced a regime of connected lender liability under section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.*

*In short, a claim against Shawbrook under Section 75 essentially mirrors the claim Ms D could make against the Supplier.*

*Section 75 of the CCA: the Supplier's misrepresentation at the Time of Sale 1*

*The Limitation Act 1980 (the 'LA') imposes time limits for people to start legal proceedings – and there are different time limits for different types of claims. Essentially, this means that if someone waits too long to make a claim, the court will usually say it's 'time-barred'. For this reason, if a consumer makes a claim after the relevant time-limit has expired, we'd usually say it was fair and reasonable for the creditor to take into account the timing of the claim to decline it.*

*A claim for misrepresentation against the Supplier would ordinarily be made under Section 2(1) Misrepresentation Act 1967. And the limitation period to make such a claim expires six years from the date on which the cause of action accrued. But a claim, like the one in question here, under Section 75 is also "an action to recover any sum by virtue of any enactment" under Section 9 of the LA. And the limitation period under that provision is also six years from the date on which the cause of action accrued.*

*The date on which the causes of action accrued was the date of the sale – 23 May 2012. I say this because Ms D entered into the purchase of her Fractional Club membership at that time based on the alleged misrepresentation of the Supplier, which she says she relied on. And as the loan from Shawbrook was used to help finance the purchase, it was when Ms D entered into Credit Agreement 1 that she suffered a loss.*

*Ms D first notified Shawbrook of her Section 75 claims on 6 August 2018. And as more than six years had passed between the Time of Sale 1 and when she first put her claims to Shawbrook, I don't think it would have been unfair or unreasonable of Shawbrook to rely on the LA to decline Ms D's claim about the alleged misrepresentation at Time of Sale 1.*

*Section 75 of the CCA: the Supplier's breach of contract – Purchase Agreement 1*

*I've already summarised how Section 75 of the CCA works and why it gives Ms D a right of recourse against Shawbrook. 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 1, Shawbrook is also liable.*

*Ms D says that she could not holiday where and when she wanted to – 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 1.*

*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 Ms D states that the availability of holidays was/is subject to demand. It also looks like she made use of her fractional points to take a holiday in May 2013.*

*The contract that Ms D is alleging has been broken by the Supplier (Purchase Agreement 1) was in existence between May 2012 and May 2013. So for me to be satisfied that there was a breach of this contract, I would have to be persuaded that Ms D was unable to take the holidays that she was entitled to as part of her Fractional Club membership, between these dates, due to a lack of availability.*

*But Ms D has provided no evidence to say when she found she was unable to go on holiday when she wanted to, due to a lack of availability. And as I've said, it seems she used her Fractional Club membership to take her May 2013 holiday. So I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement 1.*

***Ms D's Section 75 CCA Claim for Time of Sale 1 - Conclusion***

*For the reasons I've set out, I do not currently think Shawbrook is liable to pay Ms D any compensation for the alleged misrepresentation made by the Supplier at Time of Sale 1. Also, from the evidence I have seen to date, I do not think Shawbrook is liable to pay Ms D any compensation for a breach of contract by the Supplier.*

*And with that being the case, I do not think Shawbrook acted unfairly or unreasonably when it dealt with the Section 75 claim in question.*

*Section 75 of the CCA: the Supplier's misrepresentation at the Time of Sale 2*

*This part of the complaint was made for the same reasons that I set out at the start of this decision. They include the suggestion that Fractional Club membership had been misrepresented by the Supplier because Ms D was told that she was buying an investment that would make a profit when sold, when that was not true.*

*However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties, and that these would be sold at the end of the membership period, was not untrue. Ms D's share in the Allocated Property 2 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 her that interest, it did not change the fact that she acquired such an interest. Further, for the reasons I will come on to, any representation that the Fractional Club membership was an investment was not untrue, so it could not have led to a misrepresentation.*

*Section 75 of the CCA: the Supplier's breach of contract – Purchase Agreement 2*

*I've already summarised how Section 75 of the CCA works and why it gives Ms D a right of recourse against Shawbrook. 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, Shawbrook is also liable.*

***Ms D says that** she could not holiday where and when she wanted to – 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.*

*As I've said in relation to Purchase Agreement 1, 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 Ms D states that the availability of holidays was/is subject to demand.*

*The contract that Ms D is alleging has been broken by the Supplier (Purchase Agreement 2) was in existence between May 2013 and June 2015. So for me to be satisfied that there was a breach of this contract, I would have to be persuaded that Ms D was unable to take the holiday(s) that she was entitled to as part of her Fractional Club membership, between these dates, due to a lack of availability.*

*But as I've said, Ms D has provided no evidence to say when she found she was unable to go on holiday when she wanted to, due to a lack of availability. So I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement 2 in this regard.*

***Ms D's Section 75 CCA Claim for Time of Sale 2 - Conclusion***

*For the reasons I've set out, I do not currently think Shawbrook is liable to pay Ms D any compensation for the alleged misrepresentation made by the Supplier at Time of Sale 2. Also, from the evidence I have seen to date, I do not think Shawbrook is liable to pay Ms D any compensation for a breach of contract by the Supplier.*

*And with that being the case, I do not think Shawbrook acted unfairly or unreasonably when it dealt with the Section 75 claim in question.*

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

*When Ms D first complained to Shawbrook, PR said that she was making a claim under Section 75 of the CCA. No direct reference was made to Shawbrook being party to a debtor-creditor relationship which was unfair to Ms D. But I can see from Shawbrook's final response letter to Ms D's complaint, that it had looked at more aspects of the sale than were set out in Ms D's original complaint, and Shawbrook had considered the effect these may have had on Ms D and the credit relationship between them.*

*And both of our Service's Investigators considered Section 140A of the CCA in their adjudications, and once PR asked for the complaint to be considered by an Ombudsman, it specifically asked for the Ombudsman to consider Section 140A in relation to its allegation that the Fractional Club was a CIS.*

*So although a complaint under Section 140A of the CCA was not initially made to Shawbrook, I can see Shawbrook has had the opportunity to consider these allegations, so I will deal with them in this provisional decision. I say that as Section 140A of the CCA is relevant law in the context of this complaint, so I do have to consider it, 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.*

*So for this provisional decision, in arriving at a fair and reasonable outcome to this complaint, I think it will be helpful to consider whether an unfair credit relationship is likely to have come into existence between Ms D and Shawbrook. But as I have already explained, Ms D made two separate Fractional Club membership purchases, and bought both by taking a finance agreement from Shawbrook for each. So in effect Ms D had two separate debtor-creditor relationships with Shawbrook as she had two separate finance agreements – the first (Credit Agreement 1) was in place between 23 May 2012 and 21 March 2013 (when it was cleared), and the second (Credit Agreement 2) was in place between 23 May 2013 and 15 June 2015.*

*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 both Purchase Agreements) 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."*

*Shawbrook 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 both of Ms D's memberships 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 Shawbrook as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.*

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

*"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the*

*negotiator whether or not he was the creditor's agent.' […] Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."*

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

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

*In the case of Scotland & Reast v British Credit Trust Limited [2014], the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that "negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law" before going on to say the following in paragraph 74:*

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

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

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

*However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in Patel v Patel [2009] EWHC 3264 (QB) (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*

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

*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.*

*Like Ms D's claim under Section 75 of the CCA, because she had two finance agreements with Shawbrook, she has in effect made two complaints under Section 140A of the CCA. But the circumstances of each 140A complaint, and the evidence provided is the same. So, unlike Ms D's Section 75 claims, in this provisional decision I will consider Ms D's 140A of the CCA complaints together.*

***Ms D's Section 140A of the CCA complaints***

*Ms D's first credit relationship with Shawbrook relating to Credit Agreement 1 existed between 23 May 2012 and 21 March 2013, and her second, relating to Credit Agreement 2 existed between 23 May 2013 and 15 June 2015. I have considered the entirety of the credit relationships between Ms D and Shawbrook along with all of the circumstances of the complaints, and I do not think the credit relationships between them were likely to have been rendered unfair for the purposes of Section 140A. I will explain why.*

*When coming to that conclusion, and in carrying out my analysis, I have looked at all the evidence provided to me from both parties, including the Supplier's sales process – which includes:*

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; and*
2. *The provision of information by the Supplier at the Time of Sale.*

*I have then considered the impact of (1) and/or (2) on the fairness of the credit relationships between Ms D and Shawbrook.*

***Were Shawbrook's decisions to lend to Ms D irresponsible?***

*The PR says in its submission to our Service, that Ms D was 67 and 68 at the time that Shawbrook agreed to lend to her, and that her age should have been considered here. So although not necessarily expressed in this way, I think PR is saying that the decisions Shawbrook took to lend to Ms D were irresponsible, most likely due to the duration of the loan agreements (both were for 15 years) when taking into account her age when they were agreed.*

*But I haven't seen anything to persuade me that Shawbrook didn't take this into account when it was deciding if it should lend to Ms D. And someone's age, although a necessary consideration, shouldn't be a bar to lending if the lending is affordable to the consumer.*

*Shawbrook hasn't provided any detail of the checks it carried out when deciding whether to lend to Ms D on either occasion, but even if I were to find that Shawbrook 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 Ms D was actually unaffordable before also concluding that she lost out as a result, and then consider whether the credit relationship with Shawbrook was unfair to her for this reason.*

*Again, from the information provided, I am not satisfied that the lending was unaffordable for Ms D. If there is any further information on this (or any other points raised in this provisional*

*decision) that Ms D wishes to provide, I would invite her to do so in response to this provisional decision.*

*Was Fractional Club membership marketed and sold at the Time of Sale 1 and/or Time of Sale 2 as an investment in breach of regulation 14(3) of the Timeshare Regulations?*

*PR, on Ms D's behalf, has said the Fractional Club was a type of investment called a CIS. But I don't agree. I am satisfied that Ms D's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations. And it was held in Shawbrook & BPF v FOS that such a timeshare contract could not amount to a CIS.*

*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, although not expressed in these exact terms, PR says that the Supplier did that at the Time of Sale. So, that is what I have considered next.*

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

*Ms D's share in both Allocated Property 1, and then Allocated Property 2 clearly, in my view, constituted an investment as it offered her the prospect of a financial return – whether or not, like all investments, that was more than what she 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 the sale of 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 Ms D 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 or sold membership to her as an investment, i.e. told her or led her to believe that Fractional Club membership offered her 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 Ms D, the financial value of her share in the net sales proceeds of the Allocated Property 1 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 Ms D as an investment.*

*With that said, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So I accept that it's possible that Fractional Club membership was marketed and sold to her*

*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.*

*So, I have taken all of that into account. However, despite our investigator inviting Ms D to provide her own memories of the sales, Ms D has provided no evidence to support her allegation that this is what happened at either Time of Sale 1 or Time of Sale 2. Other than the generic complaint point made to Shawbrook, she has not described in any way what she was told by the Supplier about what she would receive from the net sale proceeds of her share in the Allocated Property once her Fractional Club membership ended.*

*So without any of Ms D's actual recollections of the Times of Sale and what may or may not have been said by the Supplier, this allegation simply does not have the strength to succeed. It therefore follows that I cannot say, on the balance of probability, that the credit relationship between Shawbrook and Ms D was rendered unfair to her in this regard.*

***Section 140A: Conclusion***

*In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think either of the credit relationships between Shawbrook and Ms D were 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.*

***My Provisional Conclusion***

*In conclusion, given the facts and circumstances of this complaint, I do not think that Shawbrook acted unfairly or unreasonably when it dealt with Ms D's Section 75 claim(s), and I am not persuaded that Shawbrook was party to a credit relationship with her under either Credit Agreement 1 or Credit Agreement 2, 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 Shawbrook to compensate her.*

Ms D said she did not wish to add anything further in response to my PD.

**What I've decided – and why**

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

And having done that, and because no further evidence has been submitted, I see no reason to depart from my provisional findings.

**My final decision**

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms D to accept or reject my decision before 26 August 2024.

Chris Riggs
**Ombudsman**