DRN-4962902

The complaint

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

What happened

Mr and Mrs H purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 3 November 2013 (the 'Time of the First Sale'). They entered into an agreement with the Supplier to buy 747 fractional points at a cost of £10,057 (the 'First 'Purchase Agreement') after trading in their existing timeshare.

Mr and Mrs H paid for their first Fractional Club membership by taking finance of £10,057 from the Lender (the 'First Credit Agreement').

On 6 January 2014 (the 'Time of the Second Sale'), Mr and Mrs H entered into an agreement to exchange their Fractional Club membership towards the purchase of a new Fractional Club Membership They entered into a new agreement with the Supplier to buy 1,041 fractional points at an additional cost of £5,595 (the Second Purchase Agreement') after trading in their existing Fractional Club membership.

Mrs and Mrs H paid for their second Fractional Club membership by taking finance of £5,595 from the Lender (the 'Second Credit Agreement').

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

Mr and Mrs H – using a professional representative (the 'PR') – wrote to the Lender on 2 October 2017 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of each Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

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

Mr and Mrs H say that the Supplier made a number of pre-contractual misrepresentations at the Time of each Sale – namely that the Supplier:

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

was not true.

5. told them that the compliance officer who oversaw completion and signature of the contractual documents and loan agreement was impartial when he wasn't, as he was an employee of the supplier.
6. told them they would be able to use their Fractional Club membership to travel anywhere in the world when, in reality, they couldn't find availability for where they wanted to go.
7. told them they were entitled to discounts and free upgrades when that wasn't true.
8. told them that the Supplier would buy back their Fractional Club membership, but that wasn't true.

Mr and Mrs H say that they have a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs H.

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

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

1. The contractual terms setting out (i) the duration of their Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of their membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
2. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions and aggressive commercial practices under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well prohibited practices under Schedule 1 of those Regulations.
3. 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 [it] before signing the Purchase Agreement".*
4. The interest rate on their loans was significantly higher than was being provided by other lenders.

The Lender dealt with Mr and Mrs H's concerns as a complaint and issued its final response letter on 27 December 2017, rejecting it on every ground.

Mr and Mrs H then referred the complaint to the Financial Ombudsman Service.

Some considerable time afterwards, the PR contacted this service suggesting the Fractional Club membership had been represented to Mr and Mrs H as an investment. They acknowledged that the word "investment" wasn't specifically stated in Mr and Mrs H's witness statement. But suggested that the Supplier had presented the membership in such a way and used language that suggested Mr and Mrs H would receive a financial return, meeting the definition of an "investment".

Mrs and Mrs H's complaint was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits. Mr and Mrs H disagreed with the Investigator's assessment and asked for an Ombudsman's decision - which is why it was passed to me.

Subsequently, the PR made further submissions which included additional allegations not overtly included within the original complaint. In particular, that Mr and Mrs H were pressured into purchasing their Fractional Club membership.

The PR later provided a "supplementary statement" from Mrs H dated 2 November 2023. In it, she says the Supplier told them they were buying a share in the property which would be an asset that could be sold. She said they felt the investment would be of benefit and there was no way they would have made the purchase had they not thought they were buying something *"real"* they could later sell. Mrs H says they were encouraged to consider the purchase as an investment.

The legal and regulatory context

In considering what's fair and reasonable in all the circumstances of this complaint, I'm 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 was 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 UTCCR.
- The CPUT Regulations.
- Case law on Section 140A of the CCA – including, in particular:
    - The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') (which remains the leading case in this area).
    - *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 was 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').

Having fully considered all the evidence and information provided, I issued a provisional decision ("PD") on 16 July 2024 giving Mr and Mrs H and Shawbrook Bank Limited the opportunity to respond to my findings before I reach a final decision.

In my PD, I said I didn't think that the Lender had acted unfairly or unreasonably when it dealt with their Section 75 claim. I also wasn't persuaded that the Lender was party to a credit relationship under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I could find no other reason why it would be fair or reasonable to direct the Lender to compensate them.

Shawbrook didn't acknowledge my PD or provide anything new for me to consider. After following up by this service, the PR acknowledged receipt and confirmed their intention to respond in detail within the time given.

In acknowledging my PD, the PR also raised a new allegation that the credit intermediary (who introduced the finance agreements) didn't appear to be recorded on the FCA register. In other words, suggesting that the credit intermediary didn't hold the necessary authorisation from the FCA and was unregulated.

The PR went on to suggest that the loan agreements included the consolidation of previous debts, including outstanding maintenance fees requiring the credit intermediary to also be regulated for debt adjustment and debt counselling. They suggest that the absence of authorisation from the FCA means that both Finance Agreements would be unenforceable.

The time for responses then lapsed and no further response was received from the PR. So, Mr and Mrs H's complaint was passed back to me to reach a final decision.

What I've decided – and why

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

Having done that, I still don't think Mr and Mrs H's complaint should be upheld.

For completeness, I said the following in my PD:

> 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 doesn't mean I haven't considered it.
>
> What's more, I've made my decision on the balance of probabilities – which means I've 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
>
> 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 the Lender under Section 75 essentially mirrors the claim Mr and Mrs H could make against the Supplier.
>
> Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender does not dispute that the relevant conditions are met in this complaint. And as I'm satisfied that Section 75 applies, if I find that the Supplier is liable for having misrepresented something to Mr and Mrs H at the Time of each Sale, the Lender is also liable.

This part of the complaint was made for several 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 Mr and Mrs H were told that they were buying an interest in a specific piece of "real property" when that wasn't true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties wasn't untrue. Mr and Mrs 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 didn't change the fact that they acquired such an interest.

As for the rest of the Supplier's alleged pre-contractual misrepresentations, while I recognise that Mr and Mrs H have concerns about the way in which their Fractional Club membership was sold, they haven't persuaded me that there was an actionable misrepresentation by the Supplier at the Time of each Sale for the other reasons they allege.

For me to conclude there was misrepresentation by the Supplier in the ways that have been alleged, I would need to be satisfied, based on the available evidence, that the Supplier made false statements of fact when selling the Fractional Club memberships. In other words, that they told Mr and Mrs H something that wasn't true in relation to one or more of the points raised.

I would also need to be satisfied that the misrepresentations were material in inducing Mr and Mrs H to enter the contracts. This means I would need to be persuaded that they reasonably relied on those alleged false statements when deciding to buy the Fractional Club membership, and that those misrepresentations were fundamental to their decision to proceed.

From the information available, I can't be certain about what Mr and Mrs H were specifically told (or not told) about the benefits of the membership they purchased here. But I have considered their evidence on the alleged representations alongside the other evidence available from the Time of each Sale to determine what I think was most likely to have happened.

In particular, I've seen various documents that Mr and Mrs H signed. These include:

- The first Fractional Club membership purchase

I've seen the following documents from November 2013 which were signed by Mr and Mrs H:

  - Application and Purchase Agreement; and
  - Fractional Property Owners Club Information Statement.

Having considered these, it appears Mr and Mrs H signed to acknowledged receipt of the documents and were aware of their withdrawal rights. Furthermore, although not determinative of the matter, I haven't seen anything within the documentation which supports the assertions in Mr and Mrs H's complaint. I'm aware of some of the Supplier sales and marketing practices at the Time of Sale, however I haven't found anything that was in use at the Time of Sale that echoes what they and the PR says they were told.

- The second Fractional Club membership purchase (upgrade)

I've seen the following documents from January 2014:

  - Application and Purchase Agreement;
  - Fractional Property Owners Club Information Statement; and

- Member's Declaration;

Mr and Mrs H also signed these documents which include confirmation of their receipt. And as with the documents associated with the First Sale, I haven't found anything that supports any of the alleged representations included within Mr and Mrs H's claim.

In particular:

1. The Supplier told them that Fractional Club membership had a guaranteed end date when that was not true. From what I have seen in all of the contractual documentation and the sales and marketing material, I think it likely Mr and Mrs H were told that on a set date in the future, the Allocated Property would be placed for sale and when it was sold their membership would end, rather than that their memberships would definitely end on a set future date.
2. The Fractional Club membership was an "investment". I will address this in more detail below, but in any event, I think the Fractional Club memberships did have an investment element to them – the interest in the sale proceeds of the Allocated Properties. So, if they were told the memberships were investments, and I make no such finding here, that would not have been factually incorrect.
3. The Supplier's holiday resorts were exclusive to its members. Whilst the Fractional Club may well have been exclusive to members, I've seen nothing to suggest Mr and Mrs H were told that the individual resorts in which the Supplier's properties were located were exclusive to Fractional Club members. Further, no such assurance appears in any of the contractual documentation nor the Supplier's sale and marketing materials.
4. The compliance officer who oversaw completion and signature of the contractual documents and loan agreement was represented as being impartial. My knowledge of the Supplier's sales process is that the compliance officer was independent from the original sales team (i.e., not originally involved in the sales presentation). I'm not aware of any regulatory requirement for a compliance officer to be someone other than an employee of the Supplier. And I've seen no evidence they were represented in any such way.
5. They would be able to use their Fractional Club membership to travel anywhere in the world. As far as I can see, this is subject to availability and with bookings allocated on a first come first serve basis. I've seen no evidence to suggest Mr and Mrs H weren't able to do that. It's possible that if Mr and Mrs H weren't able to access something they were entitled to under the memberships, that could amount to a breach of contract that, under Section 75, Shawbrook could be liable to answer. Some of the sales paperwork signed by Mr and Mrs H states that the availability of holidays was subject to demand. I accept that they may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.
6. They were entitled to discounts and free upgrades. I've found nothing within the documentation to support this. Mr and Mrs H have set out some of the extra things provided by the Supplier as an inducement for them to purchase, so to that extent, those things were provided to them.
7. The Supplier would buy back their Fractional Club membership. Note 4 of the Member's Declaration specifically states, *"We understand* [the Supplier]*, the Trustee or the Manager does not and will not run any resale or rental programmes and will not repurchase Fractions (or* […] *Points) or act as an agent in the sale other than as a trade in against future property purchases* […]*".*

> Mr and Mrs H original statement makes it clear that the most important selling point to them was that they believed they could sell their Fractional Club membership at any time and the Supplier would buy it back. But I can't see that this is supported by any of the evidence from the time of the sale. In fact, the note above seems to contradict this. Further, I think it inherently unlikely the Supplier would have made such a statement. To do so would make itself a hostage to fortune as it would open itself up to complaints from disgruntled customers who wished to 'cash in' their memberships at future dates. On balance, I am not satisfied such a representation was made.

So, based upon the written evidence from the Time of each Sale, which Mr and Mrs H appear to have signed, I can't reasonably conclude there was an actionable misrepresentation by the Supplier for the reasons they allege.

For these reasons, therefore, I do not think the Lender is liable to pay Mr and Mrs H any compensation for the alleged misrepresentations of the Supplier. And with that being the case, I don't 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've already explained why I'm not persuaded that the contract entered into by Mr and Mrs H was misrepresented by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Mr and Mrs H also say that the credit relationship between them 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 they have concerns about. It is those concerns that I explore here.

As Section 140A of the CCA is relevant law in the context of this complaint, I do have to consider it. So, in arriving at a fair and reasonable outcome to this complaint, it will be helpful to consider whether an unfair credit relationship is likely to have come into existence between Mr and Mrs H and the Lender.

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 each of Mr and Mrs H'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 the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

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

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

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

> "*By virtue of the deemed agency provision of s.56, therefore, acts or omissions 'by or on behalf of' the bank within s.140A(1)I 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.

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

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 the creditor's relationship with the debtor was unfair."*

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

I have considered the entirety of the credit relationship between Mr and Mrs H 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. 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 relationship between Mr and Mrs H and the Lender.

<u>The Supplier's sales & marketing practices at the Time of Sale</u>

Mr and Mrs H'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.

They include the allegation that the Supplier misled Mr and Mrs H and carried on unfair commercial practices which were prohibited under the CPUT Regulations for the same reasons they gave for their 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.

Mr and Mrs H suggest they were pressured by the Supplier into purchasing their Fractional Club membership and subsequent upgrade at the Time of each 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 they haven't provided a credible explanation for why they didn't cancel their membership during that time.

Moreover, they did go on to upgrade their first Fractional Club membership – which I find difficult to understand if the reason they went ahead with the first purchase was because they were pressured into it. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs H 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 Mr and Mrs H's credit relationship with the Lender was rendered unfair to /them under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why they say their credit relationship with the Lender was unfair to them. 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?

This particular allegation was expanded upon by the PR after the investigator issued their findings and notably, following the outcome of *'Shawbrook & BPF v FOS*', which related to the sale of Fractional Timeshares. The allegations are then supported by a newer supplementary statement from Mrs H in which she now asserts it was the representation of the products as investments that influenced their decision to proceed with the purchases.

The Lender does not dispute, and I am satisfied, that Mr and Mrs 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 that the Supplier did exactly 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.

Mr and Mrs 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 the sale of products such as the Fractional Club. They just regulated how such products were marketed and sold.

To conclude, therefore, that the Fractional Club membership was marketed or sold to Mr and Mrs H as an investment in breach of Regulation 14(3), I need to be persuaded it was more likely than not that the Supplier marketed or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs 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 Mr and Mrs H as an investment. For example, note 5 of the Information Statement says, *"The purchase of Fractional Rights is for the Primary purpose of holidays and is neither specifically for direct purposes of a trade in nor 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".*

With that said, I acknowledge that the Supplier's training material I've seen left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. And while that was not specifically alleged by either Mr and Mrs H nor their PR when they first complained about a credit relationship with the Lender that was unfair to them, I accept that it's *possible* that Fractional Club membership was marketed and sold to them 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, on my reading of the evidence provided and Mr and Mrs H's initial recollections of the sales process at the Time of Sale, that is not what appears to have happened. They described being told by the Supplier that the property would be sold in 2032 and the profits divided between the owners. Mr and Mrs H's provided a witness statement signed in September 2016. Given that statement was their own recollection of what happened, it is the best evidence available of their actual recollections of the sale. Mr and Mrs H didn't say anything about the first sale being positioned as an investment, and with respect to the second sale, they said:

> "*We were also told that our "property" would be sold on 31st December 2032, and the profits divided between the owners. However, if we wanted to sell before that,* [the Supplier] *would buy back our share at the market rate of the time"*

So, Mr and Mrs H have not made any allegation in their first witness statement about the first membership being sold as an investment. And with respect to the second sale, they have not specifically said membership was positioned or sold to them as a way of making a financial gain. They have used the word 'profit', but I can't see it was used in a context that implied they were told the membership was to be treated as an investment, rather it was more of a description of how the sale of the Allocated Property worked in practice.

On balance, I think that's more likely to be Mr and Mrs H's subsequent interpretation of what was actually said (i.e., that they would receive a share of the net sale proceeds). I'm not persuaded that Mr and Mrs H entered into the purchase agreements in the belief that they would derive a profit or gain. Rather, they were buying something that upon eventual sale of the Allocated Property, would mean

they would receive something back. There was certainly no suggestion they saw the purchase(s) as an investment from which they would gain financially.

Furthermore, I think it's inherently implausible that the Supplier would make a promise that Mr and Mrs H could also sell their membership back to them at a profit. If that were the case, clearly Mr and Mrs H could've elected to do so shortly after completing the purchases opening up the Supplier to complaints if a profit wasn't achieved.

So, while the PR now argues that the Supplier marketed and sold Fractional Club membership to Mr and Mrs H as an investment, in light of Mrs H's more recent recollections following the outcome of *Shawbrook & BPF v FOS,* I don't recognise that assertion in their initial recollections of the sale.

Indeed, Mr and Mrs H's initial recollections and the Letter of Complaint were put together much closer to the Time of Sale and are, in my view, better evidence of what they remember of the sales process at that time and why they were unhappy with it, rather than their very recent recollections. In particular, that they thought the Supplier would buy back their Fractional Club membership. After all, if Fractional Club membership had been marketed and sold as an investment by the Supplier at the Time of each Sale, it's difficult to understand why they didn't mention that in their initial recollections. And with that being the case, in the absence of persuasive evidence to suggest otherwise, I find it unlikely that the Supplier led them to believe that membership offered them the prospect of a financial gain (i.e., a profit), given their evolving version of events.

But even if I'm wrong to conclude that, on this occasion, membership was unlikely to have been sold in that way given what I have already said about Mr and Mrs H's recollections of the sales process at the Time of Sale, I'm not currently persuaded that would make a difference to the outcome in this complaint anyway.

Was there an unfair relationship between the Lender and Mr and Mrs H?

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

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

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

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

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

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

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

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs H and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) (deemed to be something done by the Lender under section 140(1)(c) of the CCA) lead them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

But as I've already said, there was no suggestion in Mr and Mrs H's initial recollections of the sales process at the Time of Sale 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. In fact, they specifically referred to other things that were important to them, for example, being able to take canal boat holidays and the quality of the accommodation. Crucially, in my view, Mr and Mrs H did not say in their first witness statement that they were motivated at all by Fractional Club membership being presented as an investment.

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'm not persuaded that Mr and Mrs 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've pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I don't think the credit relationship between Mr and Mrs H and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

<u>The provision of information by the Supplier at the Time of Sale</u>

Here, I will consider Mr and Mrs H's allegations that:

1. The contractual terms setting out (i) the duration of their Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of their membership were unfair.
2. Certain information either wasn't received, or Mr and Mrs H weren't given time to read and consider that information.

It's clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mr and Mrs H when they purchased and upgraded their membership of the Fractional Club at the Time of each Sale. But they and the PR say that the Supplier failed to provide them with all of the information they needed to make an informed decision. Or if they did, Mr and Mrs H weren't given time to consider that information before entering into the purchase agreements.

The PR also 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 UTCCR.

One of the main aims of the Timeshare Regulations and the UTCCR 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 didn't 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 UTCCR 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 doesn't 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.

Given the facts and circumstances of this complaint, I'm not persuaded that the Supplier's alleged breaches of CPUT Regulations and the UTCCR are likely to have prejudiced Mr and Mrs H's purchasing decision at the Time of each Sale and rendered their credit relationship with the Lender unfair to them for the purposes of section 140A of the CCA.

I've thought about the information that I believe should have been provided to Mr and Mrs H as required under the Timeshare Regulations. I've seen some of the documentation from the Time of each Sale which Mr and Mrs H signed to say they'd received as follows:

- <u>The first Fractional Club membership purchase</u>
    - Application and Purchase Agreement; and
    - Fractional Property Owners Club Information Statement.

Having considered these, it appears Mr and Mrs H signed to acknowledged receipt of the various documents and were aware of their withdrawal rights.

- <u>The second Fractional Club membership purchase (upgrade)</u>
    - Application and Purchase Agreement;
    - Fractional Property Owners Club Information Statement; and
    - Member's Declaration;

By signing these documents, Mr and Mrs H confirmed receiving them together with the *"Rules and Project Regulations"* and the *"Facility Sheets".*

Of course, it's possible they weren't given sufficient time to read and consider the contents of this documentation at the Time of each Sale. But even if I were to find that was the case – and I make no such finding – it's clear they still had 14 days to consider the purchases and raise any questions or concerns they might've had. And ultimately, if they were unhappy or uncertain, they could've cancelled the agreements without incurring any costs.

Furthermore, the finance agreements also included a withdrawal/cancellation period of 14 days. But I haven't seen any evidence that Mr and Mrs H did raise any questions or concerns about any of the agreements or seek to cancel them within the 14 days permitted.

<u>The annual management/maintenance charges</u>

The requirement to pay management charges each year was clearly detailed within the documentation at the Time of each Sale. And I'm not persuaded its inclusion gives cause for unfairness *per se*. Mr and Mrs H had purchased membership which included a share in the proceeds of sale of an Allocated Property. So, I think it was

reasonable to expect that they would need to pay something towards the upkeep of the property and the club in which they retained membership.

Furthermore, it's not unusual for such agreements to include provisions for recalculation of the management charges payable each year. Clause H of the Application and Purchase Agreement signed by Mr and Mrs H explains that management charges are payable. Part 4 of the Information Statement (also signed by Mr and Mrs H) provides more detail. It explains how charges are derived and refers to the Rules and Management Agreement. So, I'm not persuaded that Mr and Mrs H weren't aware of that ongoing requirement at the time of each sale.

More importantly, I haven't seen any evidence to suggest that this requirement was applied unfairly so as to cause Mr and Mrs H detriment. I understand that Mr and Mrs H say they thought that by taking out more fractional points in the second sale, their annual management fees would go down. But it isn't clear to me why they would think that to be the case. Rather, I think it would be reasonable to expect that the fees associated with having a larger fractional interest would have been higher.

The interest rate on the loan

I've carefully considered the rates that applied in this case and whether they appear fair in all the circumstances. Mr and Mrs H accepted the loans, and the loan agreements clearly set out the annual rate of interest (and the APR). The agreements included Mr and Mrs H's right to cancel the agreements within 14 days.

There's no evidence that Mr and Mrs H raised any concerns or questions about the interest rates at the time, or subsequently. And as far as I'm aware, they were under no obligation to accept the finance offers and could, if they desired, seek to fund the purchases through alternative means. So, I'm not persuaded that the interest rates payable for the loans demonstrates unfairness for the purposes of S140A.

Moreover, as I haven't seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Mr and Mrs H was unfair to them 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 Mr and Mrs H was unfair to them 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.

As far as my findings above are concerned, I've not been provided with anything new to consider. So, for that reason, I've no need to vary those findings when reaching a final decision.

Authorisation of the credit intermediary

As explained above, this aspect of Mr and Mrs H's complaint was raised by the PR in response to my PD.

The rules that cover this service's powers to consider complaints are set out in the FCA's Dispute Resolution Rules ("DISP"). DISP 2.8.1 R says:

"The Ombudsman can only consider the complaint if:

(1) the respondent has already sent the complainant its final response or summary resolution communication; or

(2) in relation to a complaint that is not an EMD complaint or a PSD complaint, eight weeks have elapsed since the respondent received the complaint […]".

As far as I can see, this particular allegation didn't form any part of the original complaint submitted. So, Shawbrook haven't been given the opportunity to consider the allegation or respond to it. Whilst the new allegation is clearly associated with the Finance Agreements referred to within Mr and Mrs H's complaint, it doesn't appear to form part of the complaint submitted to Shawbrook under S75 and S140A. And neither has the PR presented it in that way. As it's Shawbrook's response to Mr and Mrs H's S75/S140A complaint I'm considering here, I think this new allegation constitutes a new and separate complaint. So, for that reason, it wouldn't be appropriate for me to consider the merits of it at this point.

Should Mr and Mrs H which to pursue this new allegation, it's within their rights to submit a new complaint for Shawbrook to consider and investigate. If they remain unhappy with Shawbrook's response to that particular complaint, they may then be able to refer it to this service for consideration.

Summary

I am mindful that the PR told this service that they intended to respond to my PD in detail. However, as I've already said, no further response was received from them within the time given.

DISP 3.5.15 says:

"If a complainant fails to comply with a time limit, the Ombudsman may:

(1) proceed with consideration of the complaint;".

With this in mind and as the time given for responses has now passed, in order to ensure no further unnecessary delay, I've reached my final decision based upon the information and evidence already provided. For the reasons explained above, the findings within my PD remain unchanged. So, I won't be asking Shawbrook to do anything more.

My final decision

For the reasons set out above, I don't uphold Mr and Mrs H's complaint against Shawbrook Bank Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H and Mrs H to accept or reject my decision before 18 September 2024.

Dave Morgan
Ombudsman