DRN-5058029

The complaint

Mr and Mrs B'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 B were existing members of a timeshare provided by a timeshare provider (the 'Supplier').

Mr and Mrs B purchased a new membership of a timeshare (the 'Fractional Club') from the Supplier on 24 March 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 7,000 fractional points at a cost of £12,320 (the 'Purchase Agreement'). But after trading in their existing timeshare, they ended up paying £6,320 for membership of the Fractional Club.

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

Mr and Mrs B paid for their Fractional Club membership by taking finance of £6,320 from the Lender in their joint names (the 'Credit Agreement').

Mr and Mrs B – using a professional representative (the 'PR') – wrote to the Lender on 27 March 2018 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. A breach of contract by the Supplier giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
3. 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 B say that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. Told them the only way to exit their existing timeshare membership was by buying Fractional Club membership, which was untrue.
2. Told them that Fractional Club membership had a guaranteed end date when that was not true.

Mr and Mrs B 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 B.

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

Mr and Mrs B say that the Supplier breached the Purchase Agreement because there is no guarantee that any net proceeds of the sale will be forthcoming.

As a result of the above, Mr and Mrs B say that they have a breach of contract claim against the Supplier, 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 B.

(3) 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 B 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 the obligation to pay annual management charges for the duration of their membership was an unfair contract term under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
2. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mr and Mrs B's concerns as a complaint but was unable to issue its final response to them within eight weeks, so Mr and Mrs B referred the complaint to the Financial Ombudsman Service. In their complaint form they said:

"I would like my money returned. I was told if I purchased fractional membership we could exit the membership and told it is an investment. We were promised lots that were never received. We were not allowed to discuss in private on day of sale. Availability is not as they explained it and the resorts look very tired this is not fit for purpose."

On 7 November 2018 the Lender sent Mr and Mrs B its final response to their complaint, rejecting it on every ground.

Mr and Mrs B's complaint was assessed by an Investigator at this Service who, having considered the information on file, rejected it on its merits.

Mr and Mrs B disagreed with the Investigator's assessment and asked for an Ombudsman's decision. In addition, the PR stated that case law in *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*') was relevant to Mr and Mrs B's complaint as the Supplier had breached Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations') in the sale of their Fractional Club membership.

Mr and Mrs B's complaint was assessed by a second Investigator, who having considered everything, also rejected the complaint on its merits.

In response, Mr and Mrs B reiterated that they wanted an Ombudsman to review their complaint, and they submitted a statement setting out their recollections of what had happened. As no agreement could be reached the matter has been passed to me.

Having considered everything I did not think Mr and Mrs B's complaint ought to be upheld. I set out my initial thoughts to all parties in a provisional decision, and invited them to make any further submissions they wished to in response to what I had said. In my provisonal decision I said:

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.*
- *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').*
    - *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').

What I've provisionally decided – and why

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

And having done that, I do not currently think this complaint should be upheld.

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

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

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

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 B 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 B at the Time of 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 B were told that buying the Fractional Club membership was the only way they could exit their existing timeshare. But based on the available evidence, on balance, I am unable to say this is something they were told. For example, this is not something that is mentioned in Mr and Mrs B's statement at all. Plainly, buying Fractional Rights was a way of ending their existing timeshare arrangement, but I cannot say with any certainty they were told that this was the only way to do so.

While I recognise that Mr and Mrs B have concerns about the way in which their Fractional Club membership was sold, they have not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the other reason they allege, that being, the Supplier told them that Fractional Club membership had a guaranteed end date when that was not true. And I say that because I can't see that this was actually untrue.

I've not seen anything which makes me think that the Allocated Property would not be able to be sold at the conclusion of the contract period. The Terms and Conditions set out that the title to the property is held by independent trustees, the sale of the Allocated Property can only be carried out by the Trustees on or after the proposed sale date, and the Allocated Property cannot be removed from the trust before that sale date. What's more, the sale date can only be delayed by the unanimous written consent of all fractional owners, in which Mr and Mrs B are included.

As there's nothing else on file that persuades me that there were any false statements of existing fact made to Mr and Mrs B by the Supplier at the Time of Sale, I do not think 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 B any compensation for the alleged misrepresentations of the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

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

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

Mr and Mrs B say that the Supplier breached the Purchase Agreement because there is no guarantee that they will receive their share of the net sale proceeds of the Allocated Property. I understand that they are saying that they fear that, when the time comes for the Allocated Property to be sold, they will not receive their share of the sales proceeds. However, it would seem that any breach of contract (if that occurs) lies in the future and is currently uncertain.

In addition to this, in their complaint form to this Service, Mr and Mrs B said, "Availability is not as they explained it and the resorts look very tired this is not fit for purpose" – which, on my reading of the complaint, suggests that they consider that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement.

Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork signed by Mr and Mrs B states that the availability of holidays was/is subject to demand. And other than saying in their statement "we were told…that by purchasing [Fractional Club] the availability for holidays at the dates and resorts of my choosing would now be possible as this was a more flexible product…" there is no colour or context as to what exactly they were told, when and by whom. 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.

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

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

I have already explained why I am not persuaded that the contract entered into by Mr and Mrs B was misrepresented (or breached) by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Mr and Mrs B 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 B 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 Mr and Mrs B's membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

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

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

And this was recognised by 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 the 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 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 B and the Lender along with all of the circumstances of the complaint. When coming to a conclusion, and in carrying out my analysis, I have looked at all the evidence provided to me from both parties – which includes:

1. *The Supplier's sales practices at the Time of Sale; and*
2. *The provision of information by the Supplier at the Time of Sale.*

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

I have then considered the impact of (1) and/or (2) on the fairness of the credit relationship between Mr and Mrs B and the Lender.

And having done so, 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.

The Supplier's sales practices at the Time of Sale

Mr and Mrs B'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 included unfair terms within their Purchase Agreement, and these were in breach of the UTCCR. 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 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 did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, that may lead to the Timeshare Regulations and the 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 does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A of the CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

For me to conclude that any term or clause in the Purchase Agreement caused any unfairness to Mr and Mrs B in their credit relationship with the Lender, I'd have to see that that term or clause was applied in a way that was unfair to Mr and Mrs B. Yet, having considered everything that has been submitted, it seems unlikely to me that any term or clause has led to any unfairness in the credit relationship between Mr and Mrs B and the Lender for the purposes of Section 140A CCA. I say this because I cannot currently see that any term or clause was actually operated against Mr and Mrs B unfairly, whilst they were party to the Credit Agreement.

The PR also says the credit relationship between Mr and Mrs B and the Lender was unfair to them because the right checks weren't carried out before the Lender lent to Mr and Mrs B. I haven't seen what the Lender did when it was deciding whether or not to provide Mr and Mrs B the finance, but even if I were to find that the Lender failed to carry out appropriate checks before it agreed to lend (and I make no such finding), I would then have to consider whether such checks would likely have shown that the money lent to Mr and Mrs B was actually unaffordable for them. I'd then need to consider whether they lost out as a result, and then consider whether the credit relationship with the Lender was unfair to them for this reason.

From the information provided, I am not persuaded that the lending was unaffordable for Mr and Mrs B. If there is any further information on this (or any other points raised in this provisional decision) that Mr and Mrs B wish to provide, I would invite them to do so in response to this provisional decision.

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?

Although not mentioned at all in their initial Letter of Complaint to the Lender, Mr and Mrs B said the following in their complaint form to our Service:

> *"I would like my money returned. I was told if I purchased fractional membership we could exit the membership and told it is an investment."*

And then in their written statement, which was written and submitted after two Investigators had concluded that their complaint ought not to be upheld, they said:

> *"We were told… that [Fractional Club] represented a good investment opportunity as I would own part of the property…and that the property would be sold within 15 years' time…and that upon the sale we should get all our money back plus a good profit…"*

So, I have gone on to consider whether I think the Fractional Club was sold to Mr and Mrs B as an investment.

The Lender does not dispute, and I am satisfied, that Mr and Mrs B'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 Mr and Mrs B say in their statement that the Supplier did exactly that at the Time of Sale. And in addition, the PR has said that Shawbrook & BPF v FOS ought to be considered here. 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 B'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 Fractional Club membership was marketed or sold to Mr and Mrs B 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 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 B, 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 B as an investment.

For example, the second page of the Purchase Agreement was titled "Terms and Conditions", the first of which read:

> *"You should not purchase Your […] Fractional Points as an investment in real estate. The Purchase Price paid by You relates primarily to the provision of memorable holidays for the duration of Your ownership. You are at liberty to dispose of Your […] Fractional Points at any time prior to the Sale Date in accordance with Rule 7 of the Rules of the Owners Club."*

Further, there was a document titled "Key Information", an extract of which read:

> *"Exact nature and content of the right(s):*
>
> *Between six to nine months before the Proposed Sale Date, [the Trustee] will appoint two independent valuers to value the Property and will then take steps to sell the Property at the best achievable market price. You must bear in mind that your […] Fractional Points (and the purchase price paid by you for those points) relates primarily to the acquisition by you of many years of wonderful holidays. We are sure that you will get a great deal of pleasure from your holidays. Your decision to purchase […] Fractional Points should not be viewed by you as a financial investment."*

Finally, there was another document titled "Customer Compliance Statement/Declaration to Treating Customers Fairly", which included the following:

> *"5. We understand that the purchase of our […] Fractional Points is an investment in our future holidays, and that it should not be regarded as a property or financial investment. We recognize that the sale price achieved on the sale of the Property in the Owners Club (and to which our […] Fractional Points have been attributed) will depend on market conditions at that time, that property prices can go down as well as up and that there is no guarantee as to the eventual sale price of the Property.*
>
> *6. We understand that the Property referenced on our Purchase Agreement will be sold as soon as possible on or after the Proposed Sale Date. However, we realise that it may not be possible to source a buyer immediately, and that in the event that the sale is affected on or after the Proposed Sale Date, we will be required to pay our Dues each year until the Property is sold."*

Mr and Mrs B had ticked and signed to say they understood both of these points.

With that said, while that was not alleged by either Mr and Mrs B 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 B's initial recollections of the sales process at the Time of Sale, I am not persuaded that that is what happened at that time. As I've said, this element of the complaint did not form any part of their original complaint to the Lender. And I would have expected to see this be part of their complaint had it been something they remembered had happened and that caused them unhappiness about the Supplier's sales process. The first time anything like this is mentioned is in one line of their complaint form to our Service: "[I was] told it is an investment." But this provides no colour or context, and does not assist me in understanding the basis of the complaint.

In response to the first Investigator's assessment, the PR argued that the Supplier marketed and sold Fractional Club membership to Mr and Mrs B as an investment, and made reference to the outcome of Shawbrook & BPF v FOS. But as I've said, I don't recognise that assertion in their initial recollections of the sale.

And Mr and Mrs B's subsequent statement was compiled and submitted to our Service after two Investigators had assessed their complaint, and had explained why they didn't think it ought to be upheld. And indeed their statement was compiled after their PR raised the impact on the complaint of Shawbrook & BPF v FOS. So I think given all of this, there is a very real risk that their recollections may have been tainted by what they have read and heard since the initial submission of their complaint to the Lender.

So, because of this, and because Mr and Mrs B's initial recollections and the Letter of Complaint were put together much closer to the Time of Sale, they 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. After all, if Fractional Club membership had been marketed and sold as an investment by the Supplier at the Time of Sale, and they had been unhappy with this, it is difficult to understand why PR made no mention of it at all in the Letter of Complaint. With that being the case, in the absence of persuasive evidence to suggest otherwise, I find that it is unlikely that the Supplier led Mr and Mrs B 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 am 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 B's recollections of the sales process at the Time of Sale, I am not currently persuaded that would make a difference to the outcome in this complaint anyway.

<u>Was there an unfair relationship between the Lender and Mr and Mrs B?</u>

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

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

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

"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding

whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"

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

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

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

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs B 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) led 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 B's initial complaint to the Lender about 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.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Mrs B's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). After all, their purchase of the Fractional Club was for additional points above and beyond what they had with their previous timeshare, and this gave them additional holiday rights. And their statement makes it clear that Mr and Mrs B were experiencing difficulties in booking the holidays they wanted, and that the Fractional Club was pitched by the Supplier as a way of solving those problems. And for these reasons, I do not think the credit relationship between Mr and Mrs B and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

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 B 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 B 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.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs B Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with them 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 see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

Neither Mr and Mrs B, their PR nor the Lender responded to my provisional 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.

And having reconsidered everything, and having taken into account that there have been no further submissions in response to my provisional decision, I see no reason to depart from the conclusions I provisionally reached.

My final decision

I do not uphold Mr and Mrs B's complaint against Shawbrook Bank Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Mrs B to accept or reject my decision before 30 October 2024.

Chris Riggs
Ombudsman