DRN-5104547

The complaint

Mr and Mrs A'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 A have been existing members of a points-based timeshare provided by a timeshare company (the 'Supplier') since 2003. After their initial purchase of a four-week trial membership, they made two purchases of 6,000 and 7,000 points in 2004 and 2007 respectively. This membership was due to expire in 2054.

On 15 October 2014 (the 'Time of Sale') Mr and Mrs A purchased a new membership of a timeshare (the 'Fractional Club') from the Supplier. They entered into an agreement with the Supplier to buy a total of 18,000 fractional points (the 'Purchase Agreement'). But after trading in their existing points-based timeshare, they ended up paying £14,100 for membership of the Fractional Club.

Unlike their existing points-based timeshare membership, Fractional Club membership was asset backed – which meant it gave Mr and Mrs A more than just holiday rights. It included a share in the net sale proceeds of a property named on their Purchase Agreement (the 'Allocated Property') after their membership term ends. It also had a shorter membership term of 15 years, which would end in 2029.

Mr and Mrs A paid for their Fractional Club membership by taking finance of £14,100 from the Lender in their joint names (the 'Credit Agreement').

Mr and Mrs A wrote to the Supplier on 14 May 2017 to complain that:

- Its sales representative had misrepresented the Fractional Club to them as an investment that would give more flexibility and financial gain when it came to the timeshare resale.
- They were told that by converting to fractional membership it would mean that they would no longer be tied into a contract where the maintenance increases year on year (until 2054) and that they would be freed from this contract in 2029 when the property they were going to invest in would be sold.
- They were told that they would be investing their money into property which would increase in value and be an asset to their family.

The Supplier responded to this complaint, rejecting it on every ground, so Mr and Mrs A referred their complaint to the Financial Ombudsman Service. Having reviewed everything an Investigator explained to Mr and Mrs A that this Service had no jurisdiction over the Supplier, but as they had made the purchase with a finance agreement, they could complain to the Lender about the sale if they wished.

Mr and Mrs A did so, and their Letter of Complaint, sent on 21 November 2017, said in essence:

- They had been given misleading information by the Supplier who confirmed that Fractional Club was sold as an investment;
- They had been told that by converting to Fractional Club they would not be tied into a contract where maintenance fees increase until 2054;
- They were told the contract would end in 2029, when this was not true; and
- No explanation had been given to them about the investment

On 26 February 2018 the Lender sent Mr and Mrs A its final response to their complaint, which it rejected on every ground. Unhappy with this, Mr and Mrs A asked this Service to consider their complaint.

Their complaint was considered by an Investigator, who thought it should be upheld. He thought unfair and misleading sales tactics by the Supplier had caused an unfairness to the credit relationship Mr and Mrs A had with the Lender.

In response to this view the Lender disagreed, and submitted further evidence and arguments. And having considered this, along with what had previously been submitted, the Investigator changed his mind, and thought Mr and Mrs A's complaint ought not to be upheld.

Mr and Mrs A disagreed with the Investigator's second assessment and their complaint was then reviewed by a second Investigator. Having considered everything this second Investigator thought Mr and Mrs A's complaint ought to be upheld. He thought the Supplier had sold and/or marketed the Fractional Club to Mr and Mrs A as an investment in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'), and this had rendered their credit relationship with the Lender unfair to them under Section 140A of the CCA.

No agreement could be reached, so the complaint has been passed to me.

The legal and regulatory context

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

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

- The CCA (including Section 75 and Sections 140A-140C).
- The law on misrepresentation.
- The Timeshare Regulations.

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

Good industry practice – the RDO Code

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

What I've decided – and why

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

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

And having done that, I do not 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.

When bringing their complaint, Mr and Mrs A didn't set out on what regulatory or legal basis they felt the Lender needed to do something to put right what they said went wrong – I make no criticism of them in not doing so as I wouldn't expect them to necessarily know these things. Some of the concerns they have about the sale of the Fractional Club in 2014 only constitute a complaint that the Financial Ombudsman Service's jurisdiction permits it to consider if those concerns are considered with certain provisions of the CCA in mind. This is why it is necessary to refer, at times, to Sections 75 and 140A of the CCA in this decision.

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 A 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 A at the Time of Sale, the Lender is also liable. So, although not expressed in these particular words, Mr and Mrs A have made a claim to the Lender under Section 75 of the CCA for alleged misrepresentations by the Supplier.

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, or they had been given misleading information about the Fractional Club which had been sold to them as an investment. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr and Mrs A'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 Mr and Mrs A might question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.

Mr and Mrs A also said that they had been told that by converting to Fractional Club they would not be tied into a contract where maintenance fees increase until 2054. Again, I cannot see that this is untrue or would have misled them in any way. The purchase of Fractional Club *did* mean a reduced membership term, so they would no longer be required to pay maintenance fees until 2054, just until the Allocated Property was sold.

And lastly, and possibly linked to the point above, Mr and Mrs A say the Supplier told them the Fractional Club contract would end in 2029, when this was not true. But I can see that 2029 is the year that the contract is due to end with the sale of the Allocated Property. Having considered the contractual documentation, I can see the sale of the Allocated Property would be the responsibility of the trustees, and not the Supplier. And the trustees would have a duty to act in the best interests of the fractional owners, not the Supplier. So, although there is no guarantee that the Allocated Property would sell on a particular date, and I find it highly improbable that the Supplier would have suggested this, I cannot see that there has been any misrepresentation here.

What's more, as there's nothing else on file that persuades me there were any false statements of existing fact made to Mr and Mrs A 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 A 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 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 A 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 A also say that there was unfairness caused to them 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. And although not expressed in these terms, they are in effect saying that the credit relationship between them and the Lender was unfair under Section 140A of the CCA due to these concerns. It is this that I explore here.

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between Mr and Mrs A and the Lender was unfair.

Under Section 140A of the CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as *"a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]"*. And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to *"finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."*

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr and Mrs A'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*, 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.

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in *Patel* (which was recently approved by the Supreme Court in the case of *Smith),* that determining whether or not the relationship complained of was unfair had to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"* – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in *Plevin* (at paragraph 17):

"Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with […] whether the creditor's relationship with the debtor was unfair."

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

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

I have considered the entirety of the credit relationship between Mr and Mrs A and the Lender along with all of the circumstances of the complaint. In carrying out my analysis, I have looked at:

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

I have then considered the impact of these on the fairness of the credit relationship between Mr and Mrs A and the Lender.

Other than the alleged misrepresentations, which as I've said above, I do not think make for a successful claim under Section 75 of the CCA and outcome in this complaint, there is another reason they say caused unfairness here. 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.

That is what I will consider now, and whether a breach (if any) rendered their credit relationship with the Lender unfair to them.

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs A'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 A say that the Supplier did exactly that at the Time of Sale. For example, in their initial letter of complaint to the Supplier they said:

> *"Fractional membership was portrayed by your sales representative, at the sales presentation meeting, as an investment which would give more flexibility and financial gain when it came to the all-important fractional timeshare resale and also as an exit from timeshare."*
>
> …
>
> *Your representative also advised that we would be investing our money into property which would increase in value and be an asset to our family."*

And they said the same in their subsequent letter of complaint to the Lender and when they referred their complaint to this Service.

Mr and Mrs A allege, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because:

(1) There were two aspects to their investment as Fractional Club members: holiday rights and a profit on the sale of the Allocated Property.

(2) They were told, or it was implied by the Supplier that they would get their money back or more during the sale of the Allocated Property.

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 A'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, and this is an important point to remember here, the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr and Mrs A in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told 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 Owners Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs A, 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 A 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 A had ticked and signed to say they understood both of these points.

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And there are a number of strands to Mr and Mrs A's allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that membership of the Fractional Club was expressly described as an *"investment*" in several different contexts and (2) that membership of the Fractional Club could make them a financial gain and/or would retain or increase in value.

So, I have taken all of that into account. And, on my reading of the evidence provided, including the letters sent to the Supplier, and Mr and Mrs A's recollections of the sales process at the Time of Sale as described both verbally and in an email to an Investigator at this Service, I accept that is possibly what happened at that time. They did describe being told by the Supplier that they would receive the net sale proceeds of their share in the Allocated Property once their Fractional Club membership ended, and they have shown clearly that it was described what their fraction was – i.e., 6%.

So, I accept that it is possible that Mr and Mrs A's Fractional Club membership was sold and/or marketed to them by the Supplier as an investment in breach of Regulation 14(3) of the Timeshare Regulations. But I don't find it necessary to make a finding on this point, as I do not think this would make a difference to the outcome of this complaint in any event. I say this because I don't think this caused an unfairness in their credit relationship with the Lender. I'll explain.

<u>Was the credit relationship between the Lender and Mr and Mrs A rendered unfair?</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 A and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3)[2] led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

Mr and Mrs A, as they set out both in their initial complaint to the Lender, and later to this Service, made it clear that they were unhappy with their points-based membership. This is what they said in their initial letter:

"Having been unhappy with the services we had received from [the Supplier] for a number of years previously your sales representative advising us that by converting to fractional membership would mean that we would no longer be tied into a contract where the maintenance increases year on year (until 2054) and that we would be freed from this contract in 2029 when the property we were going to invest in would be sold looked to be an opportunity we could not afford to miss."

And on 25 September 2018 Mrs A had a telephone call with an Investigator at this Service. Unfortunately, I can no longer access the recording of this call, but the Investigator completed a call note, which says the following when Mrs A was asked what she recalled about the reasons for the transfer to the Fractional Club:

[Mrs A] said she was going back a few years, but was told the current timeshare wasn't as good - maintenance was going up, service was getting worse. They [Mr and Mrs A] wanted to get out of their agreement - the fractional was a shorter term. The business advised them

[2] which, having taken place during its antecedent negotiations with Mr and Mrs A, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender)

that the fractional points was a type of investment - share of property - when sold you'll get X amount back.

[Mrs A] said she didn't want it (previous agreement) to still be going while her and [Mr A] would've potentially have died so that it passed onto children.

I asked if she can remember how the investment claim was presented. She said the salespeople said the chairman was trying to do this was to make amends to previous customers because people are jumping out and they wanted to make them happy. She said it was portrayed in such a way that this was a profit and they would get at least the same amount, if not more. I asked if it was presented in these words, she said that's how she remembers it. She said perhaps it was phrased as "you should make your money back."

Mrs A then followed this up with an email to the Investigator the following day:

"Having spoken with my husband, and gone back 4 years, we can advise that the opening line from the Salesman – [name redacted] - was "Are you fed up with being trapped in your timeshare?" which we obviously said yes to having had cause to be disgruntled over the previous 5-6 years as goal post were being moved with every change of ownership i.e. points required to be a bronze, silver or gold member changed so that one year we would be gold members then we would be relegated to silver as our points value didn't qualify for gold and the only way to get back to gold was to buy more points!

[Name] then went on to say "If I could show you a way to get out of it in 15 years and get something back at the end of that term would you be interested?" Again we obviously said yes.

[Name] then proceeded to explain at length to us that by buying 1/6 of a building - we were presented with portfolios of properties and chose Cromer being the only UK one - we would have shares in that property and after the 15 years this property would be valued, [Name] did say that he couldn't predict its value in 15 years but he did say property rarely decreases in value so we should recoup our investment if not make a profit! We asked if the property would be maintained in order for it to be viable for sale in 15 years to which he assured us it would as it would not be a could (sic) investment for them to let property devalue."

So, it seems that Mr and Mrs A were unhappy with their existing points-based membership for a number of reasons, including

- changes in the points allocation meant they had to continually buy more;
- they were faced with paying increasing maintenance fees until 2054 and these obligations would be passed to their children if they died.

And as can be seen from Mrs A's recollections of the conversation with the salesperson, the opening gambit was one of *"Are you fed up with being trapped in your timeshare?"* followed by "*If I could show you a way to get out of it in 15 years and get something back at the end of that term would you be interested?"* both of which were positively received by Mr and Mrs A.

So, I think Mr and Mrs A were likely to have been interested in moving from the points-based membership to Fractional Club anyway, given their misgivings about their existing membership. And my opinion on this is strengthened when I see the note made by the member of the Quality Assurance Team Mr and Mrs A spoke to on the day of the sale. This, although written in abbreviations which I have completed with square brackets as appropriate shows that Mr and Mrs A's reason for purchasing was a shorter term:

"BU upgr[ade] + buying p[oin]ts - 3 fract[ion]s - no q[uestions] reg[arding] purchase - purchase financed - reason: shorter term - expl[ained] H[oliday]P[lus] + bonus p[oin]ts staying s[anta]b[arbara]g[olf] r[eturn]h[ome] 18/10"

And this squares with what Mrs A has said about being concerned at the length of their original membership and the ongoing liability to pay maintenance fees over the whole term, and not wanting their children to be liable in the event of their deaths.

And their purchase of an additional 5,000 fractional points also provided them with quite significant additional holiday rights, and again having seen their records of their membership usage, I can see holidays were important to them.

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 A's decision to purchase the 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 their motivation was to achieve a reduced membership term so not to be contractually obliged to pay increasing maintenance fees until 2054, along with the additional holiday rights they obtained. So, I think they would have likely pressed ahead with their purchase of Fractional Club whether or not there had been a breach of Regulation 14(3).

Section 140A: Conclusion

For the above reasons, I do not think the credit relationship between Mr and Mrs A and the Lender resulting from the Credit Agreement was unfair to them for the purposes of Section 140A of the CCA, even if the Supplier had breached Regulation 14(3). 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 A's 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.

My final decision

I do not uphold this complaint against Shawbrook Bank Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs A and Mr A to accept or reject my decision before 21 November 2024.

Chris Riggs
Ombudsman