DRN-5124445

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 14 September 2016 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 2,400 fractional points at a cost of £39,907 (the Purchase Agreement') but after trading in their existing timeshare membership, they ended up paying £17,937.

Fractional Club membership was asset backed – which meant 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 their Purchase Agreement (the 'Allocated Property') after their membership term ends.

Mr and Mrs H took finance of £17,937 from the Lender in their joint names (the 'Credit Agreement') to pay for their Fractional Club membership.

Mr and Mrs H – using a professional representative (the 'PR') – wrote to the Lender on 4 November 2021 (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. 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 Sale – namely that the Supplier:

- Told them that Fractional Club membership had a guaranteed end date, specifically after 19 years, after which they would have no further legal liability to the Supplier, when that was not true.
- Told them that they were buying an interest in a specific piece of "real property" when that was not true.
- Told them that Fractional Club membership was an "investment" when that was not 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 them.

(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:

- There was a lack of availability and the Supplier's resorts were not exclusive to members.
- Fractional Club is a Collective Investment Scheme (CIS), the promoting and/or selling of which is prohibited.
- 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').
- The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.
- The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mr and Mrs H's concerns as a claim under Section 75 of the CCA, which it declined on 4 January 2022. As a result, the PR referred Mr and Mrs H's complaint to the Financial Ombudsman Service.

The Lender issued its final response to the complaint on 17 October 2023, rejecting it on every ground.

Mr and Mrs H's complaint was assessed by an Investigator, who thought that it should not be upheld. He didn't think that there had been an unfairness in the credit relationship between the Lender and Mr and Mrs H, nor did he think there was evidence to suggest that the lending decision was irresponsible. As regards Mr and Mrs H's claim under Section 75 of the CCA, he thought their claim was invalid as the purchase price was in excess of the £30,000 limit specified in the CCA.

Mr and Mrs H did not agree with the Investigator's view and asked for their complaint to be assessed by an Ombudsman. So, as no agreement could be reached the matter has come to me to consider.

Having considered everything that had been submitted, I agreed with the outcome reached by the Investigator, in that Mr and Mrs H's complaint ought not to be upheld, but I thought there was additional reasoning that needed to be set out. As such I sent my initial thoughts to both Mr and Mrs H and the Lender in the form of a provisional decision and invited all parties to respond with any new evidence and arguments if they wished to.

My provisional decision

In my provisional 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 3.6.4R 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.*
- *The UTCCR and the Consumer Rights Act 2015 (the 'CRA').*
- *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).*
    - *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 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 – misrepresentation and/or breach of contract

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 of the CCA 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. The purchase price must be more than £100 but no more than £30,000. So, if the purchase price of the product is in excess of £30,000 (irrespective of any trade-in allowance), a claim under Section 75 cannot succeed. But where the purchase price is in excess of £30,000, a claim can be considered under Section 75A of the CCA. But a claim under 75A can only relate to a 'breach of contract' – misrepresentation isn't included. I have gone on to say what I think this means in respect of Mr and Mrs H's Section 75 claim.

The purchase price of Mr and Mrs H's Fractional Club was £39,907. This purchase price is in excess of £30,000 so I am satisfied that Mr and Mrs H's claim for misrepresentation under Section 75 of the CCA cannot succeed.

But as I've said, Section 75A of the CCA allows for a claim should the price of the purchase be over £30,000, but only in relation to a breach of contract by the Supplier.

Although not expressed in the terms of a breach of contract, Mr and Mrs H say that they could not holiday where and when they wanted to – 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 H states that the availability of holidays was/is 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.
I have also not seen any evidence that the Supplier promised Mr and Mrs H either verbally or in the Purchase Agreement that the resorts were exclusive to members of the Fractional Club. And in any event, I have not seen that a lack of exclusivity meant that Mr and Mrs H didn't receive what they were entitled to under 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 H any compensation for misrepresentation(s) or 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 H was breached by the Supplier, or that Mr and Mrs H ought to have had 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, 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 H 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 H'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.

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. When coming to that conclusion, and in carrying out my analysis, I have looked at:

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, including the contractual documentation and disclaimers made by the Supplier;*

---

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

3. *Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; and*
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 H and the Lender.

The Supplier's sales & marketing practices at the Time of Sale

Mr and Mrs H's complaint about the Lender being party to an unfair credit relationship was 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.

The PR says that the right checks weren't carried out before the Lender lent to Mr and Mrs H. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to Mr and Mrs H was actually unaffordable before also concluding that they lost out as a result, and then consider whether the credit relationship with the Lender was unfair to them for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for Mr and Mrs H.

Although not set out in these precise terms, Mr and Mrs H say that they were pressured by the Supplier into purchasing Fractional Club membership at the Time of 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. Mr and Mrs H had, after all, attended several sales presentations prior to this one, and had made purchases on four occasions previously. I have also seen that they had attended such presentations where they chose not to make a purchase, so I can see they had previously made such a decision and would therefore likely have been aware they could do so at this Time of Sale. They were also given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel their membership during that time, if, as they say, they made the purchase due to undue pressure. 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.

The misrepresentations I've described previously could also be something that led to an unfair debtor-creditor relationship[2], so I've considered what Mr and Mrs H have had to say with this in mind.

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 was not true. 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 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

[2] See Scotland & Reast v. British Credit Trust Limited [2014] EWCA Civ 790

exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.

The PR also said in the letter of complaint that the Supplier told them that membership was an 'investment' when that was not true. But, for reasons I'll go on to explain below, Mr and Mrs H's membership plainly did have an investment element to it.

As for the other 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, and that they are concerned that their membership will continue beyond the 19 years stipulated, they haven't persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for that reason. And I say that because beyond the bare allegation, little to no evidence has been provided to support it, including in Mrs H's testimony about what happened at the Time of Sale. And, the Purchase Agreement sets out how the sale of the Allocated Property will be handled by a Trustee.

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.

<u>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?</u>

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.

PR has argued that the Fractional Club was a CIS and that led to an unfair debtor-creditor relationship. However, as the Purchase Agreement qualified as a 'timeshare contract' for the purposes of the Timeshare Regulations (because Mr and Mrs H acquired holiday rights when joining the Fractional Club), it was exempt from giving rise to a CIS (see paragraphs 39-54 in Shawbrook & BPF v FOS).

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 the PR, in the Letter of Complaint, 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 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 H 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 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, in the Member's Declaration document it states:

"We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that the Supplier makes no representation as to the future price or value of the Fraction."

And in the Information Statement, it states:

"Fractional Rights have been designed to be used and enjoyed and not bought with the expectation or necessity of future financial gain." And: "The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for the direct purposes of a trade in nor as 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."

When read on their own and together, these disclaimers go some way to making the point that the purchase of Fractional Rights shouldn't be viewed as an investment. But they weren't to be read on their own. They had to be read in conjunction with what else the Standard Information Form had to say, which included the following disclaimer:

"The Vendor, any sales or marketing agent and the Manager and their related businesses (a) are not licensed investment advisers authorised by the Financial Services Authority to provide investment or financial advice; (b) all information has been obtained solely from their own experiences as investors and is provided as general information only and as such it is not intended for use as a source of investment advice and (c) all purchasers are advised to obtain competent advice from legal, accounting and investment advisers to determine their own specific investment needs; (D) no warranty is given as to any future values or returns in respect of an Allocated Property."

This disclaimer seems to have been aimed at distancing the Supplier from any investment advice that was given by its sales agents, telling customers to take their own investment advice, and repeating the point that the returns from membership from the sale of the Allocated Property weren't guaranteed.

Yet I think it would be fair to say, that while a prospective member who read the disclaimer in

question might well have thought that they would be wise to seek professional investment advice in relation to membership of the Fractional Club, rather than rely on anything they might have been told by the Supplier, it wouldn't have done much to dissuade them from regarding membership as an investment. In fact, I think it would have achieved rather the opposite.

It's also difficult to explain why it was necessary to include such a disclaimer if there wasn't a very real risk of the Supplier marketing and selling membership of the Fractional Club as an investment given the difficulty of articulating the benefit of fractional ownership in a way that distinguishes it from other timeshares from the viewpoint of prospective members.

And in addition, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's possible that Fractional Club membership was marketed and sold to Mr and Mrs H 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.

But even if the Supplier did breach Regulation 14(3) of the Timeshare Regulations when it sold the Fractional Club membership to Mr and Mrs H, I do not think it necessary to make a finding on this point. That is because, given Mr and Mrs H'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.

Was the credit relationship between the Lender and Mr and Mrs H rendered unfair?

I have considered what impact any potential breach had on the fairness of the credit relationship between Mr and Mrs H and the Lender under the Credit Agreement and related Purchase Agreement.

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 H and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3)[3] led Mr and Mrs H to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

Mr and Mrs H's initial recollections, as set out in Mrs H's witness statement dated 22 March 2021, in my view shows their motivation for the purchase of Fractional Club was to improve the quality of the available holiday accommodation by purchasing a new membership. I think this because that is what she has focussed on in her statement, not any investment element or potential return. This is what was said in her statement about the Time of Sale:

> *"In September 2016, we were in [the Supplier's] Mijas Costa resort, staying in a studio, when we were invited to go to another presentation, starting with the usual free breakfast.*
>
> *On the 14th September 2016, we were collected from our apartment, by a man with glasses, and took us for breakfast. After breakfast, we were taken to a sales suite, where another lengthy sales presentation. We said that we were a little disappointed with our accommodation, at which point the sales rep kept saying that we didn't like the Signature Suites, so what about their Signature Collection at their Monterey Royale resort in Tenerife. It was very exclusive, with even a concierge system, to book restaurants, taxis etc. There was also a room service for having meals in the Suite.*
>
> *We said that we were not saying that we didn't like the San Diego Suites, but the reps kept banging on about Monterey Royale. The sales rep said okay and went away, and came back to say what about Tenerife? They also said that they could offer us a special deal, which would enable us to have holidays around our Wedding Anniversary. But we would have to agree to buy on the day, and it wouldn't be available the next day.*
>
> *In the end, after several hours, we agreed to trade in our previous [Fractional Club] for 2,400 Fractional Rights, equating to one week (fraction) in allocated property G917 Monterey Royale Signature Collection, Monterey Royale resort, in Tenerife. The purchase Price was £39,907.00 less £21,970.00 trade in value for the previous [Supplier] Signature Collection [Fractional Club]. The balance of £17,937.00 was funded by way of a Fixed-Sum Loan with [the Lender], arranged by [the Supplier].*
>
> *Even after "upgrading" it was always a hassle booking holidays with [the Supplier]. We were also told that we were joining an exclusive Club, but we subsequently discovered that members of the public could book holidays with [the Supplier], on the internet.*
>
> *In all this time, our family only used the Mijas Costa site approximately four or five times, and never had holidays in Tenerife. Each time they booked, we had to purchase a Guest Certificate, at an extra cost.*

---

[3] which, having taken place during its antecedent negotiations with Mr and Mrs H, 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)

By the end, we were so disappointed with what we had got, for our money, we decided that we had been duped. So, we decided to contact [PR], to get out of [Supplier], and see if we could get some compensation."

There is no mention in this initial statement, written by Mrs H after engaging the PR but before the Letter of Complaint to the Lender, that their motivation to buy the Fractional Club was due to it being an investment. It appears to set out that Mr and Mrs H were motivated to make the purchase of Fractional Club due to the improved quality and available services.

And my view on this is strengthened by Mrs H concluding her statement by stating they were complaining and trying to get some compensation because they were so disappointed with the problems they had experienced around availability, and what they had got from their Fractional Club membership. Not because it was an investment that hadn't worked how they had planned.

I have however seen the supplementary statement that Mrs H has written dated 6 June 2024. This was written after the Investigator said he didn't think an unfairness had been caused to Mr and Mrs H's credit relationship with the Lender, and it accompanied a letter from the PR saying the Investigator hadn't properly considered the unfairness caused by the alleged breach of Regulation 14(3) of the Timeshare Regulations.

Mrs H, in this supplementary statement said (as far as is relevant to the Time of Sale):

"We insisted that we were not saying that we didn't like the San Diego Suites, but the sales representative kept banging on about Monterey Royale. The sales representative went away and came back to say that [the Supplier] could offer us a "special deal", in Monterey Royale, which would also enable us to have holidays around the time of our Wedding Anniversary.

However, we would have to agree to buy on the day, as the deal would not be available the following day.

We felt under a lot of pressure, as there were also other people signing up. The sales also kept coming and going, with sheets of paper, showing what a good deal we were being offered. By the end, we felt knackered, and just wanted to get out of the room.

We were also told that because the property was a better property, and would be likely to sell for more, it was a better financial investment.

In the end, based on what we had been shown and told, after approximately six hours, we agreed to the further "upgrade".

We were then taken to a separate office and met by a gentleman. A lot of documents were then placed before us, and he showed us where to sign and initial them. He did not go through the documents with us."

It is my view that these two statements are very similar, save for the recent additions in the one dated 6 June 2024 that I have highlighted. It was only after our Investigator's view, and after the outcome of Shawbrook & BPF v FOS that this was raised. It is difficult to explain why this wasn't included in the original statement, particularly if this was what motivated them to make the purchase. Further, I place less weight on her recent recollections as I don't think it's likely her memory of the sale would have improved between her original complaint and the PR's response to our Investigator's view, and there is a real risk her memories have been influenced by the judgment in Shawbrook & BPF v FOS.

So, it is my view that Mrs H's recollections of the events surrounding the Time of Sale, as set out in her witness statement dated 22 March 2021 are the best evidence of what happened. And I think it shows that Mr and Mrs H were motivated to purchase the Fractional Club

membership at the Time of Sale due to the apparent improved accommodation and available services. There simply isn't sufficient evidence to persuade me that Mr and Mrs H were motivated to purchase their Fractional Club membership by any potential profit from it.

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 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 have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not 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).

The provision of information by the Supplier at the Time of Sale

The PR 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. But the UTCCR were only applicable to contracts entered into up until 30 September 2015. The UTCCR were then replaced by the CRA. As the Purchase Agreement was dated 14 September 2016, the CRA is the applicable legislation here, so I have considered the points the PR made about the UTCCR with the CRA in mind.

One of the main aims of the Timeshare Regulations and the CRA 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 CRA 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.

Regarding the duration of the membership, the Information Statement made clear to Mr and Mrs H that the membership lasted for 19 years. I acknowledge that the sale of the Allocated Property could be postponed at the Supplier's discretion, but it could only be postponed for up to two years in limited circumstances which don't seem unusual or unreasonable. So, I don't think the term in relation to the mere duration of the membership is likely to be unfair for the purpose of the CRA.

Similarly, I don't think the term relating to the mere obligation to pay an annual management charge is likely to be unfair for the purpose of the CRA. The Information Statement explains that the charges are budgeted annually and are subject to increase or decrease as determined by the costs of managing the scheme, which doesn't seem unreasonable. And, while I acknowledge that such an increase could be greater than what had been set out, this would be in exceptional circumstances, where there had been an extraordinary increase in costs directly related to the Resort which could not previously have been foreseen.

And therefore, I don't think either of these terms created an unfairness in the relationship between Mr and Mrs H and the Lender.

Given the facts and circumstances of this complaint, I am not persuaded that the Supplier's

alleged breaches of Regulation 12 of the Timeshare Regulations and the CRA are likely to have prejudiced Mr and Mrs H's purchasing decision at the Time of Sale and rendered their credit relationship with the Lender unfair to them for the purposes of section 140A of the CCA.

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.

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 H's Section 75 claim. I am also 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 Mr and Mrs H.

If there is any further information on this complaint that Mr and Mrs H wish to provide, I would invite them to do so in response to this provisional decision.

The response to the provisional decision

The PR, on Mr and Mrs H's behalf, did not agree with the provisional outcome, and sent a comprehensive response, all of which I have read and considered. In summary, it said:

- Although mentioning them, the Ombudsman has not named the training slides and the contents are not discussed – so it is thought the Ombudsman has not properly taken them into account.
- When Mr and Mrs H purchased the Fractional Club membership, the prospect of a financial gain was an important and motivating factor.
- It is not apparent that fractional membership offered cheaper fees, nor is there anything to suggest that the fees would decrease. Mr and Mrs H say the investment element of the membership was something the salesperson used as a way to overcome these concerns, as they would get money back once the Allocated Property was sold.
- Had they not been encouraged by the prospect of a financial gain, they would not have pressed ahead with their purchase of Fractional Club regardless.
- It is wrong to place too much weight on what Mr and Mrs H have said in their statements. It is for the creditor to prove that the facts alleged do not give rise to unfairness, and the Lender has not provided any evidence whatsoever to prove that this is not the case.
- *Shawbrook & BPF v FOS* found that fractional products were sold to consumers as "investments". And the training materials show that the Supplier marketed or sold the fractional product to Mr and Mrs H as an investment.

- Overall, the evidence shows that the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs H under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. And with that being the case, taking everything into account, it is fair and reasonable that this complaint be upheld.

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 I have reconsidered everything including everything that the PR has submitted in response to my provisional decision. But having done so, I remain satisfied that Mr and Mrs H's complaint should not be upheld. I'll explain.

The PR has said that given the training that the Supplier's salespersons were given, when taken together with what Mr and Mrs H have said, it is likely that the Fractional Club was sold and marketed to Mr and Mrs H as an investment, contrary to Regulation 14(3) of the Timeshare Regulations. When coming to my provisional findings I considered the training slides closely. And as I recognised in my provisional decision, and still do, it is *possible* that the Fractional Club was sold/marketed to Mr and Mrs H at the Time of Sale as an investment in breach of Regulation 14(3). But as I also explained, in the circumstances of this complaint, I did not think that made a difference, as I did not think, even if that had happened, that caused an unfairness in the credit relationship between the Lender and Mr and Mrs H.

And in response to that point, the PR did not agree. It said that the investment element of the Fractional Club was marketed to Mr and Mrs H as a way to overcome their concerns that the management fees would increase. And the prospect of a financial gain was an important and motivating factor for Mr and Mrs H in their decision to purchase, and they would not have done so had they not been encouraged by the prospect of a financial gain.

But I am not persuaded by this. Having taken everything into account, I remain satisfied that I think it likely that Mr and Mrs H would have pressed ahead with their purchases of Fractional Club regardless of whether it was sold and/or marketed to them as an investment. This is because, like I said in my provisional decision, I think they were motivated by other factors.

I think they were most likely motivated by the prospect of improved access to accommodation, and that the accommodation would be of an improved standard, which is what they said they were motivated by in their initial statement. I find it hard to understand why, if they were motivated by something other than this i.e. the prospect of a financial gain like they now assert, this was not mentioned by them in their initial statement. The PR has said that I should not place much weight on what Mr and Mrs H have said. But it is important that I consider everything, and I consider what Mr and Mrs H say happened and what they were thinking at the time is crucial when trying to establish their motivation for their purchases of the Fractional Club and whether the credit relationship was rendered unfair as a result. So I remain satisfied that this is the best evidence of what happened at the time.

So, in the circumstances of this complaint, I remain satisfied that there is no reason why it would be fair or reasonable to direct the Lender to compensate Mr and Mrs H.

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 H and Mr H to

accept or reject my decision before 2 December 2024.

Chris Riggs
Ombudsman