DRN-5125064

The complaint

Mr and Mrs P'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 P purchased membership of a timeshare (the 'Fractional Club 1') from a timeshare provider (the 'Supplier') on 20 August 2013 (the 'Time of Sale 1'). They entered into an agreement with the Supplier to buy 1,200 fractional points at a cost of £14,518 plus £830 for the first year's management fees (the 'Purchase Agreement 1').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs P 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 1') after their membership term ends.

Mr and Mrs P paid for their Fractional Club membership by taking finance of £15,348 from the Lender in their joint names (the 'Credit Agreement 1').

On 30 July 2014 ('Time of Sale 2') Mr and Mrs P traded in their fractional points[1] towards the purchase of a new membership ('Fractional Club 2') from the Supplier. They purchased 2,040 fractional points ('Purchase Agreement 2') and after taking into account the trade in value the Supplier attributed to their existing fractional points, they ended up paying £16,750 for their Fractional Club 2 membership.

Like their previous membership, Fractional Club 2 was asset-backed, which meant Mr and Mrs P would receive a share of the net sale proceeds of the property named on their Purchase Agreement (the 'Allocated Property 2') after their membership term ends.

Mr and Mrs P paid for their Fractional Club 2 membership by taking finance in their joint names from the Lender of £25,000, which consolidated the outstanding loan from their Fractional Club 1 purchase. The remaining balance of £7,215 was paid with a second loan from a different business, and does not form part of this complaint.

Mr and Mrs P – using a professional representative (the 'PR') – wrote to the Lender on 8 January 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] By trading in their points, Mr and Mrs P relinquished any rights to the sales proceeds of Allocated Property 1.

4. The decision to lend being irresponsible because the Lender did not carry out the right creditworthiness assessment.

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

Mr and Mrs P 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 in 2032, 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 P 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.

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

Mr and Mrs P say that they found it difficult to book the holidays they wanted, when they wanted, and found they had to book two years in advance, which did not suit their circumstances.

(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 P 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:

- 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 1 and 2 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.
- They were pressured into purchasing Fractional Club 1 and 2 memberships by the Supplier.
- The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment, and the loan was unfair as the APR was excessively high.
- The features of the credit agreement which may have made it unsuitable for Mr and Mrs P were not clearly explained.
- The Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs.

The Lender dealt with Mr and Mrs P's concerns as a complaint and issued its final response letter on 25 September 2018, rejecting it on every ground.

Due to the delay in the Lender responding, Mr and Mrs P had already referred their complaint to the Financial Ombudsman Service. Following the Lender's final response, Mr and Mrs P's complaint was assessed by an Investigator who, having considered the information on file, thought their complaint should be upheld on its merits.

The Investigator thought that the Supplier had marketed and sold the Fractional Club 1 and 2 memberships as an investment to Mr and Mrs P at the Time(s) of Sale 1 in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of those breaches on their purchasing decisions, the Investigator concluded that the credit relationships between the Lender and Mr and Mrs P were rendered unfair to them for the purposes of section 140A of the CCA.

The Lender disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

Having considered everything that had been submitted, I didn't agree with the outcome reached by the Investigator. I didn't think it would be fair and reasonable to uphold Mr and Mrs P's complaint. So, I sent my initial thoughts to both Mr and Mrs P 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.*
- *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: the Supplier's misrepresentations at the Time(s) 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 P 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 P at either or both of the Time(s) of Sale, the Lender is also liable.

There were two sales of the Fractional Club which are being considered here, so in effect Mr and Mrs P have made two claims to the Lender, one about each sale. But the complaint points are the same, so I will deal with both sales in the same part of this decision.

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 they were told that the Fractional Club membership had a guaranteed end date, in 2032.

It is safe to assume that Mr and Mrs P must be referring to the Time of Sale 2 here, as that is

the Purchase Agreement that remains current, so I have considered this point on this basis. But I can't see that what the Supplier said here was actually untrue. I've not seen anything which makes me think that the Allocated Property 2 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 P are included.

Mr and Mrs P also say they 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 P's share in both the Allocated Property 1 (prior to its relinquishment) and Allocated Property 2, were clearly purchases of a share of the net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.

Mr and Mrs P also make an allegation that the product was sold as an investment, which I address further below. For the reasons I'll explain, had they been told either of their Fractional Club 1 or 2 memberships were an investment (and I make no finding on that point here), that would not have been untrue.

While I recognise that Mr and Mrs P 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 either the Time of Sale 1 or Time of Sale 2 for the reasons they allege. 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 P by the Supplier at either the Time of Sale 1 or Time of Sale 2, 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 P 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 claims 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 P 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 P say that they could not holiday where and when they wanted to and had to book two years in advance – 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 P states that the availability of holidays was/is subject to demand. Whilst I accept that they may not have been able to take certain holidays, I have not seen enough to persuade me that the Supplier had breached the terms of either of the Purchase Agreements.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mr and Mrs P 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 either of the contracts entered into by Mr and Mrs P were 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 P 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 both the Time of Sale 1 and Time of Sale 2 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 relationships between Mr and Mrs P and the Lender were 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 1 and 2) 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 P's memberships of Fractional Club 1 and 2 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."[2]

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.

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

As I have said, there were two credit agreements in place here, so I have considered the entirety of the credit relationships between Mr and Mrs P and the Lender, along with all of the circumstances of the complaint, and I do not think either of the credit relationships between them were 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(s) of Sale – which includes training material that I think is likely to be relevant to the sale;*
2. *The provision of information by the Supplier at the Time(s) 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(s) of Sale; and*
4. *The inherent probabilities of the sale(s) given its circumstances.*

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

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

Like their Section 75 claims, Mr and Mrs P have, in effect, made two complaints to the Lender – one for each of the credit agreements. So in determining whether either relationship was unfair, I will consider them separately, even if I provide my answer to each in the same section of this decision.

Mr and Mrs P's complaint about the Lender being party to unfair credit relationships 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 P 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, like my findings on the alleged misrepresentations, given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.

Mr and Mrs P say that they were pressured by the Supplier into purchasing both Fractional Club 1 and 2 memberships at the Time(s) 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 presentations that made them feel as if they had no choice but to purchase either of the Fractional Club memberships when they simply did not want to. They were also given a 14-day cooling off period after both sales and they have not provided a credible explanation for why they did not cancel their membership during that time. Moreover, they did go on to upgrade their Fractional Club membership at Time of Sale 2, which I find difficult to understand if the reason they went ahead with their first purchase in question was because they were pressured into it. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs P made the decision to purchase either Fractional Club 1 or Fractional Club 2 membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

The PR says that the right checks weren't carried out before the Lender lent to Mr and Mrs P. The same complaint has been made regarding both Credit Agreement 1 and Credit Agreement 2. But 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 P 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 P. If there is any further information on this (or any other points raised in this provisional decision) that Mr and Mrs P wish to provide, I would invite them to do so in response to this provisional decision.

PR, on Mr and Mrs P's behalf, has said there were features of the Credit Agreement(s) which may have been unsuitable for them, and these were not clearly explained. However, this point has not been expanded upon at all, and no details of which feature is being referred to, nor how or why this feature of either agreement was unsuitable. So without further information on this point, I am not persuaded that any unfairness has been caused. It may be that PR is linking this to the APR of both credit agreements, which it says were excessively high. Having interest applied to a loan is not unusual, and I can see that on both credit agreements, which were signed by both Mr and Mrs P, the APR is set out. So I think it likely that they would have been aware that the Lender would charge interest, and the rate at which this would be charged. And there is no evidence which leads me to think Mr and Mrs P had no choice but to take either of the credit agreements, so I cannot see that this has rendered the associated credit relationships unfair to them.

I'm not persuaded, therefore, that Mr and Mrs P's credit relationships with the Lender were 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 relationships with the Lender were unfair to them. And that's the suggestion that Fractional Club 1 and Fractional Club 2 memberships were marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

Were Mr and Mrs P's Fractional Club memberships marketed and sold at the Time(s) 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 both of Mr and Mrs P's Fractional Club memberships met the definition of a "timeshare contract" and both were 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 both the Time of Sale 1 and Time of Sale 2:

"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 P say that the Supplier did exactly that at both Time(s) of Sale. In their submission to this Service, they sent a written statement, dated 18 July 2017. In relation to Time of Sale 1, they have said, where relevant:

> *"We were told the benefits of fractional ownership, its affordability, cost effective for guaranteed luxury accommodation, investment opportunity, ease of use, accessibility, that it would meet ours and wider family needs, and that Ownership was temporary, i.e. 19 years and we would get our money back when sold. The implication was that this was a property investment and as property goes up in value we would make a profit and in the meantime, enjoy the prestige standard of accommodation at this and any resort at the [Supplier] and other affiliated holiday clubs.*

And in relation to Time of Sale 2 they said:

> *We were offered an upgrade of accommodation and facilities at the Sunningdale village setting. We were told of an opportunity to obtain fractions at an optimum price as a cancellation had just come through.*
> *…*
> *We had to decide there and then if we wanted this returned increased fractional property ownership, which would increase our ownership giving us better scope for long-haul holidays.*
> *…*
> *We were convinced to upgrade as it was sold as a better deal with a larger fraction. We were also told that we could use this to go back to Jamaica on holiday. We would now have a larger investment so we would make more money when the property was sold."*

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 P's share in both the Allocated Property 1 and Allocated Property 2 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 their Fractional Club membership(s) 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 either or both of their Fractional Club memberships were marketed or sold to Mr and Mrs P 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 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.

Both Fractional Club 1 and Fractional Club 2 were the same version of what the Supplier called The Fractional Property Owners Club ('FPOC'). And there is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of both of the Fractional Clubs as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs P, 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, which was the same for both sales, that state that Fractional Club membership was not sold to Mr and Mrs P 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 both of their Fractional Club memberships were marketed and sold to Mr and Mrs P 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.

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

processes at the Time(s) of Sale, I am not currently persuaded that would make a difference to the outcome in this complaint anyway.

Were the credit relationships between the Lender and Mr and Mrs P rendered unfair?

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 either of the credit relationships between Mr and Mrs P and the Lender being rendered unfair to them, and warranted relief as a result, whether the Supplier's breach of Regulation 14(3)[3] led them to enter into either or both of the Purchase Agreement(s) and the Credit Agreement(s) is an important consideration.

In order to come to a conclusion on this point, I need to consider each sale separately.

Fractional Club 1

Mr and Mrs P were not existing members of any timeshare arrangement at the Time of Sale 1. But they were on a free holiday provided by the Supplier having attended a sales event in the UK. And part of the agreement for them to have this holiday, was the

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

requirement for them to attend a sales presentation in the resort. So I think it is a fair assumption to make that Mr and Mrs P were interested in taking holidays.

They said in their statement, which was dated prior to the Letter of Complaint to the Lender, that the Supplier told them about: "…the benefits of fractional ownership, its affordability, cost effective for guaranteed luxury accommodation, investment opportunity, ease of use, accessibility, that it would meet ours and wider family needs, and that Ownership was temporary, i.e. 19 years and we would get our money back when sold. The implication was that this was a property investment and as property goes up in value we would make a profit and in the meantime, enjoy the prestige standard of accommodation at this and any resort at the [Supplier] and other affiliated holiday clubs.

So my reading of this, is that the Supplier went over all the potential benefits of membership that Mr and Mrs P could enjoy, and as I've said above, this included the investment element of Fractional Club.

But, whilst accepting that it provides some background context to their ultimate decision, this doesn't help me greatly when considering what I think likely motivated Mr and Mrs P to make their Fractional Club 1 membership purchase. But I do find myself assisted in this regard by what Mr and Mrs P go on to say in their statement:

> *"After several hours, we were eventually coerced into making the purchase because we could get luxury holidays. It would make us take holidays. It would be good for the children etc. We were sold on the benefits."*

So this suggests that Mr and Mrs P's motivation to take membership of the Fractional Club 1 was based on taking holidays and the benefits that those holidays would have on their family. They say they bought it in order to take holidays, and there is little evidence to say that any potential return from the sale of the Allocated Property 2 was a material and motivating factor in their decision to purchase.

On balance therefore, even if the Supplier had marketed or sold the Fractional Club 1 membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Mrs P's decision to purchase the Fractional Club 1 membership at the Time of Sale 1 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 use the membership to take holidays, which they thought would be luxurious. So, I think they would have likely pressed ahead with their purchase of Fractional Club 1 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 P and the Lender resulting from Credit Agreement 1 was unfair to them even if the Supplier had breached Regulation 14(3).

<u>Fractional Club 2</u>

Fractional Club 2 was purchased a little over one year after Mr and Mrs P made their purchase of Fractional Club 1. And the new purchase provided them with an additional 840 fractional points, an increase of 70% over their original membership. These additional fractional points, in addition to providing a larger fraction of the sales proceeds of Allocated Property 2 over that which they were entitled to receive from Allocated Property 1, provided Mr and Mrs P significantly increased holiday rights.

And I can see the holiday rights were important to them given their familial circumstances. For instance, they have said they had children to take on the holidays, so needed to go while the schools were out. And they wanted to go on long-haul trips, specifically Jamaica, and they thought increasing their ownership would give them better scope to achieve both

holidays during the peak times of the school holidays, and their trip to Jamaica.

So, from the evidence that I have seen, I think Mr and Mrs P's motivation when making their purchase of Fractional Club 2 was the improved availability and range of holidays that they could take to suit their particular circumstances. And whilst I appreciate that Mr and Mrs P haven't actually used their membership since its purchase due to availability problems, that doesn't dissuade me that their motivation for purchasing Fractional Club 2 at the Time of Sale 2 was to use the perceived improved holiday rights that came with it.

So, as with Mr and Mrs P's purchase of Fractional Club 1, on balance, even if the Supplier had marketed or sold the Fractional Club 2 membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Mrs P's decision to purchase the Fractional Club 2 membership at the Time of Sale 2 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 use the membership to improve the accessibility and range of holidays which they could take. So, I think they would have likely pressed ahead with their purchase of Fractional Club 2 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 P and the Lender resulting from Credit Agreement 2 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

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.

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.

Given the facts and circumstances of this complaint, I am not persuaded that the Supplier's alleged breaches of the UTCCR and the CPUT Regulations are likely to have prejudiced Mr and Mrs P's purchasing decision at the Time(s) of Sale and rendered their credit relationships with the Lender unfair to them for the purposes of section 140A of the CCA. I say this because I cannot currently see that there is any evidence that any term was actually operated against Mr and Mrs P, let alone unfairly, or that the existence of any specific term, in and of itself, caused unfairness.

The Letter of Complaint also states that the Supplier failed to give Mr and Mrs P sufficient information regarding the ongoing costs of membership. But I can see that information regarding the requirement to make annual 'management charges' was included in its own section of the Standard Information form under the heading:

4. INFORMATION ON THE COSTS

Management and fees

…

The Manager is responsible for providing management, repair and maintenance of the Property. Owners will be required to contribute to those charges by means of an annual charge called "management Charge" (Charges) payable whether weeks are used or not. These Charges will be allocated among Owners in a particular Allocated Property in a fair and equitable manner, decided by the Manager, and in proportion to the number of weekly periods an Owner is entitled to use each year according to his Fractional Rights Certificate (the Charges will also include an element for managing and administering the Trustee).

Full details are contained in the Rules and Management Agreement. Charges will be budgets annually and will be subject to increase or decrease as determined by the costs of managing the Project and are payable annually in advance each year.

This Standard Information Statement went on to set out the first year's fee. For Fractional Club 1 this was €949 and for Fractional Club 2 this was €1,938.

So it seems likely to me that Mr and Mrs P were told by the Supplier at the Time of Sale 1 and 2 that the annual management charges could go up each year. And while it's possible the Supplier didn't give them sufficient information, in good time, on the various charges they could have been subject to as Fractional Club members in order to satisfy its regulatory responsibilities at either or both of the Time(s) of Sale, I haven't seen enough to persuade me that this, alone, rendered either of Mr and Mrs P's credit relationships with the Lender unfair to them.

Given the facts and circumstances of this complaint, I am not persuaded that the Supplier's alleged breaches of the CPUT Regulations and the UTCCR are likely to have prejudiced Mr and Mrs P's purchasing decision at either of the Time(s) of Sale and rendered either of their credit relationships 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 relationships between the Lender and Mr and Mrs P were unfair to them because of an information failing by the Supplier, I'm not persuaded they were.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think either of the credit relationships between the Lender and Mr and Mrs P were 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 P's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with them under either Credit Agreement 1 or Credit Agreement 2 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 P.

If there is any further information on this complaint that Mr and Mrs P wish to provide, I

would invite them to do so in response to this provisional decision.

The response to my provisional decision

The PR, on Mr and Mrs P'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 P purchased the Fractional Club membership, although looking to buy holidays, 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 P 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 P 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 products to Mr and Mrs P as an investment.
- The complexity of the investment meant that the credit relationship was unfair due to the extreme inequality of knowledge and understanding.

The PR thought, that overall, the evidence shows that the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs P under the Credit Agreements and related Purchase Agreements for the purposes of Section 140A. And with that being the case, taking everything into account, the PR thought 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 P'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 P have said, it is likely that the Fractional Club was sold and marketed to Mr and Mrs P 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 P 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 P.

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 P 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 P 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 P 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 have again, considered each sale separately. As regards their Fractional Club 1 membership, I remain satisfied that they were motivated to make the purchase by the prospect of luxurious holidays for the benefit of their family, which is what they said they were motivated by in their initial statement. And as regards Fractional Club 2, likewise I remain persuaded by what Mr and Mrs P actually said regarding their motivation – that they needed to book accommodation during the school holidays and wanted to go to Jamaica, and this was to be achieved by upgrading their Fractional Club membership. 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 P have said. But it is important that I consider everything, and I consider what Mr and Mrs P 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 their statement, setting out their recollections and thoughts, 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 P

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 Mr P and Mrs P to accept or reject my decision before 3 December 2024.

Chris Riggs
Ombudsman