DRN-5163043

The complaint

Mr and Mrs W complain 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 claims under Section 75 of the CCA.

Background to the Complaint

I issued a provisional decision on Mr and Mrs W's complaint on 23 October 2024, in which I said I was minded to uphold their complaint against the Lender. A copy of that provisional decision is appended to, and forms a part of, this final decision. For that reason, it's not necessary for me to go over the events leading up to the complaint again, but in very brief summary:

- Mr and Mrs W were existing customers of a timeshare provider (the 'Supplier') and, in June 2012, March 2013 and May 2013, they purchased successive upgrades to their membership in what I referred to as the Supplier's 'Fractional Club', financing each upgrade with a point of sale loan from the Lender.

- Fractional Club membership was a type of asset-backed timeshare product. As well as giving Mr and Mrs W holiday rights, it included a share in the net sale proceeds of a property named on their Purchase Agreement (the 'Allocated Property') at the end of their membership term.

- Mr and Mrs W later complained that the upgrades financed by the Lender had, essentially, been mis-sold. They claimed, or complained, to the Lender, that the Lender ought to honour a claim under Section 75 of the CCA in respect of the Supplier's misrepresentations and breaches of contract in relation to the Fractional Club membership upgrades. Mr and Mrs W also contended that certain wrongful acts or omissions of the Supplier or Lender had caused the Lender to participate in an unfair credit relationship with them under section 140A of the CCA.

- The reasons Mr and Mrs W argued the credit relationship between them and the Lender had been rendered unfair were as follows:

    - The Fractional Club membership had been marketed to them as an investment, in breach of the Timeshare Regulations 2010.
    - They'd been subjected to improper pressure, and misleading acts and omissions by the Supplier in entering into the upgrade agreements and the associated credit agreements with the Lender.
    - Their upgrade agreements with the Supplier contained unfair contract terms.
    - The Lender had lent to them irresponsibly because it had not carried out a proper creditworthiness assessment and the loans could not be repaid sustainably.

In my provisional decision, I made no findings on some of Mr and Mrs W's allegations, and this was because ultimately I was minded to conclude the credit relationship between Mr and

Mrs W was rendered unfair by breaches by the Supplier of the prohibition on selling or marketing timeshares as investments, as set out in Regulation 14(3) of the Timeshare Regulations 2010.

Again, it's not necessary to repeat the details from the appended provisional decision, but I found the Supplier had breached Regulation 14(3) in relation to all of the June 2012, March 2013 and May 2013 sales of upgrades to the Fractional Club membership, for broadly (and briefly) the following reasons:

- Mr and Mrs W had given plausible testimony that the Supplier had marketed each upgrade to their Fractional Club membership to them as an investment, encouraging them to upgrade their fractional holding to an Allocated Property at a superior resort, which would make them more money when sold at the end of their membership.

- This testimony was consistent with evidence I'd seen of how the Supplier positioned or framed membership of the Fractional Club at the relevant time to customers – that it was an investment that may lead to a profit in the future.

I didn't think that these breaches by the Supplier, by themselves, would automatically mean the credit relationships between Mr and Mrs W and the Lender, would be rendered unfair. However, I went on to conclude that the Supplier's breaches *had* that effect in this case because:

- While I accepted that Mr and Mrs W's purchases of upgrades from the Supplier were, to some extent, motivated by the acquisition of holiday-related benefits, based on their testimony and the surrounding context, I thought the prospect of a profit on the sale of the Allocated Property, by trading up to apparently more desirable or saleable inventory, was material to their purchasing decisions at the time of each of the June 2012, March 2013 and May 2013 purchases.

I said I was therefore minded to uphold the complaint and direct the Lender to provide fair compensation. Once again, this is set out in the appended provisional decision, but I thought that fair compensation would involve the refund of repayments made under the credit agreements used to fund the purchases in question, along with the timeshare management fees associated with the purchases, minus the value of the benefits received by Mr and Mrs W under the purchases. I also said I was minded to direct the payment of compensatory interest on any net refund, the amendment of Mr and Mrs W's credit files, and for the Lender to indemnify Mr and Mrs W against ongoing liabilities in respect of the purchases made in June 2012, March 2013 and May 2013.

I invited both parties to the complaint to provide any further submissions they wanted me to consider. I've received responses from both the Lender and PR on behalf of Mr and Mrs W.

PR, after initially saying it disagreed with the provisional decision, told me Mr and Mrs W accepted it. The Lender said it disagreed with some points in the provisional decision and set out several reasons why it did so, but nonetheless said it would not oppose the provisional decision and would agree to settle the complaint.

While I acknowledge both parties appear willing to reach a settlement at this point, I think it's appropriate to issue a final decision in this case.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable

in the circumstances of this complaint.

I note Mr and Mrs W have accepted the provisional decision, and the Lender has confirmed that it does not intend to challenge my provisional decision given the specific facts of Mr and Mrs W's case. As a result, I don't think it's necessary for me to address specifically the comments it's raised in its submissions following the provisional decision, although I confirm I have read and considered these carefully.

Having considered the available evidence and arguments again, I've reached the same conclusions as I did in my appended provisional decision, and for the same reasons. It follows that my directions to the Lender regarding what would constitute fair compensation remain the same, but I have set these out again below.

Fair Compensation

Having found that Mr and Mrs W would not have agreed to purchase Fractional Club membership at the Time of Sale in June 2012, March 2013 and May 2013 were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable to put them back in the position they would have been in had they not purchased the Fractional Club memberships (i.e., not entered into the Purchase Agreements), and therefore not entered into the Credit Agreements, provided Mr and Mrs W agree(s) to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

But before I go on to consider what that would look like, I need to consider whether the final purchase Mr and Mrs W made of Fractional Club membership in April 2014, increasing their holdings by a further 142 points and apparently paid for with about £5,350 in cash, meant that the unfairness in the debtor-creditor relationship between them and the Lender came to an end. This purchase appears to have involved a trade-in of their existing points so, in a technical sense, the previous Purchase Agreement had been replaced by a new one. But, I think that any new membership was effectively a continuation of Mr and Mrs W's existing membership, and was really just a 'top up' of their fractional points, rolling over their existing holdings, plus more points, into a new Purchase Agreement. Mr and Mrs W were still subject to the ongoing financial consequences of the June 2012, March 2013 and May 2013 sales, which continued the ongoing unfair relationship with the Lender and means, in my view, that the Lender remains answerable for them.

In April 2014, 2,688 points were 'rolled over' into the new agreement (1,660 of which had been financed by the Lender) and had ongoing financial consequences for Mr and Mrs W, and the compensation needs to reflect that.

Here's what I think needs to be done to compensate Mr and Mrs W with that being the case – whether or not a court would award such compensation:

(1) The Lender should refund Mr and Mrs W's repayments to it under the Credit Agreements used to fund the June 2012, March 2013 and May 2013 Purchase Agreements, and cancel any outstanding balances if there are any.
(2) In addition to (1), the Lender should also refund the annual management charges Mr and Mrs W paid as a result of Fractional Club membership, insofar as these charges relate to the number of points purchased in June 2012, March 2013 and May 2013.
(3) The Lender can deduct

   i. The value of any promotional giveaways that Mr and Mrs W used or took advantage of which were granted under the June 2012, March 2013 and May 2013 Purchase Agreements; and
   ii. The market value of the holidays* Mr and Mrs W took using their Fractional Points purchased as part of the June 2012, March 2013 and May 2013 Purchase Agreements.

   (the 'Net Repayments')

   *I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Mr and Mrs W took using their Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

(4) Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.
(5) The Lender should remove any adverse information recorded on Mr and Mrs W's credit files in connection with the Credit Agreements.
(6) If Mr and Mrs W's Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), insofar as that interest relates to points purchased in June 2012, March 2013 and May 2013, the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership, again insofar as these liabilities relate to the points purchased as part of the June 2012, March 2013 and May 2013 purchases.

   **HM Revenue & Customs may require the Lender to take off tax from this interest. If that's the case, the Lender must give the consumer a certificate showing how much tax it's taken off if they ask for one.

My final decision

For the reasons explained above, and in my appended provisional decision, I uphold Mr and Mrs W's complaint and direct Shawbrook Bank Limited to take the actions outlined in the "Fair Compensation" section above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W and Mrs W to accept or reject my decision before 23 December 2024.

Will Culley
Ombudsman

COPY OF PROVISIONAL DECISION

NB: due to the way this document has been produced, the paragraph numbering in the "Fair Compensation" section incorrectly reads (7) to (12), instead of (1) to (6).

I've considered the relevant information about this complaint.

Having done so, I'm minded to reach a different set of conclusions to our investigator, so I'm issuing this provisional decision to give the parties to the complaint an opportunity to comment before I make my decision final.

I'll look at any more comments and evidence that I get before 6 November 2024. But unless the information changes my mind, my final decision is likely to be along the following lines.

The Complaint

Mr and Mrs W'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 claims under Section 75 of the CCA.

Background to the Complaint

Mr and Mrs W made a series of purchases from a timeshare provider (the 'Supplier') between October 2011 and March 2014. Three purchases made between June 2012 and May 2013 were financed by the Lender, and it is these purchases that this complaint is about. I think the whole series of purchases by Mr and Mrs W is important however, for the purpose of context, and so I will outline them all in this decision.

The first purchase made by Mr and Mrs W was a 'Trial' membership with the Supplier, made on 17 October 2011, costing £3,995 and paid for in cash. While on holiday with the Supplier in March 2012, Mr and Mrs W traded in their Trial membership for membership of a timeshare (the 'Fractional Club') on 20 March 2012 ('the March 2012 sale'). They bought 1,028 points in the Fractional Club for £14,699 after consideration was given for the Trial membership. It's my understanding that this purchase was financed by a different lender.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs W 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 W's next purchase was financed by the Lender, and took place on 17 June 2012 ('the June 2012 sale'). Mr and Mrs W traded in their existing Fractional Points for 1,494 points. The cost of the new fraction was £28,988, reduced to £6,884 after consideration had been given for Mr and Mrs W's existing points. This amount was financed by a loan from the Lender of £6,884 to be repaid over 180 months.

On 21 March 2013 Mr and Mrs W made another purchase from the supplier, this time of 2,574 points in a different Allocated Property ('the March 2013 sale'). As with the last purchase, their existing points were traded in. The price of the new membership was £48,799, and after £24,512 was credited for trading in the existing points, there was £24,287 left to pay. This was again financed by the Lender, but this time the loan included a consolidation of the previous loan, of £7,052.49, meaning the total loan amount was £31,339, repayable over 180 months.

The last purchase financed by the Lender was made on 23 May 2013, when Mr and Mrs W purchased 2,688 points from the supplier, trading in the points they had purchased two months prior ('the May 2013 sale'). Again, the new points were linked to a different Allocated Property, and the price this time was £55,674. Mr and Mrs W were given £48,799 as consideration for their existing points, leaving £6,875 to be financed by the Lender. A loan of this amount was taken out by Mr and Mrs W, repayable over 180 months. The loans used to finance the March 2013 sale and May 2013 sale ran concurrently and were paid off early.

Mr and Mrs W went on to enter two more agreements with the Supplier. The first was in September 2013 and was to purchase property in Turkey. Mr and Mrs W said they withdrew from this purchase. The second agreement was a further purchase of points in the Fractional Club. No paperwork relating to this purchase has been provided, but it's my understanding that it was a purchase of 2,830 points on 19 April 2014, for which approximately £5,350 cash was paid, and which involved the trading in of Mr and Mrs W's existing points. This sale doesn't form a part of this complaint.

Mr and Mrs W – using a professional representative (the 'PR') – wrote to the Lender (the 'Letter of Complaint') to complain about:

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

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

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

1. told them that Fractional Club membership had a guaranteed end date when that was not true.
2. told them that they were buying an interest in a specific piece of "real property" when that was not true.
3. told them that Fractional Club membership was an "investment" when that was not true.

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

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

Mr and Mrs W say that the Supplier was in breach of contract because they found it difficult to book the holidays they wanted, when they wanted. In particular, they say:

- The resorts are all in the middle of nowhere.*
- The Supplier's resorts are not exclusive to members, and in fact are cheaper to book for non-members.
- On one occasion they booked a refurbished ground floor apartment using their membership, as their party included a wheelchair user, but the Supplier put them in an apartment which was not on the ground floor.*

- There was never any availability at certain resorts, or when they tried to book discounted weeks they'd been offered.

As a result of the above, Mr and Mrs W say that they have a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to them.

*These specific details were not mentioned in the Letter of Complaint, but were provided by Mr and Mrs W later. For the sake of completeness, I've included them here.

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

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

1. Fractional Club membership was marketed and sold to them as an investment.
2. The contractual terms setting out (i) the duration of their Fractional Club memberships 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').
3. They were pressured into purchasing Fractional Club memberships by the Supplier and not given enough time to read the documents presented to them at the Time of Sale.
4. 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.
5. The decisions to lend were irresponsible because the Lender didn't carry out the right creditworthiness assessment and the loans could not be repaid in a sustainable way.

The Lender dealt with Mr and Mrs W's concerns as a complaint and issued its final response letter on 5 March 2018, rejecting it on every ground.

Mr and Mrs W then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, upheld the complaint on its merits.

The Investigator thought that the Supplier had marketed and sold Fractional Club membership at the time of the March 2013 sale as an investment to Mr and Mrs W, in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of that breach on their purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr and Mrs W was rendered unfair to them for the purposes of section 140A of the CCA.

Mr and Mrs W accepted the Investigator's assessment. The Lender disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why the case was passed to me. The Lender's argument in response to our investigator's assessment was essentially that Mr and Mrs W's testimony relating to their purchases was not credible, with the following points being made:

- Mr and Mrs W had never specifically said in their testimony that the Supplier had sold any of the purchases it had financed, as an investment. They had made a mix of different allegations over time, which suggested an investment motivation for their purchases was not that important.

- Mr and Mrs W's witness statement had been shaped by PR. Some of the facts were incorrect, such as a claim that the March 2012 purchase had been financed by the Lender, and the use of tenses was inconsistent.

- There appeared to be a clear holiday-related motivation for Mr and Mrs W's purchases, as they had bought more points in the Fractional Club with each purchase, entitling them to better quality accommodation. They had also made 14 holiday reservations using their membership between 2012 and 2014.

- Mr and Mrs W had signed a disclaimer in the sales paperwork which said they had made the purchases for the primary purpose of holidays and no representations had been made to them about the future price or value of their fractional membership.

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').

My provisional findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling the Fractional Club membership financed by the Lender in all three of the sales to Mr and Mrs W as an investment, which, in the circumstances of this complaint, rendered the credit relationship between them and the Lender unfair to them for the purposes of Section 140A of the CCA.

However, 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, while I recognise that there are a number of aspects to Mr and Mrs W complaint, it isn't necessary to make formal findings on all of them in relation to the three sales financed by the Lender. This includes the allegations that:

- The Supplier misrepresented the Fractional Club membership, or was in breach of contract, and the Lender ought to have accepted and paid the claim under Section 75 of the CCA.
- The Supplier had breached the UTCCR or CPUT Regulations, leading to an unfair debtor-creditor relationship between Mr and Mrs W and the Lender.
- The Lender had failed to carry out an appropriate assessment of creditworthiness or affordability, leading it to make irresponsible lending decisions.

And that's because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs W in the same or a better position than they would be if the redress was limited to what would be reasonable in the event the complaint had been upheld for other reasons.

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

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 the Mr and Mrs W 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 W'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.

What's more, the scope of that responsibility extends to both acts and omissions by the Supplier as the Supreme Court in *Plevin* made clear when it referred to 'acts or omissions' when discussing Section 56. And as Section 56(3)(b) says that an applicable agreement can't try to relieve a person from liability for 'acts or omissions' of any person acting as, or on behalf of, a negotiator, it must follow that the reference to 'omissions' would only be necessary because they can be attributed to the creditor under Section 56.

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in *Patel* (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 W and the Lender along with all of the circumstances of the complaint and I think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A, in relation to the sales in March 2013 and May 2013 and the finance taken to fund them. 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

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

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

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

The Supplier's breach of Regulation 14(3) of the Timeshare Regulations in relation to the June 2012, March 2013 and May 2013 sales

The Lender does not dispute, and I am satisfied, that Mr and Mrs W's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling Fractional Club membership as an investment. This is what the provision said at the Time of Sale:

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

But Mr and Mrs W say that the Supplier did exactly that at the Time of Sale – saying the following during the course of this complaint:

- That the Supplier had previously, in connection with the March 2012 purchase of a Fractional Club membership not financed by the Lender, told them that their purchase was "an investment in bricks and mortar" and that they'd be likely to get their money back when the fractional asset was sold, or more, because property tended to appreciate in value.

- The Supplier had, during the June 2012 sale, the March 2013 sale, and the May 2013 sale, encouraged them to upgrade their fractional holding to an Allocated Property in a resort which the Supplier said was superior, and which would make them more money when it was sold.

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

(1) There were two aspects to their Fractional Club membership: holiday rights and a profit on the sale of the Allocated Property.
(2) they were told by the Supplier that they would get their money back or more during the sale of Fractional Club membership.
(3) they were told by the Supplier that Fractional Club membership would be likely to increase in value.

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 W's share in the Allocated Properties clearly, in my view, constituted investments as they 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 memberships were marketed or sold to Mr and Mrs W as investments 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 memberships to them as investments, 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 W, 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 W as an investment. These include the disclaimers the Lender has mentioned, that the purchases were primarily for the purpose of taking holidays, and that no representations had been made about the future price or value of the Fractional Club membership.

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

So, I have considered:

(1) whether it is more likely than not that the Supplier, at the Time of Sale, sold or marketed membership of the Fractional Club as an investment, i.e. told Mr and Mrs W or led them to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered them the prospect of a financial gain (i.e., a profit); and, in turn
(2) whether the Supplier's actions constitute a breach of Regulation 14(3).

And for reasons I'll now come on to, given the facts and circumstances of this complaint, I think the answer to both of these questions is 'yes' for at least some of the sales made to Mr and Mrs W by the Supplier.

How the Supplier marketed and sold the Fractional Club membership

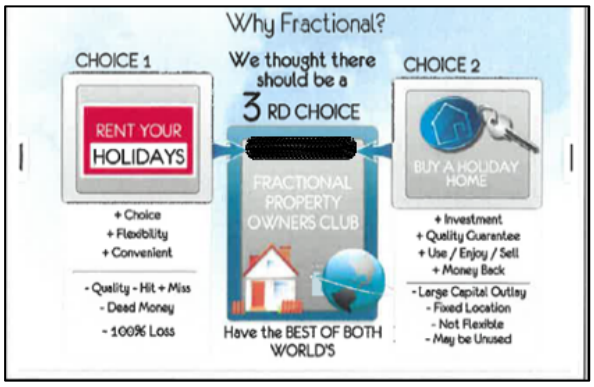
During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives – including a document called "2011 Spain PTM FPOC 1 Practice Slides Manual" (the '2011 Fractional Training Manual').

As I understand it, the 2011 Fractional Training Manual was used throughout the sale of the Supplier's first version of a product called the Fractional Property Owners Club – which I've

referred to and will continue to refer to as the Fractional Club. From what I've seen it appears that this was the version of the product that was sold in all three sales. It isn't entirely clear whether Mr and Mrs W would have been shown the slides included in the Manual. But it seems to me to be reasonably indicative of:

(1) the training the Supplier's sales representatives would have got before selling Mr and Mrs W's Fractional Club membership and subsequent upgrades; and
(2) how the sales representatives would have framed the sale of Fractional Club membership to Mr and Mrs W.

Having looked through the manual, my attention is drawn to page 6 (of 41) – which includes the following slide on it:

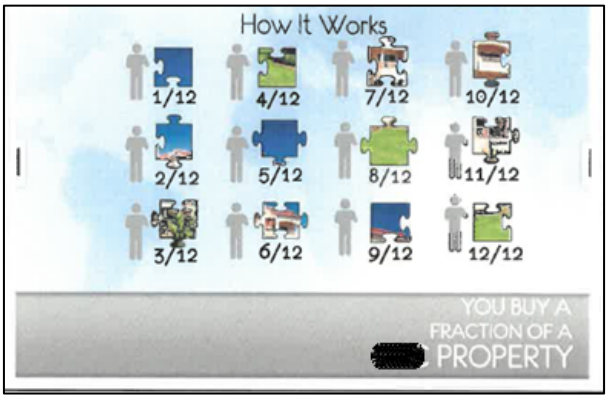


This slide titled "*Why Fractional?*" indicates that sales representatives would have taken Mr and Mrs W through three holidaying options along with their positives and negatives:

(1) *"Rent Your Holidays"*
(2) *"Buy a Holiday Home"*
(3) *The "Best of Both Worlds"*

It was the first slide in the 2011 Fractional Training Manual to set out any information about Fractional Club membership and I think it suggests that sales representatives were likely to have made the point to Mr and Mrs W that membership combined the best of (1) and (2) – which included choice, flexibility, convenience and, significantly, an investment they could use, enjoy and sell before getting money back.

The manual then moved on to two slides (on pages 7 and 8) concerned with how Fractional Club membership worked:



I'm aware that the Supplier says that 90-95% of its time during its sales presentations was focused on holidays rather than the sale of an allocated property. Having looked through the 2011 Fractional Training Manual, it seems to me that there were 10 slides on how Fractional Club membership worked before the slides moved onto to sections titled "Peace of Mind", "Resort Management" and "Which Fractional". And as 5 of the 10 slides look like they focused on holidays, there seems to me to have been a fairly even split during the Supplier's sales presentations between marketing membership of the Fractional Club as a way of buying an interest in property and as a way of taking holidays.

However, even if more time was spent on marketing membership of Fractional Club membership as a way of taking holidays rather than buying an interest in property, as the slides above suggest, in my view, that the Supplier's sales representatives would have probably led prospective members to believe that a share in an allocated property was an investment (after all, that's what the slide titled "Why Fractional" expressly described it as) , I can't see why the Supplier wouldn't have been in breach of Regulation 14(3) in those circumstances.

I acknowledge that there was no comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mr and Mrs W the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that *'[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).'"*[2] And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.

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[2] The Department for Business Innovation & Skills *"Consultation on Implementation of EU Directive 2008/122/EC on Timeshare, Long-Term Holiday Products, Resale and Exchange Contracts (July 2010)".* https://assets.publishing.service.gov.uk/media/5a78d54ded915d0422065b2a/10-500-consultation-directive-timeshare-holiday.pdf

So, if a supplier *implied* to consumers that future financial returns (in the sense of possible profits) from a timeshare were a good reason to purchase it, I think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment.

Mr and Mrs W have specifically said through the course of this complaint that the Supplier positioned membership of the Fractional Club as an investment to them at each of the relevant sales. And as I've said before, the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members – including Mr and Mrs W. And as the slides clearly indicate that the Supplier's sales representative was likely to have led them to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e., a profit) in the future, I don't find them either implausible or hard to believe when they say they were told that if they upgraded their fractional asset to a better resort, they would have a better unit to sell at the end of the scheme, and make more money. On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mr and Mrs W were led by the Supplier to believe at the relevant time. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

Was the credit relationship between the Lender and the Consumer rendered unfair?

Having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr and Mrs W and the Lender under the Credit Agreements and related Purchase Agreements.

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 W and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) (which, having taken place during its antecedent negotiations with Mr and Mrs W, 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) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On my reading of Mr and Mrs W's witness statement, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their March 2013 and May 2013 purchases. That doesn't mean they were not interested in holidays. Their own testimony and booking history demonstrate that they quite clearly were. And that is not surprising given the nature of the product at the centre of this complaint. So to some extent, I agree with the Lender's point that Mr and Mrs W's purchases were motivated by the acquisition of holiday-related benefits. But Mr and Mrs W say (plausibly in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale in March 2013 and May 2013 as something that offered them more than just holiday rights. On the balance of probabilities, I think these purchases were motivated by the prospect of obtaining a share in the Allocated Property and the possibility of an increased profit on the sale of said property, by trading up to an apartment at resorts which were apparently more desirable or saleable. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decisions Mr and Mrs W ultimately made in March and May 2013.

Mr and Mrs W have not said or suggested, for example, that they would have pressed ahead with the purchases in question had the Supplier not led them to believe that Fractional Club membership was an appealing investment opportunity and that they were improving their holdings and chance of a profit. And as they faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from upgrading their membership of the Fractional Club, I have not seen enough to persuade me that they would have pressed ahead with their purchase regardless.

I'm aware the Lender has concerns about Mr and Mrs W's testimony. For example, they say their witness statement gets important facts wrong such as the identity of the lender for the March 2012 purchase, and that they consider it's likely the PR shaped the witness statement. I agree that Mr and Mrs W's statement incorrectly identifies the Lender as the lender who financed the March 2012 purchase, but I've not been directed to anything else which is demonstrably wrong, nor have I seen sufficient evidence that the witness statement is not genuinely representative of what Mr and Mrs W recall of their various purchases from the Supplier.

On the other hand, Mr and Mrs W's testimony in their witness statement has been rather vague in places, for example in relation to the June 2012 purchase. In their witness statement, Mr and Mrs W have not specifically referred to there being an investment motivation when they decided to go ahead with this purchase. All they have said is that they were told they were getting a 'brilliant' deal. However, PR included more detail about the circumstances of this sale in the Letter of Complaint to the Lender, and, having considered the contents of the letter, I think this extra detail is likely to have been based on Mr and Mrs W's recollections as told to PR. And what is said about the June 2012 purchase in the Letter

of Complaint is similar to what Mr and Mrs W say happened in the March 2013 and May 2013 purchases, in that the Supplier informed them that upgrading to a better Allocated Property would mean they'd make more profit when the scheme came to an end. I think it's likely this is representative of Mr and Mrs W's recollections of the June 2012 sale.

I think it's also important to take a step back and consider the overall sequence of purchases and what motivated them, before concluding that the vagueness of Mr and Mrs W's testimony in relation to the June 2012 purchase means the Supplier's breach of Regulation 14(3) must not have been significant in their purchasing decision on that occasion.

Given the above slides, I think it's highly likely that the Supplier breached Regulation 14(3) in the same way at the time of the March 2012 sale, for the same reasons I've explained above. I think it's also likely, based on their testimony, that the March 2012 breach by the Supplier was influential in Mr and Mrs W's decision to make their first purchase of a Fractional Club membership on that occasion. It was a sale financed by another lender and so the Supplier was not the agent of the Lender for the purposes of those antecedent negotiations, meaning they can't render the credit relationship between the Lender and Mr and Mrs W unfair for any of the loans they took out with the Lender.

However, I think the first sale is highly relevant context, in terms of the state of mind Mr and Mrs W would have had when going into subsequent sales (already believing they had an investment product, which they were being asked to consider upgrading), and I think the Supplier's breaches in relation to the subsequent sales would be more likely to render the credit relationship between Mr and Mrs W and the Lender unfair in relation to those subsequent sales as a result. In other words, Mr and Mrs W already being interested in taking out the type of memberships for the investment element is a relevant consideration when considering the impact of the breaches of Regulation 14(3) that I found happened in each of the three subsequent sales.

I've already found that the March 2012, March 2013 and May 2013 purchases were motivated by the investment aspect of the Fractional Club product, and that the Supplier's breaches of Regulation 14(3) were therefore material to Mr and Mrs W's purchasing decisions. I've also already found the Supplier breached Regulation 14(3) in relation to the June 2012 purchase, marketing the upgraded Fractional Club membership as an investment on that occasion. Given the background and the context, I think it's logical to conclude, in the absence of evidence to suggest another motivation, that the June 2012 purchase was also motivated by the prospect of a return on investment as a result of the Supplier's repeated breaches of Regulation 14(3), and that this rendered the credit relationship between Mr and Mrs W and the Lender unfair.

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs W under the Credit Agreement and related Purchase Agreements (June 2012, March 2013 and May 2013) for the purposes of Section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint.

Fair Compensation

Having found that Mr and Mrs W would not have agreed to purchase Fractional Club membership at the Time of Sale in June 2012, March 2013 and May 2013 were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable to put them back in the position they would have been in had they not purchased the Fractional Club memberships (i.e., not entered into the Purchase Agreements), and therefore not entered into the Credit Agreements, provided Mr and Mrs W agree(s) to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

But before I go on to consider what that would look like, I need to consider whether the final purchase Mr and Mrs W made of Fractional Club membership in April 2014, increasing their holdings by a further 142 points and apparently paid for with about £5,350 in cash, meant that the unfairness in the debtor-creditor relationship between them and the Lender came to an end. This purchase appears to have involved a trade-in of their existing points so, in a technical sense, the previous Purchase Agreement had been replaced by a new one. But, I think that any new membership was effectively a continuation of Mr and Mrs W's existing membership, and was really just a 'top up' of their fractional points, rolling over their existing holdings, plus more points, into a new Purchase Agreement. Mr and Mrs W were still subject to the ongoing financial consequences of the June 2012, March 2013 and May 2013 sales, which continued the ongoing unfair relationship with the Lender and means, in my view, that the Lender remains answerable for them.

In April 2014, 2,688 points were 'rolled over' into the new agreement (1,660 of which had been financed by the Lender) and had ongoing financial consequences for Mr and Mrs W, and the compensation needs to reflect that.

Here's what I think needs to be done to compensate Mr and Mrs W with that being the case – whether or not a court would award such compensation:

(7) The Lender should refund Mr and Mrs W's repayments to it under the Credit Agreements used to fund the June 2012, March 2013 and May 2013 Purchase Agreements, and cancel any outstanding balances if there are any.

(8) In addition to (1), the Lender should also refund the annual management charges Mr and Mrs W paid as a result of Fractional Club membership, insofar as these charges relate to the number of points purchased in June 2012, March 2013 and May 2013.

(9) The Lender can deduct

iii. The value of any promotional giveaways that Mr and Mrs W used or took advantage of which were granted under the June 2012, March 2013 and May 2013 Purchase Agreements; and

iv. The market value of the holidays* Mr and Mrs W took using their Fractional Points purchased as part of the June 2012, March 2013 and May 2013 Purchase Agreements.

(the 'Net Repayments')

*I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Mr and Mrs W took using their Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in

which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

(10) Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.
(11) The Lender should remove any adverse information recorded on Mr and Mrs W's credit files in connection with the Credit Agreements.
(12) If Mr and Mrs W's Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), insofar as that interest relates to points purchased in June 2012, March 2013 and May 2013, the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership, again insofar as these liabilities relate to the points purchased as part of the June 2012, March 2013 and May 2013 purchases.

**HM Revenue & Customs may require the Lender to take off tax from this interest. If that's the case, the Lender must give the consumer a certificate showing how much tax it's taken off if they ask for one.

My provisional decision

For the reasons explained above, I'm currently minded to uphold Mr and Mrs W's complaint, and to direct Shawbrook Bank Limited to take the actions outlined in the "Fair Compensation" section above.

I now invite the parties to the complaint to let me have any new evidence or arguments they'd like me to consider, before 6 November 2024. I will review the case again on or after this date.

Will Culley
Ombudsman