DRN-5172726

The complaint

Mr S and Mrs S'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 S and Mrs S purchased membership of a timeshare (the 'Fractional Club 1') from a timeshare provider (the 'Supplier') on 6 October 2014 (the 'Time of Sale 1'). They entered into two agreements with the Supplier to buy a total of 24,000 fractional points (16,000 + 8,000) at a total cost of £33,200 ('Purchase Agreements 1 and 2'). But after trading in their existing timeshare, they ended up paying £16,200 for membership of the Fractional Club.

Fractional Club membership was asset backed – which meant it gave Mr S and Mrs S more than just holiday rights. It also included a share in the net sale proceeds of a property named on their Purchase Agreements ('Allocated Property 1') after their membership term ends.

Mr S and Mrs S paid for their Fractional Club 1 membership by taking finance of £16,200 from the Lender in their joint names ('Credit Agreement 1').

On 28 September 2015 (the 'Time of Sale 2'), Mr S and Mrs S purchased membership of another timeshare (the 'Fractional Club 2') from the same Supplier. They entered into another agreement with the Supplier to buy 7,000 fractional points at a cost of £4,995 ('Purchase Agreement 3').

This further Fractional Club membership was also asset backed giving Mr S and Mrs S further holiday rights and included a share in the net sale proceeds of another property named on Purchase Agreement 3 ('Allocated Property 2') after their membership term ends.

Mr S and Mrs S paid for their Fractional Club 2 membership by taking finance of £4,995 from the Lender in their joint names ('Credit Agreement 2'). However, Credit Agreement 2 also included an amount sufficient to repay Credit Agreement 1. So, the total amount borrowed under Credit Agreement 2 was £20,926.73.

Mr S and Mrs S – using a professional representative (the 'PR') – wrote to the Lender on 14 June 2018 (the 'Letter of Complaint') to complain about the timeshare purchases made at the Time of Sales 1 and 2. The Letter of Complaint read (in full):

"Our clients were members of [another] points-based timeshare membership from the Supplier] *in 2014, which they thought was a good idea at the time, as they could be left to their children. However, the children did not want to be tied to having holidays in one resort and so did not want it. They then discovered that Points were in perpetuity and that the only way to relinquish them was to buy into Fractional. They were told that this was a good move as the Fractionals would be sold in 19 years and they would* ***definitely*** *make a profit on their purchase price. They used your finance for the Points which was £16200 in 2014 and again for the Fractional £4995 in 2015.*

They were told it was an exclusive, members only club but the holiday weeks are freely available to anyone at [a specified online travel platform] *whilst members are repeatedly told "no availability". Incidentally, it is also much cheaper on* [the online travel platform] *than the maintenance fees members have to pay. Also,* [the Supplier] *has now been taken over* [by another company] *and all the Sales staff have been sacked, so there is now nobody to sell the Fractional so no profit either".*

We request a full refund of monies under Section 75 of the Consumer Credit Act 1974 […]*."*

The Lender dealt with Mr S and Mrs S's concerns as a complaint and issued its final response letter on 9 January 2019 rejecting it on every ground.

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

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

In responding to our investigator's assessment, the PR raised a number of general observations and arguments[1]. These can be summarised as follows:

- PR's clients did not benefit from additional holidays or points and, in most cases lost points and found booking difficult. In some cases, while clients may have gained an additional small number of points, it is questioned whether this justifies the price paid and so clients' motivation to purchase.
- The only difference between the contracts was the reduced term associated with the Fractional Club membership which was to be sold for a profit as an investment with a guaranteed return.
- PR's clients were induced to purchase the fractional investment which would guarantee huge sales, reduced term time and the omission of perpetuity.
- Old contracts provided clients with more holidays and points than the Fractional Club membership.
- Other claims have been upheld and all clients advise Fractional Club membership was sold as an investment in breach of Regulation 14(3) of the Timeshare Regulations[2] - with reference to the outcome of a recent judicial review[3].
- The rationale for Fractional Club membership is challenged on the basis that the only additional benefit was as an investment.
- The Fractional Club membership was marketed and sold only for investment purposes otherwise clients wouldn't have proceeded with their purchase(s).

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)

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[1] It was not clear to me whether this response was in reference to Mr S and Mrs S or to the PR's clients more generally. In so far as it could be said that the submissions related to Mr S and Mrs S, I have taken them into account.

[2] The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010

[3] *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*').

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 Unfair Terms in Consumer Contract Regulations 1999 ('UTCCR').
- The Consumer Protection from Unfair Trading Regulations ('CPUTR').
- 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').

Having considered Mr S and Mrs S's complaint, I reached a similar outcome to that of our investigator. But as I'd expanded somewhat on the reasons given, I issued a provisional decision ('PD') on 13 November 2024 giving Mr S, Mrs S and the Lender the opportunity to respond to my findings before I reach a final decision.

Despite follow up by this service, none of the parties to Mr S and Mrs S's complaint have acknowledged or provided any further comments or information for me to consider. So, the complaint was passed back to me in order to reach a final decision.

What I've decided – and why

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

For completeness, in my PD I said:

> I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. And having done that, I do not currently think this complaint should be upheld.
>
> But before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.
>
> What is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.
>
> **Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale**
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> 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 S and Mrs S 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. Here the total cash price of Purchase Agreement 1 and 2 at the Time of Sale 1 is above the limits for Section 75 to apply. However, the alleged misrepresentations could, if made out, have led to an unfair debtor-creditor relationship (dealt with further below). So, I have gone on to consider whether there were any actionable misrepresentations in relation to each of the purchases in this case.
>
> For me to conclude there was a misrepresentation by the Supplier in the way that has been alleged, generally speaking, I would need to be satisfied, based on the available evidence, that the Supplier made false statements of fact when selling the Fraction Club memberships. In other words, that they told Mr S and Mrs S something that wasn't true in relation to one or more of the points raised. I would also need to be satisfied that the misrepresentations were material in inducing Mr S and Mrs S to enter the Purchase Contracts. This means I would need to be persuaded that Mr S and Mrs S reasonably relied on those false statements when deciding to buy the Fractional Club memberships.
>
> 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 memberships would *"**definitely** make a profit"* when they were sold at the end of each membership term. The difficulty I have is identifying what was actually said at the Time of Sale. The PR have provided limited details and evidence to support the misrepresentations Mr S and Mrs S says the Supplier made, although I acknowledge they do say they were told these things. So, I've thought about this alongside the limited evidence that is available from the Time of each Sale.

As I've explained above, Mr S and Mr S's Fractional Club memberships included a share in the net sale proceeds of the properties named on each of the Purchase Agreements after the membership term ends. So, simply telling Mr S and Mrs S that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr S and Mrs S's share in the Allocated Properties was clearly the purchase of a share of the net sale proceeds of those specific properties in those specific resorts. But I can't see anything to suggest that they were told the sale of the Allocated Properties would result in them making a defined or guaranteed profit. In fact, I've found nothing within the evidence provided to suggest the Supplier gave any assurances or guarantees about the future sales value of either of Mr S and Mrs S's Fractional Club memberships, or the Allocated Properties. And Mr S and Mrs S haven't explained in any detail what was specifically said and in what circumstances.

While I recognise that Mr S and Mrs S have concerns about the way in which their Fractional Club membership was sold, they have not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for any of the reasons alleged.

For these reasons, therefore, I do not think the Lender is liable to pay Mr S and Mrs S any compensation for the alleged misrepresentations of the Supplier. And with that being the case, I do not think the Lender ultimately acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

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

I've already summarised how Section 75 of the CCA works and why I don't think Mr S and Mrs S have a right of recourse against the Lender under that provision. However, Section 75A may provide a similar way that if the Supplier was liable for having breached the Purchase Agreement, the Lender is also liable.

Mr S and Mrs S say that they could not holiday where and when they wanted to – which, on my reading of the complaint, suggests that they consider that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreements. 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 S and Mrs S states that the availability of holidays was/is subject to demand. It also looks like they made use of their fractional points to holiday on four occasions between September 2015 and October 2016. Further, it appears they successfully used their fractional points to book a holiday in February 2017, albeit this was subsequently cancelled by them. I accept that they may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

Mr S and Mrs S also allege that while they were told that the Fractional Club memberships were exclusive in as much as they relate to a members' only club, they have discovered that weeks at the Supplier's resorts are now freely available to anyone through an online travel platform at prices much cheaper than the maintenance fees members have to pay.

I don't think it's possible to directly compare Mr S and Mrs S's Fractional Club membership costs to those ordinarily associated with traditional holiday accommodation bookings. The Fractional Club membership appears to provide more than just the ability to book holiday accommodation and is, ultimately, a completely different kind of holiday product. So, it's not possible to make a simple cost comparison. And I've found nothing within the documentation, from the Time of each

Sale, which defines exclusivity in a way that suggests that the Supplier's resorts would only be available for use by Members of their Timeshare Product schemes. So, I'm not persuaded that the Supplier breached the terms of the Purchase Agreement in the ways suggested here.

Mr S and Mrs S also say that the Supplier breached the Purchase Agreements as a consequence of their subsequent takeover by another company, whereupon the Suppliers sales staff were *"sacked".* The suggestion is that this leaves no one to sell *"the Fractional"*. I believe that this is reference to the proposed sale of the allocated properties under the Purchase Agreements once Mr S and Mrs S's membership reaches a conclusion. While I understand why the PR is alleging that there was a breach of the Purchase Agreement as a result, neither Mr S and Mrs S nor the PR have said, suggested or provided evidence to demonstrate that they are no longer:

1. members of the Fractional Clubs;
2. able to use their Fractional Club memberships to holiday in the same way they could initially; and
3. entitled to a share in the net sales proceeds of the Allocated Property when their Fractional Club membership ends.

While I understand that they are essentially suggesting that when the time comes for the Allocated Properties to be sold, they will not receive their share of the sales proceeds, it would seem that any breach of contract (if that occurs) lies in the future and is currently uncertain.

In any event, I think it's clear from the Purchase Agreements and the accompanying documentation from the Time of Sales 1 and 2 that the Allocated Properties will be sold, once the Purchase Agreement ends, by the Trustee's - who own the legal title to the Allocated Properties. As far as I can see, this remains unchanged. So, I'm not persuaded that the departure of the Supplier's sales staff following the company takeover is likely to have any bearing upon the eventual sale of the Allocated Properties.

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

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

I have already explained why I am not persuaded that the contracts entered into by Mr S and Mrs S were misrepresented (or breached) by the Supplier in a way that makes for a successful claim under the CCA and outcome in this complaint. But Mr S and Mrs S concerns may also suggest that the credit relationship between them and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sales that they have concerns about. It is those concerns that I explore here.

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between the Mr S and Mrs S 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 Agreements) 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 agreements or any related agreements.

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 S and Mrs S's membership of the Fractional Clubs 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."[4]

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.

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

I have considered the entirety of the credit relationship between Mr S, Mrs S and the Lender along with all of the circumstances of the complaint and I do not think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale;
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; and
4. The inherent probabilities of the sale given its circumstances.

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

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

Mr S and Mrs S's complaint about the Lender being party to an unfair credit relationship was also made was made on the basis that the Fractional Club memberships had been sold to them as investments. This allegation was mentioned in the Letter of Complaint but was expanded on in December 2023 in response to our Investigator's findings. I have considered that further.

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

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

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

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

But in alleging that Mr S and Mrs S would make a profit on their purchases(s), the PR says that the Supplier did exactly that at the Time of Sales 1 and 2. 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 S and Mrs S'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 them. But the fact that Fractional Club memberships 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 S and Mrs S 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 memberships to them as an investment, i.e. told them or led them to believe that Fractional Club memberships offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

In the initial complaint and subsequent submissions, the PR has not set out in any particular detail why or how Mr S and Mrs S's Fractional Club membership was sold as an investment or what they were specifically told that led her to believe it was an investment, other than to say that they were told they'd make a profit. So, I have also considered, amongst other things, the paperwork from the Time of Sale.

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 S and Mrs S, 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 S and Mrs S as an investment.

In particular, the documentation relating to Purchase Agreements 1 and 2, which Mr S and Mr S signed includes the following:

- Note 1 of the Terms and Conditions attached to the Purchase Agreements says, *"You should not purchase your* […] *Fractional Points as an investment in real estate. The Purchase Price paid by You relates primarily to the provision of memorable holidays for the duration of Your ownership.*

- Note 3 in Part 1 of the Key Information documents includes, *"*[…] *You must bear in mind that your* […] *Fractional Points (and the purchase price paid by you for those points) relates primarily to the acquisition by you of many years of wonderful holidays* […] *Your decision to purchase* […] *Fractional Points should not be viewed by you as an investment".*

- Note 5 of the document headed Customer Compliance Statement/Declaration to Treating Customers Fairly says, *"We understand that the purchase of our* […] *Fractional Points is an investment in our future holidays, and that it should not be regarded as a property or financial investment. We recognize that the sale price achieved on the sale of the Property in the Owners Club (and to which our* […] *Fractional Points have been attributed) will depend on market conditions at that time, that property prices can go down as well as go up and that there is no guarantee as to the eventual sale price of the Property".*

- Note 27 of the Customer Compliance Statement/Declaration to Treating Customers Fairly goes on to include, *We confirm no oral or written representations have been made to us upon which we have relied and which are either not contained in the documentation presented to us today and signed by us OR noted by us in the comments box".* The document doesn't show any such comments recorded.

The documentation relating to Purchase Agreement 3, also signed by Mr S and Mrs S, includes the following:

- Note 1 of the Terms and Conditions attached to the Purchase Agreement, *"You should not purchase your* […] *Fractional Points as an investment in real estate. The Purchase Price paid by You relates primarily to the provision of memorable holidays for the duration of Your ownership.*

- Note 5 of the document headed Customer Compliance Statement/Declaration to Treating Customers Fairly says, *"We understand that the purchase of our* […] *Fractional Points is an investment in our future holidays, and that it should not be regarded as a property or financial investment. We recognize that the sale price achieved on the sale of the Property in the Owners Club (and to which our* […] *Fractional Points have been attributed) will depend on market conditions at that time, that property prices can go down as well as go up and that there is no guarantee as to the eventual sale price of the Property".*

With that said, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club memberships as investments. And while such an allegation was not set out in any detail by Mr S and Mrs S, I accept that it's *possible* that Fractional Club membership was marketed and sold to them as investments 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 sale did breach the prohibition on marketing or selling Fractional Club membership as an investment, for the reasons I will explain, I am not currently persuaded that would make a difference to the outcome in this complaint anyway.

Was the credit relationship between the Lender and Mr S and Mrs S 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 a credit relationship between Mr and Mrs S 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 S, 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) lead them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

While I acknowledge Mr S and Mrs S's recollections in the Letter of Complaint, I'm unable to find anything that indicates that they were actually induced into the purchase on that basis.

Furthermore, based upon Mr S and Mrs S's initial recollections included within the Letter of Complaint, it seems their primary motivation to purchase Fractional Club membership was driven by a desire to shorten the term of their existing timeshare product holding. And this was driven by their children's lack of interest in taking on that existing timeshare product holding in the future. And in doing so, they also acquired more points to be utilised against holiday accommodation and experience bookings.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations – and I make no such finding - I am not persuaded that Mr S and Mrs S's decision to purchase the Fractional Club memberships at the Time of each Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with their purchases 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 S, Mrs S and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Mr S and Mrs S was unfair to them for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr S and Mrs S's Section 75 claim(s), and I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

Having received nothing more to consider from any of the parties to this complaint, I've no reason to vary from my provisional findings. So, while I appreciate Mr S and Mrs S are likely to be very disappointed, I will not be asking the Lender to do anything more here.

My final decision

For the reasons set out above, I do not uphold Mr S and Mrs S's complaint against Shawbrook Bank Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S and Mrs S to accept or reject my decision before 2 January 2025.

Dave Morgan
Ombudsman