DRN-5207172

The complaint

Mr B's complaint is, in essence, that Shawbrook Bank Limited ("Shawbrook") acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him under Section 140A of the Consumer Credit Act 1974 (as amended) ("CCA") and (2) deciding against paying a claim under Section 75 of the CCA.

Background to the complaint

Mr B purchased membership of a timeshare ("Fractional Club") from a timeshare provider ("the Supplier") on 2 September 2018 ("the Time of Sale"). He entered into an agreement with the Supplier to buy 2,640 fractional points at a cost of £27,818 ("the Purchase Agreement"). But after trading in an existing timeshare, he ended up paying £16,118 for membership of the Fractional Club.

Fractional Club membership was asset backed – which meant it gave Mr B more than just holiday rights. It also included a share in the net sale proceeds of a property named on his Purchase Agreement ("the Allocated Property") after the membership term ends.

Mr B paid for his Fractional Club membership by taking finance of £16,118 from Shawbrook ("the Credit Agreement").

Mr B – using a professional representative ("PR") – wrote to Shawbrook on 12 September 2019 ("the Letter of Complaint") to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against Shawbrook under s.75 CCA, which Shawbrook failed to accept and pay.
2. Shawbrook being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of s.140A CCA.
3. The decision to lend being irresponsible because Shawbrook did not carry out the right creditworthiness assessment.

The Letter of Complaint set out the specific allegations behind Mr B's complaint, but it included an allegation that Fractional Club membership was marketed and sold to him as an investment in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').

Shawbrook dealt with Mr B's concerns as a complaint and issued its final response letter on 11 December 2019, rejecting it on every ground.

Mr B 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 as an investment to Mr B at the Time of Sale in breach of Reg.14(3) of the Timeshare Regulations. And given the impact of that breach on his purchasing decision, the Investigator concluded that the credit relationship between Shawbrook and Mr B was

rendered unfair to him for the purposes of s.140A CCA.

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

Having considered everything, I issued a provisional decision ("PD"), setting out my thoughts on Mr B's complaint. In short, I agreed with our Investigator, but I wanted to give both parties the opportunity to consider what I said, and provide any further evidence and arguments, before I set out my thoughts in a final decision. An extract of that PD reads as follows:

> ***The legal and regulatory context***
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> *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.*
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> *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:*
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> - *The CCA (including ss.75 and 140A-140C).*
> - *The law on misrepresentation.*
> - *The Timeshare Regulations.*
> - *The Consumer Rights Act 2015.*
> - *The Consumer Protection from Unfair Trading Regulations 2008.*
> - *Case law on s.140A 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***
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> *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***
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> *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 Reg.14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr B as an investment, which, in the circumstances of this complaint, rendered the credit relationship between him and Shawbrook unfair to him for the purposes of s.140A 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 B's complaint, it is not necessary to make formal findings on all of them. This includes the allegation that Shawbrook ought to have accepted and paid the claim made under s.75 CCA as, even if those aspects of the complaint ought to succeed, the redress I am currently proposing puts Mr B in the same or a better position than he would be if the redress was limited to those other complaints.

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 Shawbrook participate in an unfair credit relationship?

As s.140A 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 B and Shawbrook was unfair.

Under s.140A 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 s.56 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.

S.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 s.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 s.12(b) 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 s.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."

Shawbrook does not 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 B'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 s.12(b). That made them antecedent negotiations under s.56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for Shawbrook as per s.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 s.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 s.56(2) 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 Shawbrook's statutory agent for the purpose of the pre-contractual negotiations.

However, an assessment of unfairness under s.140A is not 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

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

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 s.140A, therefore, is stark. But it is not 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 s.140A is the consequence of all of the relevant facts.

I have considered the entirety of the credit relationship between Mr B and Shawbrook 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 s.140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. *The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale; and*
2. *The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*
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 B and Shawbrook.

<u>The Supplier's breach of Regulation 14(3) of the Timeshare Regulations</u>

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

Reg.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 B says that the Supplier did exactly that at the Time of Sale. In the Letter of Complaint it was said:

> *"During this presentation, he advises he was offered the opportunity to purchase fractional points in the Signature collection. He was advised this was an investment in a fractional property ownership of the signature collection, this would be in the Sunningdale Village resort.*

> *He was advised that if he purchased fractional points, he would be investing in a property that would increase in value. He was advised the property would be sold and he would have a guaranteed exit from his timeshare product.*
>
> *He was guaranteed that when this was sold, he would make a profit. It is contrary to the 2010 timeshare regulations to sell a timeshare as an investment…"*

Alongside the Letter of Complaint, PR provided a 'Client Statement' from Mr B. This was dated 7 August 2019, but was unsigned. In the statement Mr B set out the background to what happened, including information about an earlier purchase he made in 2011. With respect to that purchase, he said:

> *"In Tenerife in 2011 on holiday. I was invited to a meeting with the representatives. This was a long meeting and I felt under pressure to purchase a product. I was advised that if I purchased fractional points, I would be investing in a property that would increase in value. I would be able to sell the property and then have a guaranteed exit from my timeshare product. I would also be able to hand this to my family as an inheritance…"*

Mr B then gave information about what happened at the Time of Sale, saying:

> *"In 2018 I was in Tenerife and invited to a meeting with the representatives. This time I was offered the opportunity to purchase fractional points in the Signature collection. Take us to see it and it was out of this world. This again was a long-pressured sale meeting where I was given the opportunity to investing in the Sunningdale Village resort. Again, I would be able to sell the property or hand it to my children to inherit. I was advised that I would make a profit from this sale."*

Mr B alleges, therefore, that the Supplier breached Reg.14(3) at the Time of Sale because Fractional Club membership was presented as an investment and he was told that he would make a profit when it was sold.

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 paragraph 56. I will use the same definition.

Mr B's share in the Allocated Property clearly, in my view, constituted an investment as it offered him the prospect of a financial return – whether or not, like all investments, that was more than what he first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Reg.14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It does not 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.

Further, just because it may be more probable that a timeshare with an investment element was marketed or sold as an investment than a product without that element, it does not follow that it was more likely than not that it was sold in that way due to the product's makeup. To conclude, therefore, that Fractional Club membership was

marketed or sold to Mr B as an investment in breach of Reg.14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to him as an investment, i.e. told him or led him to believe that Fractional Club membership offered him 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 B, the financial value of his 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 B as an investment. For example, in the Member's Declaration that he signed, it was said:

> *"We understand that the purchase of our Fractional Right is for the primary purpose of holidays and is not specifically for the direct purpose of a trade in and that [the Supplier] makes no representation as to the future price or value of the Fractional Rights which are personal rights and not interests in real estate (all as explained in the Information Statement)."*

In that eleven-page Information Statement, there are further disclaimers, including:

> *"…Fractional Right have been designed to be used and enjoyed and not bought with the expectation or necessity of future financial gain." (page 2)*
>
> *"…The Vendor, Manager and the Trustee are unable to give any guarantees on the ultimate sales price as this depends on many factors including the state of the property market, supply and demand and exchange rates at the time of sale.*
>
> *This is a holiday product and there should be no expectation of financial gain in respect of the Suites." (page 3)*

However, there were other aspects of the Information Statement that, in my view, may have given the impression that Fractional Club membership was to be treated as an investment:

> *"**Investment advice***
>
> ***The Vendor, any sales or marketing agent and the Manager and their related businesses (a) are not licensed investment advisors authorized by the Financial Conduct Authority or any relevant authority to provide investment or financial advice; (b) all information has been obtained solely from their own experiences as investors and is provided as general information only and as such is not intended for use as a source of investment advice and (c) all purchasers are advised to obtain competent advice from legal, accounting and investment advisors to determine their own specific investment needs; (d) no warranty is given as to any future values or returns in respect of any Suite.**" (page 8)*

It seems to be that the inclusion of that disclaimer was only necessary if the Supplier was aware that Fractional Club membership ran the risk of being presented as an investment, either in the marketing materials the Supplier produced or orally by its sales staff.

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. 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 B or led him to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered him the prospect of a financial gain (i.e., a profit); and, in turn*
(2) *whether the Supplier's actions constitute a breach of Reg.14(3).*

And for reasons I will now come on to, given the facts and circumstances of this complaint, I think the answer to both of these questions is 'yes'.

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. Relevant to this complaint was a document called "2015 SPAIN FRACTIONALS AT SIGNATURE SUITE COLLECTION SALES TRAINING MANUAL FOR FPOC AND VACATION CLUB OWNERS" ("the Manual"), which was used to train the Supplier's sales agents in the selling of the product purchased by Mr B. Although this document was put together in 2015, the Supplier has not provided any further training that was used to sell this product between then and the Time of Sale. The Manual contains a number of slides that would have been shown to prospective customers alongside notes and directions, telling sales staff how to present these slides and Fractional Club membership.

Based on the evidence available in this complaint, I cannot say for certain whether Mr B would have been shown these specific slides, however the Manual is, in my view, reasonably indicative of:

(1) *the training the Supplier's sales representatives would have got before selling Fractional Club membership; and*
(2) *how the sales representatives would have framed any of the Supplier's multimedia presentations during the sale of Fractional Club membership to prospective members – including Mr B.*

The "Game Plan" on page 4 of the Manual sets out what the salesperson was to cover when selling memberships such as Mr B's Fractional Club. Part of this was the introduction to consumers of the idea of Fractional Club membership.

Having looked through the Manual, the first mention of the structure of Fractional Club membership was on page 11. It says:

> *"In recent years our members requested shorter term products so to fulfil that demand we created our Fractional Property Owners Club which is a shorter term product with a fixed asset attached providing an exit in 19 years and money back"*

To me, this suggests the sales agent is likely to have made the point to the customer that purchasing the membership would allow them to own a physical asset, that being the fraction of a real property, and that this ownership would lead to "money back" at the end of the term. So this would have been highlighted at the outset of the sale.

In the set of slides contained in the Manual, the section that explained how the returns from Fractional Club membership worked was in a section titled "PRESENTATION FOR VACATION CLUB OWNERS'. However, Mr B was not a Vacation Club owner but was an existing Fractional Club member at the Time of Sale, so he would not have been shown these slides. But I think these slides are indicative of the sales practices taught by the Supplier at that time.

On page 106, there is a slide that reads:

"Vacation Club	*CLC Estates*
Choice 1	*Choice 2*
Choice/flexibility	*Investment*
130 resorts	*Quality Guarantee*
Mini-breaks	*Use/sell*
Lodges	*Money back*
Cruises	
Hotels	
Ends 2078	*Large capital outlay*
Re-sale value?	*Fixed location*
Investment in holidays	*Not flexible"*

I think this slide compares the features between two of the Supplier's products – Vacation Club, which was a traditional timeshare product with no 'fractional' element and CLC Estates, which was set up for customers to buy an overseas property and then 'rent' it back to the Supplier for an income.

The next slide reads:

"Vacation Club	*CLC Estates*
Choice 1	*Choice 2*
We thought there should be a 3RD CHOICE	
Club La Costa Fractional Owners Property Club	
Have the BEST OF BOTH WORLDS	
Choice/flexibility	*Investment*
130 resorts	*Quality Guarantee*
Mini-breaks	*Use/sell*
Lodges	*Money back*
Cruises	
Hotels"	

So the word 'investment' was used when describing Fractional Club membership to existing Vacation Club members. Although I accept this part of the slide deck was not shown to Mr B, I think this demonstrates that it was likely that the Supplier's sales staff would have been trained to talk about Fractional Club memberships like Mr B's as investments at the Time of Sale. So I think it was a real possibility that a sales representative who used that language when selling to existing Vacation Club members would use the same or similar language when selling to existing fractional members. That means there was a real possibility that was done in Mr B's sale.

I also acknowledge that there was no comparison between the expected level of financial return and the purchase price of Fractional Club membership in the Manual. However, if I were to only concern myself with express efforts to quantify to Mr B the financial value of the proprietary interest he was offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Reg.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.*

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.
Indeed, if I'm wrong about that, I find it difficult to explain why, in paragraphs 77 and 78 followed by paragraph 100 of Shawbrook & BPF v FOS when, Mrs Justice Collins Rice said the following:

> *"[…] I endorse the observation made by Mr Jaffey KC, Counsel for BPF, that, whatever the position in principle,* ***it is apparently a major challenge in practice for timeshare companies to market fractional ownership timeshares consistently with Reg.14(3). […] Getting the governance principles and paperwork right may not be quite enough.***
>
> ***The problem comes back to the difficulty in articulating the intrinsic benefit of fractional ownership over any other timeshare from an individual consumer perspective****. […]* ***If it is not a prospect of getting more back from the ultimate proceeds of sale than the fractional ownership cost in the first place, what exactly is the benefit?*** *[…] What the interim use or value to a consumer is of a prospective share in the proceeds of a postponed sale of a property owned by a timeshare company – one they have no right to stay in meanwhile – is persistently elusive."*
>
> *"[...] although the point is more latent in the first decision than in the second, it is clear that both ombudsmen viewed fractional ownership timeshares – simply by virtue of the interest they confer in the sale proceeds of real property unattached to any right to stay in it, and the prospect they undoubtedly hold out of at least 'something back' – as products which are inherently dangerous for consumers.* ***It is a concern that, however scrupulously a fractional ownership timeshare is marketed otherwise, its offer of a 'bonus' property right and a 'return' of (if not on) cash at the end of a moderate term of years may well taste and feel like an investment to consumers who are putting money, loyalty, hope and desire into their purchase anyway.*** *Any timeshare contract is a promise, or*

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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

> *at the very least a prospect, of long-term delight. [...] A timeshare-plus contract suggests a prospect of happiness-plus. And a timeshare plus 'property rights' and 'money back' suggests adding the gold of solidity and lasting value to the silver of transient holiday joy." (my emphasis added)*

Having considered the Manual in the round, I note that there does not appear to be any attempt to minimise or explicitly reject the notion that the Fractional Club membership contained an investment element. Nor have I seen anything that contradicts or clashes with what Mr B has said about the way the membership was sold. Given this, I think it's more likely than not that the Supplier did, at the very least, imply that future financial returns (in the sense of possible profits) from the membership were a good reason to purchase it. I recognise that the Manual is mainly taken up with explaining and selling the additional benefits of the Signature membership, namely the luxurious nature of the accommodation and the services on offer to members. However, I also don't think this contradicts Mr B's position that he was told he would make a profit from membership.

Overall, therefore, the slides in the Manual I have 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. Having considered the Manual, Mr B's memories of the sale and all of the other evidence from the time of sale, I think it more likely than not that the representative was likely to have led Mr B 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. And with that being the case, I do not find them either implausible or hard to believe when he said he thought he was buying an investment and that "I was advised that I would make a profit from this sale." On the contrary, in the absence of evidence to persuade me otherwise, I think that is likely to be what Mr B was led by the Supplier to believe at the relevant time. And for that reason, I think the Supplier breached Reg.14(3) of the Timeshare Regulations.

<u>Was the credit relationship between Shawbrook and Mr B rendered unfair?</u>

Having found that the Supplier breached Reg.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 B and Shawbrook under the Credit Agreement and related Purchase Agreement.

As the Supreme Court's judgment in Plevin makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of s.140A CCA. 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 Reg.14(3) led to a credit relationship between Mr B and Shawbrook that was unfair to him and warranted relief as a result, whether the Supplier's breach of Reg.14(3) (which, having taken place during its antecedent negotiations with Mr B, is covered by s.56 CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of s.140(1)(c) CCA and deemed to be something done by Shawbrook) led him to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On my reading of Mr B's evidence, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when he decided to go ahead with his purchase, after all he only mentioned that and the quality of the accommodation he saw as reasons behind his purchase. That does not mean he was not interested in holidays as he himself said he thought the accommodation was 'out of this world'. And that is not surprising given the nature of the product at the centre of this complaint. So there were other reasons why he chose to take out Fractional Club membership other than the investment element. But, as Mr B says (plausibly in my view) that Fractional Club membership was marketed and sold to him at the Time of Sale as something that offered more than just holiday rights, on the balance of probabilities, I think his purchase was motivated by the share in the Allocated Property and the possibility of a profit. I note that he complained about this around a year after the Time of Sale, so his memories of the sale would have been relatively fresh, and he has been consistent during the course of this complaint that the potential investment return was a central part of his reason to purchase. I also note that he previously held a fractional timeshare with the Supplier and has been clear he also believed that to have been an investment, which I also find plausible given the nature of the membership.

In response, Shawbrook has questioned Mr B's evidence. In particular it said that the evidence lacked detail, was unsigned and some parts were inaccurate, as Mr B said the sale was pressured, but the Supplier's notes of the sale specifically said "no pressure felt". Further, the Supplier's notes said that the sale was "purchased for usage". I have not seen a copy of the notes of sale, just Shawbrook's extracts from them. However, I am prepared to accept they contain the things Shawbrook say they do. That is because I think it would be strange if the Supplier had recorded that its sales staff had either pressured Mr B into the sale or that it had positioned Fractional Club membership as an investment, given the prohibition in the Timeshare

Regulations. So the absence of those things in the notes is not something I think particularly helpful, one way or another, in determining this complaint. I also do not think the fact that Mr B's evidence is neither signed nor longer means that I ought to discount what was said. When bringing this complaint to our service, Mr B signed a complaint form that repeated the allegation that Fractional Club membership was sold as an investment, so I am satisfied this is the complaint that he is making. Further, although the evidence is brief, it is clear and, in my view, explains why he took out the membership. And with that being the case, I think the Supplier's breach of Reg.14(3) was material to the decision Mr B ultimately made.

Mr B has not said or suggested, for example, that he would have pressed ahead with the purchase in question had the Supplier not led him to believe that Fractional Club membership was an appealing investment opportunity. And as he faced the prospect of borrowing and repaying a substantial sum of money while subjecting himself to long-term financial commitments, had he not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I have not seen enough to persuade me that he would have pressed ahead with his purchase regardless.

Conclusion

Given the facts and circumstances of this complaint, I think Shawbrook participated in and perpetuated an unfair credit relationship with Mr B under the Credit Agreement and related Purchase Agreement 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.

I then set out what I thought fair compensation looked like in the context of Mr B's complaint.

Comments following my Provisional Decision

PR, on behalf of Mr B, agreed with my PD.

Shawbrook disagreed. It argued that my PD was based on an error in my approach to the prohibition in Reg.14(3) and my analysis of the evidence referred to in my PD. In particular, Shawbrook argues:

- The wording in my PD is inconsistent with the premise that there is no prohibition to the sale of fractional timeshares, only a prohibition on the way they were sold, and the definition of 'investment' that I used. It argues that I took the position that *"the mere existence of the "prospect of a financial return" constituted an "investment". In particular, the PD falls into that error by conflating two different meanings of the word 'return': (i) a 'return on investment', which is normally understood to mean the measure of profit (the return) on the original investment; and (ii) a customer being told that some money will be 'returned' upon sale, which carries no connotation of investment or profit.".*
- I did not engage with the specific facts of Mr B's sale and erred by making generic assumptions about his particular Fractional Club membership and sale.
- None of the sales materials or documents from Mr B's sale described Fractional Club membership as an 'investment' and his evidence on the issue was generic in nature and failed to explain how it was sold to him as an 'investment'.
- Telling a customer that they would get a financial return from the sale of the Allocated Property would not breach Reg.14(3).
- Mr B was not shown the sales presentation documents I referred to in my PD but, in any event, they did not demonstrate a breach of Reg.14(3).

- Mr B confirmed, at the Time of Sale, that he understood the relevant disclaimers that Fractional Club membership was not an investment.
- The parts of the training materials to which I referred were unobjectionable. In particular, Shawbrook said:

> *"Crucially, these materials at no stage refer to the presence of the Allocated Property as an "investment", despite the conclusion the Ombudsman has made on page 9 that the use of this word on page 106 is evidence that the purpose or benefit of the product was the opportunity to make a financial gain/profit on the initial outlay. To the contrary, the material indicated that there would be a "money back" at the exit in 19 years and in a section of training material relevant for other sales event, there is the word 'investment' but with no detail or qualification. It is unreasonable for the Ombudsman to conclude it was 'likely that the Supplier's sales staff would have been trained to talk about Fractional Club memberships like Mr B's as investments at the Time of Sale', when there is no evidence that either sales people were given the same training, that Mr B saw the presentation that the training material supports nor indeed that the content of page 106 was alluding to the benefit of the product being a financial investment."*

- I ought to follow the judgment a District Judge reached when considering a similar sale, where it was held there was no breach of Reg.14(3) (*Prankard v Shawbrook Bank Limited,* 8 October 2021, unreported).
- Shawbrook has pointed to discussions between the Supplier and Mr B (and his daughter and/or granddaughter) in April 2019 when the Supplier offered to unwind the agreement based on Mr B's circumstances at the time, given that the membership was only six months old and had not been used. If this had happened, Mr B would have been able to use the proceeds to settle his Shawbrook loan.[3] Mr B chose not to accept this offer after taking advice.
- Shawbrook has suggested that PR (or another represetnative) may have gathered leads from customers, cuch as Mr B, by cold-calling and that they may have told prospecive customers they could 'get out' of their memberships by stating it was sold as an investment.
- Mr B's witness statement was unsigned and not provided directly to Shawbrook.
- Mr B's evidence is generic and contains material inconsistencies that mean I ought not to place significant weight on what was said, for example the statement says that an earlier membership was purchased in 2011, when it was actually purchased in 2014. Shawbrook argues that the evidence suggests that Mr B purchased Fractional Club membership due to the quality of the accommodation on offer.
- I erred in not applying the test I had highlighted in the judment of *Carney*, rather I said '*I have not seen enough evidence to persuade me that they would have pressed ahead with their purchase regardless*', which reverses the burden of proof.

My findings

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

Having considered everything again, I still uphold Mr B's complaint for the reasons set out above in the extract of my PD. I will also deal with the matters Shawbrook raised in response. In doing so, I note again that my role as an Ombudsman is not to address every

[3] Shawbrook has said this evidence had been provided before and not commented on in my PD. Having looked at the file, I can see that a secure message was received from Shawbrook, but I had not seen the contents of the message before this response.

single point that has been made in response. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I have read Shawbrook's response in full, I will confine my findings to what I find are the salient points.

In my PD, I noted that, to breach Reg.14(3), the Supplier had to market or sell Fractional Club membership as an investment and I used the following definition of 'investment' when considering whether that provision was breached: *"a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit"*.

Shawbrook says my PD was inconsistent with the notion that there was no prohibition on the sale of fractional timeshares per se, only a prohibition on the way they were sold. But this, in my view, takes too narrow a view of my PD and overlooks that part of my PD that reads:

> *"Mr B's share in the Allocated Property clearly, in my view, constituted an investment as it offered him the prospect of a financial return – whether or not, like all investments, that was more than what he 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 does not 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."*

However, for the avoidance of any doubt, I recognise that it was possible to market and sell Fractional Club membership without breaching the relevant prohibition in Reg.14(3). For instance, depending on the circumstances, there is every chance that simply telling a prospective customer very factually that Fractional Club membership included a share in an allocated property and that they could expect to receive a financial return or some money back on the sale of that property would not breach Reg.14(3).

But with that said, there seem to me to be many ways of marketing and selling a timeshare as an investment, without necessarily referring to (or even including) an allocated property. And if the Supplier said and/or did something in relation to an allocated property and/or Fractional Club membership more generally that at least implied to a prospective member that membership offered them the prospect of a financial gain, that would, in my view, breach Reg.14(3).[4]

With that in mind, therefore, I will first consider the sales and marketing materials more generally, before turning to the evidence Mr B has supplied in this case.

Sales and marketing materials

As I acknowledged in my PD, the Supplier did try, in the sales documentation, to avoid describing Fractional Club membership as an 'investment' and giving any indication of the likely financial return. For example, I highlighted that in the Member's Declaration, it was said:

> *"We understand that the purchase of our Fractional Right is for the primary purpose of holidays and is not specifically for the direct purpose of a trade in and that [the Supplier] makes no representation as to the future price or value of the Fractional Rights which are personal rights and not interests in real estate (all as explained in the Information Statement)."*

[4] See paragraphs 73 and 76 of the judgment in *Shawbrook & BPF v FOS*

As Shawbrook has pointed out, Mr B signed the Member's Declaration confirming that he had read and understood its contents. I do not think however that he signed the document to say he understood that Fractional Club membership was not an investment, as that is not what the Members Declaration said at in the above quoted passage.[5] In my PD I also considered what other disclaimers there were in the paperwork, in particular quoted passages from pages 2, 3 and 8 of the 'Information Statement'[6]

Some of those disclaimers went some way to making the point that the purchase of Fractional Club membership should not be viewed as an investment. But they had to be read along with the other things in the Information Statement, which included the following disclaimer:

> "***Investment advice***
>
> ***The Vendor, any sales or marketing agent and the Manager and their related businesses (a) are not licensed investment advisors authorized by the Financial Conduct Authority or any relevant authority to provide investment or financial advice; (b) all information has been obtained solely from their own experiences as investors and is provided as general information only and as such is not intended for use as a source of investment advice and (c) all purchasers are advised to obtain competent advice from legal, accounting and investment advisors to determine their own specific investment needs; (d) no warranty is given as to any future values or returns in respect of any Suite.****"*
> (page 8)

This disclaimer was, in my view, an attempt to ensure that prospectice members do not take and rely on what they were told by the Supplier as investment advice and a decleartion that no assurance was given as to the future value of the Allocated Property. However the disclaimer does suggest that (1) the "Vendor's" and "Manager's" experience as investors had fed into the information provided during the sales presentations and (2) prospective members might be wise to consult an investment advisor. And, in my view, both of those suggestions, particularly the latter, ran the risk of giving a prospective Fractional Club member the impression that there was investment potential to what was being sold. Which is why I said in my PD that I thought this disclaimer was only necessary if the Supplier was aware that Fractional Club membership ran the risk of being presented as an investment. Further, if during the course of the sale a prospective member was given the impression that Fractional Club membership was an investment, I do not think this disclaimer would have done much to disabuse them of that idea.

However, as I said before, deciding what happened in practice is often not as simple as looking at the contemporaneous paperwork. Especially when such paperwork was produced and signed *after* a potential customer, such as Mr B, had already been through a lengthy sales presentation. So that is why the training materials referred to in my PD are important.

In response to my PD, Shawbrook says that it does not accept that the training material I relied on I was shown to Mr B. However I have not been provided with any slides or other marketing material that the Supplier says would have been shown to him. In light of that, I

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[5] Had the Supplier wished to clarify this, it could have simply said in the paperwork that Fractional Club membership was not, or was not to be treated as, an investment and the reasons for that. But it did not do that.

[6] Under Reg.12 of the Timeshare Regulations, the Supplier was required to give Mr B "key information" in relation to the purchase, ensuring that such information met the requirements of that particular provision. 'Key information' was a defined term in the Timeshare Regulations and means the information required by parts 1, 2 and 3 of a "standard information form".

repeat my finding from my PD that the material in question is (1) reasonably indicative of the training the Supplier's sales staff received around the Time of Sale and (2) how the sale staff were likely to have framed any presentation during the sale.

Shawbrook also says that the relevant training material did not expressly refer to Fractional Club membership as an investment. And I agree with that observation, especially as the slide including the word 'investment' was not likely to have been shown to Mr B due to the type of his earlier membership. But Shawbrook continues to take too narrow a view of the prohibition against marketing and selling timeshares as an investment in Reg.14(3). As I have suggested before, the Supplier did not have to refer to Fractional Club membership expressly as an investment to breach Reg.14(3). Instead, it is important to consider both the explicit and implicit messaging at the Time of Sale to decide what I think was most likely to have happened. Further, I also want to make clear that it was not simply the training materials that led to the finding in my PD that Reg.14(3) was breached by the Supplier at the Time of Sale, but rather it was a combination of all of evidence available, which included the documents from that time, Mr B's evidence as well as the training material to which I have referred.

With respect to the training material, Shawbrook says that the parts I highlighted in my PD were unobjectionable and:

> *"Crucially, these materials at no stage refer to the presence of the Allocated Property as an "investment", despite the conclusion the Ombudsman has made on page 9 that the use of this word on page 106 is evidence that the purpose or benefit of the product was the opportunity to make a financial gain/profit on the initial outlay. To the contrary, the material indicated that there would be a "money back" at the exit in 19 years and in a section of training material relevant for other sales event, there is the word 'investment' but with no detail or qualification. It is unreasonable for the Ombudsman to conclude it was 'likely that the Supplier's sales staff would have been trained to talk about Fractional Club memberships like Mr B's as investments at the Time of Sale', when there is no evidence that either sales people were given the same training, that Mr B saw the presentation that the training material supports nor indeed that the content of page 106 was alluding to the benefit of the product being a financial investment."*

However, as I explained in my PD, I think it is too narrow an approach to take to only find that there was a breach of Reg.14(3) if the likely return from that sale of the Allocated Property was expressly quantified by the Supplier. The training material to which I referred in my PD indicates that the Supplier was likely, in my view, to have implied to a prospective purchaser that they were buying an interest in a physical asset, with an emphasis on there being a financial return based on the ownership of something tangible.

I also think it is important that this training material was used in training sales staff selling the same version of fractional membership that Mr B went on to purchase. And, although Mr B would not have been shown the slide at page 106, I think it is plain that sales staff were instructed to present membership to some prospective customers as combining the best elements of traditional timeshare membership and overseas property ownership, including that it was an 'investment'. The fact that there was no further detail provided, nor a quantification of any investment element, does not detract that the membership was plainly presented as an investment. So I find it is likely that the sales staff that were involved in Mr B's sale would have seen training material that encouraged them to present

memberships similar to that one that Mr B eventually took out as an investment.[7]

When taken together with Mr B's memories of the sale, which are not undermined or contradicted by the contents of the training material, I think that there was at least the implication that Fractional Club membership was an investment – which is enough to find there was a breach of Reg.14(3) by the Supplier.

Mr B's evidence

Shawbrook says that Mr B's evidence is 'generic' and contains material inconsistencies that mean I ought not to place significant weight on it.

Mr B provided a statement when he referred his complaint to the Financial Ombudsman Service in 2020. The statement runs to one page and is, as Shawbrook has noted, unsigned. I also accept that Shawbrook say it was not sent to it alongside the original complaint, but it has been with our service since the complaint was first referred, so I place no weight on that fact. Having seen a number of complaints that have been made by consumers and professional representatives, many do follow a similar pattern – setting out a consumer's purchasing history, details of the sale in question and then explain why they thought something had gone wrong. However, just because Mr B's evidence follows this pattern, on balance, I think it sets out his actual memories and I cannot say it is 'generic'.

When assessing the evidence before me, I think it is helpful to consider the judgment in the case of *Smith v. Secretary of State for Transport* [2020] EWHC 1954 (QB). At paragraph 40 of the judgment, Mrs Justice Thornton helpfully summarised the case law on how a court should approach the assessment of oral evidence. Although in this case I have not heard direct oral evidence, I think this does set out a useful way to look at the evidence Mr B has provided. Paragraph 40 reads as follows:

> *"At the start of the hearing, I raised with Counsel the issue of how the Court should assess his oral evidence in light of his communication difficulties. Overnight, Counsel agreed a helpful note setting out relevant case law, in particular the commercial case of Gestmin SPGS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) (Leggatt J as he then was at paragraphs 16-22) placed in context by the Court of Appeal in Kogan v Martin [2019] EWCA Civ 1645 (per Floyd LJ at paragraphs 88-89). In the context of language difficulties, Counsel pointed me to the observations of Stuart-Smith J in Arroyo v Equion Energia Ltd (formerly BP Exploration Co (Colombia) Ltd) [2016] EWHC 1699 (TCC) (paragraphs 250-251). Counsel were agreed that I should approach Mr Smith's evidence with the following in mind:*
>
> *a. In assessing oral evidence based on recollection of events which occurred many years ago, the Court must be alive to the unreliability of human memory. Research has shown that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base*

[7] Shawbrook has said there is no evidence that sales staff would have received this training, but as I have already explained, Shawbrook has not provided any alternate training nor any explanation why this training would not have been used, when the Supplier has previously provided it to the Financial Ombudsman Service as its training material.

factual findings on inferences drawn from the documentary evidence and known or probable facts (Gestin and Kogan).

b. A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence (Kogan).

c. The task of the Court is always to go on looking for a kernel of truth even if a witness is in some respects unreliable (Arroyo).

d. Exaggeration or even fabrication of parts of a witness' testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony (Arroyo).

e. The mere fact that there are inconsistencies or unreliability in parts of a witness' evidence is normal in the Court's experience, which must be taken into account when assessing the evidence as a whole and whether some parts can be accepted as reliable (Arroyo).

f. Wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, may be neither reliable nor even truthful, the difficulty of discerning where the truth actually lies, what findings he can properly make, is often one of almost excruciating difficulty yet it is a task which judges are paid to perform to the best of their ability (Arroyo, citing Re A (a child) [2011] EWCA Civ 12 at para 20).”

From this, and from my own experience, I find that inconsistencies in evidence are a normal part of someone trying to remember what happened in the past. So, I am not surprised that there are some inconsistencies between what Mr B said happened and what other evidence shows. The question to consider, therefore, is whether there is a core of acceptable evidence from him that the inconsistencies have little to no bearing on, or whether such inconsistencies are fundamental enough to undermine, if not contradict, what they say about what the Supplier said and did to market and sell Fractional Club membership as an investment. Given that, I do not find that just because Mr B said an earlier sale took place in 2011, when in fact it took place in 2014, means I ought to place less weight on Mr B’s recollections of a sale that took place around eighteen months before the evidence was provided.

I have again considered what Mr B said in his evidence. In his statement, he said at the Time of Sale:

> *“In 2018 I was in Tenerife and invited to a meeting with the representatives. This time I was offered the opportunity to purchase fractional points in the Signature collection. Take us to see it and it was out of this world. This again was a long-pressured sale meeting where I was given the opportunity to investing in the Sunningdale Village resort. Again, I would be able to sell the property or hand it to my children to inherit. I was advised that I would make a profit from this sale.”*

Shawbrook has pointed to a note that the Supplier made at the Time of Sale that Mr B “*purchased for usage*” and Mr B was “*[r]eally more than impressed with the Signature unit and looking forward to stay in it.*” Shawbrook says this indicates that he was interested in the quality of accommodation on offer.

I have no doubt that Mr B was impressed by the accommodation he could secure using his Fractional Club membership, after all it was designed specifically to provide access to more luxurious accommodation that 'standard' membership and he himself said it was '*out of this world'.* But Mr B was also clear from the start that he was given the opportunity to 'invest' in the Supplier's property and he was advised he would make a profit from the sale. Further, given the prohibition on selling timeshares as investments, I am not surprised that no mention of this was made in the Supplier's own notes.

I have considered what Shawbrook has said about some professional representatives cold calling prospective clients and that some may go as far as to concoct or suggest evidence on behalf of their clients. But I have not seen anything to make me think this has happened in this case.

It is clear to me that Mr B is saying that the Supplier sold him Fractional Club membership as an investment, and that this fit with his understanding of an earlier purchase that was made as a way of investing in property that would increase in value. On balance, I find there is a consistent and believable recollection that Fractional Club membership was sold as an investment and, when considered alongside the other evidence, I find the Supplier did breach Reg.14(3) at the Time of Sale. Further, Mr B's emphasis of the investment element throughout his evidence makes me think that it was a material and important factor that led him to enter into the Purchase Agreement and the Credit Agreement.

In conclusion, it is my view that the evidence suggests that (1) Fractional Club membership being presented to Mr B as an investment was a material part of their purchasing decision and (2) I am not persuaded that they would have continued with their purchase had it not been presented as an investment.

Other matters

I have read and considered the judgment on *Prankard v Shawbrook Bank Limited*. However, that case was decided by the judge on its own facts and circumstances, and it does not change my own findings that, on balance, Mr B's sale did breach Reg.14(3).

I have also considered the discussions between the Supplier and Mr B (and his daughter and/or granddaughter) in April 2019 when the Supplier offered to unwind the agreement based on Mr B's circumstances at the time. I accept that, had Mr B taken up this offer, he could have used the refund to settle his Shawbrook loan. However, such an offer did not deal with the relationship between Mr B and Shawbrook, the interest he had paid to that point under the Credit Agreement, nor any management charges he paid. Further, if Shawbrook had thought this offer was a fair way to resolve this complaint, it could have repeated it *after* Mr B first raised his complaint. But it did not. So I do not think the fact such an offer was made makes a difference to the outcome of this complaint.

It follows that, I still think that Shawbrook participated in and perpetuated an unfair credit relationship with Mr B under the Credit Agreement and related Purchase Agreement 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 B would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Reg.14(3) of the Timeshare Regulations by the Supplier (as deemed agent for Shawbrook), and the impact of that breach meaning that, in my view, the relationship between Shawbrook and Mr B was unfair under s.140A CCA, I think it would be fair and reasonable to put him back in the position he would have been in

had he not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr B agrees to assign to Shawbrook his Fractional Points or hold them on trust for Shawbrook if that can be achieved.

Mr B was an existing Fractional Club member ("FC Membership 1") and his membership was traded in against the purchase price of Fractional Club membership in question ("FC Membership 2"). Under FC Membership 1, he had 1,816 Fractional Points. And, like FC Membership 2, he had to pay annual management charges as part of FC Membership 1. So, had Mr B not purchased FC Membership 2, he would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr B from the Time of Sale as part of FC Membership 2 should amount only to the difference between those charges and the annual management charges he would have paid as part of FC Membership 1.

I am conscious that, under FC Membership 1, Mr B was entitled to a share in an allocated property. In response to my PD, Mr B said that he did not want reinstatement into that earlier membership, so I make no direction on that issue.

So, here is what I think needs to be done to compensate Mr B with that being the case – whether or not a court would award such compensation:

(1) Shawbrook should refund Mr B's repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.

(2) In addition to (1), Shawbrook should also refund the difference between the annual management charges paid after the Time of Sale under FC Membership 2 and what Mr B's annual management charges would have been under FC Membership 1 had they not purchased FC Membership 2.

(3) Shawbrook can deduct:

   i. The value of any promotional giveaways that Mr B used or took advantage of; and
   ii. The market value of the holidays* Mr B took using FC Membership 2 if his annual management charge for the year in which the holidays were taken was more than the annual management charge he would have paid as an ongoing FC Membership 1 member. However, the deduction should be a proportion equal to the difference between those annual management charges. And if any of Mr B's FC Membership 1 annual management charges would have been higher than his equivalent FC Membership 2 annual management charge, there should not be a deduction for the market value of any holidays taken using Fractional Points in the years in question as he could have taken those holidays as an ongoing FC Membership 1 member in return for the relevant annual management charge.

   (I will refer to the output of steps 1 to 3 as the 'Net Repayments')

(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 Shawbrook settles this complaint.

(5) Shawbrook should remove any adverse information recorded on Mr B's credit file in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr B's Fractional Club membership is still in place at the time of this decision, as

long as he agrees to hold the benefit of his interest in the Allocated Property Shawbrook (or assign it to Shawbrook if that can be achieved), Shawbrook must indemnify him against all ongoing liabilities as a result of his Fractional Club membership.

*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 is not practical or possible to determine the market value of the holidays Mr B took using his 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 his usage.

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

My final decision

I uphold Mr B's complaint against Shawbrook Bank Limited and to direct it work out and pay fair compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 28 January 2025.

Mark Hutchings
Ombudsman