DRN-5246784

The complaint

Mr S and Mrs S complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by being party to an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA').

What happened

Mr S and Mrs S purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 22 July 2012 (the 'Time of Sale'). they entered into an agreement with the Supplier to buy 2,766 fractional points at a cost of £46,100 (the 'Purchase Agreement'). But after trading in their existing timeshare, they ended up paying £14,086 for membership of the Fractional Club.

Mr and Mrs S have held memberships with the Supplier since their first purchase in 2003. In February 2003, Mr and Mrs S purchased 300 Vacation Club points and ceded* their existing timeshare week with another Resort for 560 points (* they gave their week to Vacation Club for other Members to book and in return they received 560 non- billed points); they went on to increase these in December 2003, February 2006, May 2006, July 2008, and July 2010 giving them a balance of 2501 points. In July 2012, Mr S and Mrs S went on to increase their level of holding again by trading in their 2501 Vacation Club towards 2766 fractional points whilst at the same time decreasing the annual management charges by circa £120.

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 Agreement (the 'Allocated Property') after their membership term ends.

Mr S and Mrs S paid for their Fractional Club membership by taking finance of £14,086 from the Lender in both their names (the 'Credit Agreement'). (On the 13 December 2012 they repaid this loan in full.)

Mr S and Mrs S – using a professional representative (the 'PR') – wrote to the Lender on 21 November 2017 (the 'Letter of Complaint') to complain about:

1. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.
2. The decision to lend being irresponsible because (1) the Lender did not carry out the right creditworthiness assessment and (2) the money lent to them under the Credit Agreement was unaffordable for them.

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

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

1. Fractional Club membership was marketed and sold to them as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. they were pressured into purchasing Fractional Club membership by the Supplier.
3. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mr S and Mrs S' concerns as a complaint and issued its final response letter on 1October 2018, rejecting it on every ground.

Mr S and Mrs S 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 S and Mrs S at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of that breach on their purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr S and Mrs S was rendered unfair to them for the purposes of section 140A of the CCA.

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

Having considered everything, I came to a different conclusion to our investigator and I thought Mr S and Mrs S' complaint ought to have been upheld. So I issued a provisional decision, setting out my thoughts and invited both parties to respond with anything further they wished me to consider before I issue a final decision. An extract of that provisional decision reads:

"*The legal and regulatory context*

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:

- *The CCA (including Section 75 and Sections 140A-140C).*
- *The law on misrepresentation.*
- *The Timeshare Regulations.*
- *The UTCCR.*
- *The CPUT Regulations.*
- *Case law on Section 140A of the CCA – including, in particular:*

    - *The Supreme Court's judgment in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 ('Plevin') (which remains the leading case in this area).*

- *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
- *Patel v Patel [2009] EWHC 3264 (QB) ('Patel').*
- *The Supreme Court's judgment in Smith v Royal Bank of Scotland Plc [2023] UKSC 34 ('Smith').*
- *Carney v NM Rothschild & Sons Ltd [2018] EWHC 958 ('Carney').*
- *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm) ('Kerrigan').*
- *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service [2023] EWHC 1069 (Admin) ('Shawbrook & BPF v FOS').*

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time – which, in this complaint, includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code').

My provisional findings

…

I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr S and Mrs S as an investment, which, in the circumstances of this complaint, rendered the credit relationship between them and the Lender unfair to them for the purposes of Section 140A of the CCA.

However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I recognise that there are a number of aspects to Mr S and Mrs S complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that:

- *There wasn't proper checks done to assess affordability*
- *Mr S and Mrs S were pressured into this purchase*

because, even if those aspects of the complaint ought to succeed, the redress I've decided puts Mr S and Mrs S in the same or a better position than they would be if the redress was limited to these issues.

What is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

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

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between the Mr 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 Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as "a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]". And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to "finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr S and Mrs S' membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

Antecedent negotiations under Section 56 cover both the acts and omissions of the Supplier, as Lord Sumption made clear in Plevin, at paragraph 31:

"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.' […] Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."

And this was recognised by Mrs Justice Collins Rice in Shawbrook & BPF v FOS at paragraph 135:

"By virtue of the deemed agency provision of s.56, therefore, acts or omissions 'by or on behalf of' the bank within s.140A(1)(c) may include acts or omissions of the timeshare company in 'antecedent negotiations' with the consumer".

In the case of Scotland & Reast, the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that "negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law" before going on to say the following in paragraph 74:

"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[1]

So, the Supplier is deemed to be Lender's statutory agent for the purpose of the pre-contractual negotiations.

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in Patel (which was recently approved by the Supreme Court in the case of Smith), that determining whether or not the relationship complained of was unfair had to be made "having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination" – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in Plevin (at paragraph 17):

"Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with […] whether the creditor's relationship with the debtor was unfair."

Instead, it was said by the Supreme Court in Plevin that the protection afforded to debtors by Section 140A is the consequence of all of the relevant facts.

I have considered the entirety of the credit relationship between Mr S and Mrs S and the Lender along with all of the circumstances of the complaint and I think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. 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 S and Mrs S and the Lender.

The Supplier's breach of Regulation 14(3) of the Timeshare Regulations

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

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

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

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

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

- *That they were told they could resell the membership and make a profit*
- *And that they would have an "investment in property"*

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

(1) *There were two aspects to their Fractional Club membership: holiday rights and a profit on the sale of the Allocated Property.*

(2) *they were told by the Supplier that they would get their money back or more during the sale of Fractional Club membership.*

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' share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr 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 membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr 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. These include:

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

There was also the following:

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

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

So, I have considered:

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

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

How the Supplier marketed and sold the Fractional Club membership

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

As I understand it, the 2011 Fractional Training Manual was used throughout the sale of the Supplier's first version of a product called the Fractional Property Owners Club – which I've referred to and will continue to refer to as the Fractional Club. It isn't entirely clear whether Mr S and Mrs S would have been shown the slides included in the Manual. But it seems to me to be reasonably indicative of:

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

Having looked through the manual, my attention is drawn to page 6 (of 41) – which includes the slide titled "Why Fractional?" indicates that sales representatives would have taken Mr S and Mrs S through three holidaying options along with their positives and negatives:

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

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

The manual then moved on to two slides (on pages 7 and 8) concerned with how Fractional Club membership worked. I'm aware that the Supplier says that 90-95% of its time during its sales presentations was focused on holidays rather than the sale of an allocated property. Having looked through the 2011 Fractional Training Manual, it seems to me that there were 10 slides on how Fractional Club membership worked before the slides moved onto to sections titled "Peace of Mind", "Resort Management" and "Which Fractional". And as 5 of the 10 slides look like they focused on holidays, there seems to me to have been a fairly even split during the Supplier's sales presentations between marketing membership of the Fractional Club as a way of buying an interest in property and as a way of taking holidays.

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

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

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

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.

The bundle of documents PR supplied this service at the time it referred Mr S and Mrs S' complaint in June 2018 contained a witness statement, which the Lender suggests I approach with a degree of caution given the inconsistencies it contained. For example, the Lender points to Mr S and Mrs S referring to being contacted by the Supplier when they were in 'Tenerife' when in fact they were in mainland Spain; Mr S and Mrs S saying it was a 20-year term when it was in fact 18-year term; and an inconsistency in the written testimony

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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

about who the Lender was in 2012. This is certainly unhelpful but still, I don't think it enough to undermine the complaint in its entirety. Further, I do not think it would be fair or reasonable to discount all of Mr S and Mrs S' evidence simply due to the poor presentation of their complaint by the PR. But I do note that Mr S and Mrs S did say the Supplier presented Fractional Club membership as an investment.

I'm conscious that the Witness Statement was written nearly six years after the Time of Sale and from experience I am aware that memories can fade or change over the passage of time. Further, I am conscious of what was said by Mrs Justice Thornton in the judgment in Smith v. Secretary of State for Transport [2020] EWHC 1954 (QB), where it was held, at para 40:

"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."

So I have considered all of the other available evidence in this complaint to see whether it points to Mr S and Mrs S being sold Fractional Club membership by the Supplier as an investment.

Part of that evidential matrix is what it was that Mr S and Mrs S actually bought. At that Time of Sale, they held 2,501 points in the Supplier's (non-fractional) Vacation Club, which they had acquired over five incremental purchases from the Supplier – the previous purchase in 2010 had taken place in Tenerife, which may explain how they came to misremember the location of the sale in question. The lender points to this and Mr S and Mrs S saying: "we have purchased points on the basis of moving up through a grade system that would allow us to have greater availability to holidays" supporting the motivation behind their purchases being to take better holidays.

On this occasion, Mr S and Mrs S acquired 2,766 fractional points after trading in their 2,501 non-fractional points – a modest increase of 265 points (10.6% increase) for £14,086. The purchasing power in respect of exchanging points for holidays was the same between the two types of points – in other words, this increase wouldn't afford Mr S and Mrs S a higher membership status (in the same way that their previous purchase had entitled them to 'platinum' membership status), and so I think it sets apart this purchase from their previous ones. I also think it points to the purpose of the upgrade being for something other than increased holiday rights, in other words, that it was possible Mr S and Mrs S bought it for the investment potential.

So in the round I'm not persuaded by what the Lender says here about Mr S and Mrs S' testimony. I think what Mr S and Mrs S say about it being sold as an investment with a view to making a profit is likely to be what they were led by the Supplier to believe at the relevant time. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

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

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

As the Supreme Court's judgment in Plevin makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in Carney and Kerrigan (respectively) on causation.

In Carney, HHJ Waksman QC said the following in paragraph 51:

"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"

And in Kerrigan, HHJ Worster said this in paragraphs 213 and 214:

*"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court **may** make an order **if** it determines that the relationship is unfair to the debtor. […]*

[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr S 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 S 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.

For this reason, I've also thought about the terms of the bargain. Mr S and Mrs S acquired a modest 10.6% increase to their points holding, which as I've already explained, wouldn't afford them a higher membership status; a shorter membership term; and the investment element as set out above. So I've considered all of these aspects further. For the £14,086 Mr S and Mrs S ended up paying for membership of the Fractional Club, they gained an extra 265 points rights (in addition to their 2,501 existing (non-fractional) rights which were exchanged on a one for one basis to Fractional Club points rights) and an 1/26 share in the sale proceeds of the allocated property. It strikes me that had Mr S and Mrs S had been seeking to only increase their points rights by an extra 265 points, they could have done so

more economically by extending their existing membership, as they had done four times previously.

Further, I've not seen any evidence that points to Mr S and Mrs S wishing to have a shorter membership term, rather the evidence points to the investment element being a major factor in their purchasing decision. Indeed, the Lender has already pointed to Mr S and Mrs S mistaking the term of their membership as lasting 20-years when in fact it lasted only 18-years, which I think in turn shows Mr S and Mrs S placing little weight on the duration of the membership term.

And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

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

Conclusion

Given the facts and circumstances of this complaint, it is my decision that the Lender participated in and perpetuated an unfair credit relationship with Mr S and Mrs S 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 and Mrs S would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable to put them back in the position they would have been in had they not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr and Mrs S agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs S were existing Vacation Club members and their membership was traded in against the purchase price of Fractional Club membership. Under their Vacation Club membership, they had 2,501 Vacation Club points. And, like Fractional Club membership, they had to pay annual management charges as a Vacation Club member. So, had Mr and Mrs S not purchased Fractional Club membership, they 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 and Mrs S from the Time of Sale as part of their Fractional Club membership should amount only to the difference between those charges and the annual management charges they would have paid as ongoing Vacation Club members.

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

The Lender should refund Mr and Mrs S's repayments to it under the Credit Agreement, including any sums paid to settle the debt owing under the Credit Agreement.

In addition to (1), the Lender should also refund the difference between Mr and Mrs S' Fractional Club annual management charges paid after the Time of Sale and what their Vacation Club annual management charges would have been had they not purchased Fractional Club membership.

The Lender can deduct:

The value of any promotional giveaways that Mr and Mrs S used or took advantage of; and The market value of the holidays Mr and Mrs S took using their Fractional Points if their annual management charge for the year in which the holidays were taken was more than the annual management charge they would have paid as ongoing Vacation Club members. However, the deduction should be a proportion equal to the difference between those annual management charges. And if any of Mr and Mrs S' Vacation Club annual management charges would have been higher than their equivalent Fractional Club annual management charge, there shouldn't be a deduction for the market value of any holidays taken using Fractional Points in the years in question as they could have taken those holidays as ongoing Vacation Club members in return for the relevant annual management charge.*

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

*Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.*

If Mr and Mrs S' Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their 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 isn't practical or possible to determine the market value of the holidays Mr and Mrs S took using their Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.*

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

Responses to my provisional decision

Shawbrook replied and whilst it didn't agree entirely with my findings, it said that it wouldn't challenge the overall decision to uphold Mr S and Mrs S' complaint.

PR responded by saying Mr S and Mrs S accepted my decision and that their "*clients do not wish reinstatement of the timeshare and do not wish to have any future legal or financial obligations towards* (the Supplier) *or any of their subsidiaries*."

What I've decided – and why

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

in the circumstances of this complaint.

I have not been provided with anything further to consider on my decision to uphold Mr S and Mrs S' complaint, so I see no reason to now depart from my provisional findings or to reconsider fair compensation following the responses to my provisional decision.

Putting things right

The Lender must refund Mr and Mrs S' repayments to it under the Credit Agreement, including any sums paid to settle the debt owing under the Credit Agreement.

In addition to (1), the Lender should also refund the difference between Mr and Mrs S' Fractional Club annual management charges paid after the Time of Sale and what their Vacation Club annual management charges would have been had they not purchased Fractional Club membership.

The Lender can deduct:

The value of any promotional giveaways that Mr and Mrs S used or took advantage of; and The market value of the holidays* Mr and Mrs S took using their Fractional Points if their annual management charge for the year in which the holidays were taken was more than the annual management charge they would have paid as ongoing Vacation Club members. However, the deduction should be a proportion equal to the difference between those annual management charges. And if any of Mr and Mrs S' Vacation Club annual management charges would have been higher than their equivalent Fractional Club annual management charge, there shouldn't be a deduction for the market value of any holidays taken using Fractional Points in the years in question as they could have taken those holidays as ongoing Vacation Club members in return for the relevant annual management charge.

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

Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.

If Mr and Mrs S' Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their 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 isn't practical or possible to determine the market value of the holidays Mr and Mrs S took using their Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

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

My final decision

For the reasons set out above, I uphold this complaint and direct Shawbrook Bank Limited to compensate Mr S and Mrs S in line with the 'Fair Compensation' I set out above (and in my provisional decision).

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 5 February 2025.

Rod Glyn-Thomas
Ombudsman