DRN-5272062

The complaint

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

What happened

Mrs S was an existing member of a points-based timeshare arrangement (the 'European Collection') from a timeshare provider (the 'Supplier'), holding 5,000 points that she had bought in the year 2000. As a member, every year she was granted a number of points that she could exchange for holidays at the Supplier's holiday resorts. Different accommodation had different points values, depending on factors such as location, size, and time of year. So, for example, a larger apartment in peak season would cost more to a member in their points than a smaller apartment outside of school holiday periods.

On 15 July 2013 (the 'Time of Sale') Mrs S traded in her 5,000 European Collection points towards a new type of timeshare membership (the 'Fractional Club') from the Supplier. She entered into an agreement with the Supplier to buy 7,000 fractional points (the 'Purchase Agreement') for a purchase price of £11,760. But after the trade-in value attributed to her European Collection points, she ended up paying £6,760 for membership of the Fractional Club.

Like her European Collection membership, Fractional Club membership granted 'points' every year which she could exchange for holidays. But unlike her European Collection membership, Fractional Club membership was also asset backed – which meant it gave Mrs S more than just holiday rights. It also included a share in the net sale proceeds of a property named on her Purchase Agreement (the 'Allocated Property') after her membership term ends.

Mrs S paid for her Fractional Club membership by taking finance of £6,760 from the Lender in her sole name (the 'Credit Agreement').

Mrs S – using a professional representative (the 'PR') – wrote to the Lender on 17 May 2019 (the 'Letter of Complaint') to complain about misrepresentations made by the Supplier at the Time of Sale, giving her a claim against the Lender under Section 75 of the CCA, and complained about 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.

The Letter of Complaint said, in summary:

- The Supplier and the Lender had failed to disclose the amount of commission paid as a result of the Credit Agreement, and who this commission was paid to.
- She was pressured into purchasing Fractional Club membership by the Supplier.
- The Supplier guaranteed that Mrs S would receive £13,000 on the sale of the Allocated Property, when this is untrue.

- The Supplier said the Fractional Club had a guaranteed exit date, when this is untrue.
- Fractional Club membership was marketed and sold to her as an investment in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
- Mrs S found it difficult to book the holidays she wanted, when she wanted.
- The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mrs S's concerns as a complaint and issued its final response letter on 11 June 2019, rejecting it on every ground.

Mrs S then referred the complaint to the Financial Ombudsman Service. As part of her submissions, the PR sent in a statement dated 26 February 2019. This statement set out Mrs S's recollections of the entirety of her relationship with the Supplier and the Lender.

Mrs S's complaint 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 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 her purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mrs S was rendered unfair to her 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.

On 6 December 2024 I issued a Provisional Decision (the 'PD') on this complaint. I set out that I thought the Supplier had sold and/or marketed the Fractional Club to Mrs S as an investment in breach of Regulation 14(3) of the Timeshare Regulations. And I thought the impact of that breach on her purchasing decision was such that it rendered her resultant credit relationship with the Lender unfair to her for the purposes of Section 140A of the CCA. I then went on to say how I thought the Lender should calculate and pay fair compensation to Mrs S.

In my PD I said:

What I've provisionally decided – and why

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

And having done that, I 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 Mrs S as an investment, which, in the circumstances of this complaint, rendered the credit relationship between her and the Lender unfair to her 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 Mrs S's complaint, it isn't necessary to make formal findings on all of them. This includes the allegation that the Supplier misrepresented the Fractional Club to

Mrs S at the Time of Sale, because, even if that aspect of the complaint ought to succeed, the redress I'm currently proposing puts Mrs S in the same or a better position than she would be if the redress was limited to misrepresentation.

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 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 Mrs S'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 Mrs S and the Lender, along with all of the circumstances of the complaint. When coming to my conclusion, and in carrying out my analysis, I have looked at:

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

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

I have then considered the impact of these on the fairness of the credit relationship between Mrs S and the Lender. Having done this, I think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A.

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

The Lender does not dispute, and I am satisfied, that Mrs S'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 Mrs S says that the Supplier did exactly that at the Time of Sale – saying the following in her statement about what she remembers the Supplier telling her:

> *"He advised us that fractional points were better as they allowed us to make an investment in property. He advised us that we would own these fractional points for 13 years, and after this time we were guaranteed that the property would be sold. We were advised that when the property sells, we would be given £13,000 from the proceeds of the sale. He absolutely guaranteed we would get £13,000 back in 13 years. He advised us that we had to purchase 2,000 fractional points before we would be able to convert our existing points to the fractional system."*

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

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

(2) *She was told by the Supplier that she would get her money back and 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.

Mrs S's share in the Allocated Property clearly, in my view, constituted an investment as it offered her the prospect of a financial return – whether or not, like all investments, that was more than what she 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 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 her as an investment, i.e. told her or led her to believe that Fractional Club membership offered her 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 Mrs S, the financial value of her 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 Mrs S as an investment.

For example, the second page of the Purchase Agreement was titled "Terms and Conditions", the first of which read:

> *"You should not purchase Your […] Fractional Points as an investment in real estate. The Purchase Price paid by You relates primarily to the provision of memorable holidays for the duration of Your ownership. You are at liberty to dispose of Your […] Fractional Points at any time prior to the Sale Date in accordance with Rule 7 of the Rules of the Owners Club."*

Further, there was a document titled "Key Information", an extract of which read:

> *"Exact nature and content of the right(s):*
>
> *Between six to nine months before the Proposed Sale Date, [the Trustee] will appoint two independent valuers to value the Property and will then take steps to sell the Property at the best achievable market price. You must bear in mind that your […] Fractional Points (and the purchase price paid by you for those points) relates primarily to the acquisition by you of many years of wonderful holidays. We are sure that you will get a great deal of pleasure from your holidays. Your decision to purchase […] Fractional Points should not be viewed by you as a financial investment."*

Finally, there was another document titled "Customer Compliance Statement/Declaration to Treating Customers Fairly", which included the following:

> *"5. We understand that the purchase of our […] Fractional Points is an investment in our future holidays, and that it should not be regarded as a property or financial investment. We recognize that the sale price achieved on the sale of the Property in the Owners Club (and to which our […] Fractional Points have been attributed) will depend on market conditions at that time, that property prices can go down as well as up and that there is no guarantee as to the eventual sale price of the Property.*
>
> *6. We understand that the Property referenced on our Purchase Agreement will be sold as soon as possible on or after the Proposed Sale Date. However, we realise that it may not be possible to source a buyer immediately, and that in the event that the sale is affected on or after the Proposed Sale Date, we will be required to pay our Dues each*

year until the Property is sold."

Mrs S ticked each and signed to say she understood both of these points.

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 Mrs S'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" and (2) that membership of the Fractional Club could make her a financial gain.

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 Mrs S or led her to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered her 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

There is little information available in relation to this Supplier in terms of training or sales materials which might give an indication as to how they sold or marketed this particular membership to Mrs S. So, I have considered Regulation 14(3) of the Timeshare Regulations, how that provision is to be interpreted and whether, based on the evidence available, I think Mrs S's sale breached that provision.

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)).' 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 100 of Shawbrook & BPF v FOS, 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 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." (emphasis my own)*

So, I'm not persuaded that the prohibition in Regulation 14(3) was confined to, for example, using the word 'investment' when promoting or selling a timeshare contract. I think that the prohibition may capture the promotion of investment features incorporated into a timeshare to persuade consumers to purchase, including leading a consumer to expect a financial gain from the timeshare. After all, Mrs Justice Collins Rice said in Shawbrook & BPF v FOS, at 76 (when discussing an ombudsman's approach to Regulation 14(3)):

"[…] He was entitled in other words to be highly sensitive to the ***overt and covert*** *messaging – that is, the fine calibration of the encouragement given – by the seller in a case like this. There was nothing wrong with an approach which had the absolute prohibition in Reg.14(3) within the ombudsman's field of vision from the outset as he looked at the evidence for the true nature of the transaction that was done here. Indeed, he was required as a matter of law to do so." (emphasis my own)*

Mrs S, in her testimony, says the Supplier explicitly told her that she would receive a guaranteed £13,000 from the sale of the Allocated Property. So, I've also thought about how Fractional Club Membership would likely have been presented to Mrs S. Without specific details about the sale or how the Supplier normally sold its products, I've considered the inherent probability of the allegation when assessing whether I find that thing did or did not happen.

And I am satisfied I am able to do that. After all, in Onassis v. Vergottis [1968] 10 WLUK 101, Lord Pearce referred to the need to look at "probabilities", as well as contemporaneous documents and admitted or incontrovertible facts, when weighing the credibility of a witness's evidence (at p.431). In Armagas Ltd v. Mundogas SA (The Ocean Frost) [1986] 2 W.L.R. 1063, Goff LJ also referred to looking at "the overall probabilities" when ascertaining the truth (at p.57). And in Gestmin SGPS S.A. v. Credit Suisse (UK) Limited [2013] EWHC 3560, Leggatt J suggested (at para.22) that factual findings should be based on "inferences drawn from the documentary evidence and known or ***probable*** *facts" (my emphasis). Here, I think it is inherently more probable that a timeshare product with an investment element is sold in a way promoting that element, and therefore risking a breach of Regulation14(3), compared with the sale of a product without the possibility of a monetary return.[2]*

Here Mrs S has said that she was told by the Supplier that it was guaranteed that she would receive £13,000 from the proceeds of the sale of the Allocated Property. And given that the

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[2] This is different to saying that it is more likely than not that a product with an investment element is sold as an investment, simply due to that investment element. For the avoidance of doubt, I make no such finding.

purchase price of the Fractional Club (disregarding the trade in value she was given) was £11,760, this would seem to imply a profit on the deal.

The Lender has said that the Supplier included specific disclaimers to show that it didn't present Fractional Club Ownership as an investment – and I have set these out above. But it's ultimately difficult to explain why it was necessary to include such disclaimers if there wasn't a very real risk of the Supplier marketing and selling membership of the Fractional Club as an investment. That risk seems an obvious one, given the difficulty of articulating the benefit of fractional ownership otherwise than as an investment, in a way that distinguishes it from other timeshares from the viewpoint of prospective members. And Mrs S had already held a non-fractional timeshare membership for several years, so, I think it's reasonable to assume there was likely some discussion at the Time of Sale as to why she should purchase this new type of membership in particular. In other words, some discussion of why Mrs S ought to purchase the Fractional Club in the way that she did.

So, in my view, there had to be some other benefit which motivated her purchase which was specific to fractional membership. I'll go into more details about this below.

The Lender may say in response to this PD, that the Supplier would not have highlighted the possible returns available to Mrs S when selling Fractional Membership to her, but Mrs S has been clear from the outset of her complaint that she was led to believe she would get back more than her initial outlay (i.e., a profit) at the end of the agreement.

Mrs S, in both her statement and in her Letter of Complaint, has been specific in what she says about how the Fractional Club was sold to her. She has said that it was positioned as an investment in property from which she would get a guaranteed sum in return. So, given both her circumstances at the Time of Sale, and what she has said in her statement, I am persuaded it is more likely than not that the Supplier's salesperson positioned Fractional Club membership as an investment that may lead to a financial gain (i.e., a profit) in the future, whether explicitly or implicitly. So, I am currently satisfied that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale.

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 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 Mrs S and the Lender that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3)[3] led her to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On my reading of Mrs S's testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when she decided to go ahead with her purchase. That doesn't mean she was not interested in holidays. Her own testimony and timeshare usage demonstrates that she quite clearly was, which is not surprising given the nature of the product at the centre of this complaint.

It may be that the Lender points to the extra holiday entitlement Mrs S got when she moved to Fractional Club, as she purchased 2,000 additional fractional points which meant she would be able to access more luxurious accommodation. But I can't see that as being a motivation for Mrs S to purchase Fractional Club membership specifically. I accept, as I've said before, Mrs S had some concerns regarding the availability afforded to her with her holding of European Collection points. But the Supplier has said that the same accommodation stock was available to members of both the European Collection and the Fractional Club, so if it was additional holiday rights that Mrs S was looking for, she could have simply purchased 2,000 additional European Collection points to achieve the same upgrade.

The Lender may also say in response to this PD, that the prospect of a shorter membership term was an important motivating factor here for Mrs S, and this was why she decided to move from the European Collection membership to Fractional Club. I agree that this appears to have been attractive to Mrs S, but I don't think this was her reason to switch. I'll explain. At the Time of Sale Mrs S was 61 years old. Under the terms of the Supplier's exceptional circumstances policy[4] Mrs S would have been able to relinquish her European Collection membership when she turned 75, which was in 14 years' time. And importantly, she would have been able to do so without having to pay anything. So given the Fractional Club also had a membership term of 14 years, I do not think this would have been a significant motivation for her, especially as she had to pay an extra £6,760 for very little, if any, reduction in the length of the term.

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[3] (which, having taken place during its antecedent negotiations with 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)

[4] Set out in the EC Relinquishment Fact Sheet.

But as Mrs S says (plausibly in my view) that Fractional Club membership was marketed and sold to her at the Time of Sale as something that offered her more than just holiday rights, on the balance of probabilities, I think her purchase was motivated by her share in the Allocated Property and the possibility of a profit, as that share was one of the defining features of membership that marked it apart from her existing European Collection membership. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision she ultimately made.

Mrs S has not said or suggested, for example, that she would have pressed ahead with the purchase in question had the Supplier not led her to believe that Fractional Club membership was an appealing investment opportunity. And as she faced the prospect of borrowing and repaying a substantial sum of money while subjecting herself to long-term financial commitments, had she not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I haven't seen enough to persuade me that she would have pressed ahead with the purchase and taken the associated Credit Agreement regardless. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision she ultimately made. This is the basis upon which I have decided that the credit relationship between Mrs S and the Lender was unfair to her.

As I've said, given that it was, on the balance of probability, likely that the sale of Fractional Club was pitched as an investment in breach of Regulation 14(3), and I think it likely that the potential for a profit from the sale of the Allocated Property was an important driver for Mrs S in her purchase of the Fractional Club membership, it follows that the associated credit relationship under the Credit Agreement with the Lender was rendered unfair to Mrs S.

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with 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.

I then set out what I considered to be a fair and reasonable way for the Lender to calculate and pay compensation to Mrs S.

The responses to my PD

Mrs S accepted my provisional findings and confirmed that she did not wish for her original European Collection membership to be reinstated. The Lender also responded, disagreeing with my provisional findings. It provided witness statements from both previous and (at the time) existing employees of the Supplier setting out how its sales staff were trained to sell all its products, and how Fractional Membership in particular was sold to both new and existing members. In addition to these statements it said, in summary:

- The PD was premised on a material error of law in its approach to the prohibition under Regulation 14(3) of the Timeshare Regulations. And it erred in its application of that prohibition to the underlying documentation in support of the Fractional Club sale.
- The error(s) above undermined the approach to Mrs S's witness testimony; and
- The PD was premised on a material error of law in its approach to the legal test to determine the existence of an unfair relationship.

The Lender then went on to set out how it thought the PD erred in its approaches above. While I don't intend to repeat its submissions here in detail, I will summarise them:

- There is nothing inherent in the Fractional Club which contravenes Regulation 14(3).
- The wording of the PD is inconsistent with the definition of an "*investment"* as set out in *Shawbrook & BPF v FOS*.
- The customer being told that some money would be 'returned' upon sale of the Allocated Property does not breach Regulation 14(3).
- It was an error to conclude that it is appropriate to make inferences about the conduct of the sale based on generic assumptions about the Fractional Points, rather than engaging meaningfully with the evidence in this specific case.
- Membership of the Fractional Club was not described to Mrs S as an investment, and the documentation provided to Mrs S made clear that the membership did not constitute an investment in real estate.
- It is not a reasonable approach to give little weight to the relevant disclaimers.
- The contemporaneous materials referenced in the PD do not reference the word *"investment".*
- The Supplier only gave the consumers information about the sale of the Allocated Property, merely describing its features, and doing so has been found by the court[5] to be not inherently objectionable. Indeed a failure to clarify there would be a financial interest in the Allocated Property would likely infringe other parts of the Timeshare Regulations.
- Selling an investment requires the prospect of a financial gain/profit, and the corresponding motive on the part of the consumer. Referring to the prospect of a residual return does not satisfy this test.

The Lender continued by making submissions regarding the Fractional Club documentation and the Supplier's sales processes:

- It and the Supplier have both previously submitted detailed submissions on the sales and training materials used by the Supplier, and these should be considered by the Ombudsman.
- The documentation relating to the sale is unobjectionable and shows no breach of Regulation 14(3).
- The disclaimers emphasised that the product should not be seen as an investment, and Mrs S confirmed she understood this at the Time of Sale. There was at no stage during the sale any representation as to the future price or value of the fractional share.
- The question the Ombudsman should have considered is whether there is sufficiently clear, compelling evidence that the timeshare product was marketed and sold as an investment (i.e., for intended financial profit or gain as against the initial outlay). The reasonable answer, is that the sales documentation provides no reason to consider there was any such marketing or sale.

The Lender then assessed the witness statement from Mrs S. It said, in summary:

- The veracity of Mrs S's witness statement was not adequately considered in the PD,

[5] *Shawbrook & BPF v FOS*

meaning it was given undue weight and in places misinterpreted.

- The statement is unsigned, and made by a third party. This calls into question its origin, and it may have been prepared for Mrs S. It also calls into question its relevance to this sale.
- The statement was only sent to it in January 2024. If it accepts it was dated February 2019 this is over four years after the Time of Sale and recalls events going back 19 years. This, combined with the doubts over who prepared the statement, reinforces why caution should be taken when assessing the accuracy of the allegations.
- The witness statement presents disappointment with the availability of holidays as a strong theme throughout, whereas the testimony regarding the investment allegation is limited to a description about what was said, and not how this was connected to the decision to purchase. The motivation was the length of contract, availability and exclusivity.
- When having regard to the sales materials and practices at the Time of Sale, it knows that guaranteeing the amount a customer would get back upon the sale of the Allocated Property was not a feature of the sale. It is very unlikely that Mrs S was guaranteed a return of £13,000, and this bears no resemblance to either the purchase price nor the actual property. It is also an illogical leap to conclude that a 'guaranteed' £13,000 being more than the purchase price implies a 'profit on the deal'. To conclude any return that is more than the original purchase price is a 'profit' fails to appreciate that the timeshare purchase facilitated the provision of holidays, and the return was merely one element.
- The information collected at the Time of Sale shows Mrs S's motivation to purchase was the reduced membership term.
- To state that the shorter membership term was a motivating factor, but not her reason to switch based on Mrs S's knowledge of the exceptional circumstances policy is an irrational conclusion.
- The conclusions reached in the PD are based solely on the erroneous interpretation of: (i) the witness statement; (ii) the definition of 'investment'; (iii) the disclaimer language in the documentation; and (iv) the Fractional Club training and sales documentation.
- Any interpretation that the Fractional Club was sold and marketed as an investment based on Mrs S's generic allegations contained within her statement is unsafe.

And finally, it made submissions regarding the legal test applied in the PD when assessing if the relationship is unfair:

- The test to be applied, as stated in *Carney v NM Rothschild and Sons Ltd,* was whether there was a "material impact on the debtor when deciding whether or not to enter the agreement".
- The Ombudsman has erred here and applied a different test – reversing the burden of proof. It is necessary to assess whether there is sufficient evidence of a material impact on the decision to enter the agreement, not to start from the position, as the Ombudsman has done, that the prospect of a financial gain existed, but that this was not insignificant enough for it not to render the relationship unfair.
- Mrs S's circumstances (i.e. her motivation to purchase Fractional Club membership due to its shortened term) demonstrates the future sale of the timeshare did not have a material impact on her decision to purchase, therefore the credit relationship was fair.

It concluded that there is no clear, compelling evidence that the Fractional Club was sold to Mrs S either as an investment or with the intention of financial gain, or alternatively, not in a manner that was of importance, as against their purpose of meeting her future holiday needs.

As the deadline for responses to my PD has now passed, the complaint has come back to me to reconsider. Before I come to my findings, I'll set out what I still consider to be the relevant legal and regulatory context.

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 Unfair Terms in Consumer Credit Regulations 1999.
- The Consumer Protection from Unfair Trading Regulations 2008.
- Case law on Section 140A of the CCA – including, in particular:
    - The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') (which remains the leading case in this area).
    - *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
    - *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*').
    - The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*').
    - *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
    - *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
    - *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').

Good industry practice – the RDO Code

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

What I've decided – and why

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

in the circumstances of this complaint.

And having done that, and having read and considered all of the statements, training material and sales documentation, along with the reasons the Lender gave for why it disagreed with my PD, I remain satisfied that this complaint should be upheld for the reasons set out above in the extract of my PD. I think it is more likely than not that the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mrs S as an investment. And, in the circumstances of this complaint, this breach rendered the credit relationship between her and the Lender unfair to her for the purposes of Section 140A of the CCA.

I will also deal with the matters raised by the Lender in response. In doing so, I note again that my role as an Ombudsman is not to address every single point that has been made in response. Instead it is to decide what is fair and reasonable, on the balance of probabilities, in the circumstances of this complaint. So, while I have read the Lender's response in full, I will confine my findings to what I believe are the salient points.

The Lender said my PD was inconsistent with the idea 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 the part which reads:

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

However, for the avoidance of doubt, I recognise that it was possible to market and sell the Fractional Membership without breaching the relevant prohibition in Regulation 14(3). For instance, depending on the circumstances and when considering what an *investment* is, 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 Regulation 14(3).

With this in mind, I have reconsidered the sales and marketing materials more generally, alongside the statements submitted by the Lender.

I recognise the amount of witness evidence that's been provided in support of the disclaimers in the paperwork I've referred to above. Indeed, I acknowledge what the witness statements say about the Supplier' sales representatives being trained to not refer to Fractional Membership as an 'investment', to not make any reference to the value of the Allocated Property and making every effort to not give customers, such as Mrs S, the impression that she was investing in something that would make her a profit.

However, as I said above, I think the argument by the Lender on this issue runs the risk of taking too narrow a view of the prohibition against marketing and selling timeshares as an investment. As I said in my PD, and I maintain now, 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)).''* 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, in my view, 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. And I acknowledge again that the Supplier, within the sales documentation, made efforts to avoid specifically describing Fractional Club membership as an 'investment' or quantifying to prospective purchasers, such as Mrs S, the financial value of her share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them.

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 Mrs S, had already been through a lengthy sales presentation. So it is important to balance it with what I think it is likely that Mrs S was told about Fractional Club membership.

When coming to my conclusion I have paid close regard to the witness statements the Lender has submitted in response to my PD. These set out that the Supplier's sales representatives were all trained specifically to *avoid* breaching the Timeshare Regulations when selling Fractional Membership. They also all had to sign declarations that they had been trained and would abide by that training. But I need to consider what I think was most likely to have happened during the sale of Fractional Membership to Mrs S specifically, and while I find the statements useful in understanding how the Supplier trained its sales staff, they don't assist me greatly when thinking about what happened on this particular occasion.

Mrs S has set out her recollections of the Time of Sale in her statement. The Lender has said I have not adequately considered the veracity of this statement, bearing in mind that it appears to have been prepared by a third-party, and was made some four years after the event in question. But having considered it, and whilst being mindful that memories fade over time, I remain satisfied that I am able to place weight on, and rely on, the contents of the statement, whilst remaining cognisant of any possible material errors. I do not agree with the Lender when it says that as the statement appears to have been prepared by a third party, its contents should either be disregarded or treated with more caution than a statement would normally be. I say that, because it is not unusual for statements to be taken down by others, and Mrs S has been consistent with her recollections throughout. I remain persuaded by her testimony:

> *"He advised us that fractional points were better as they allowed us to make an investment in property. He advised us that we would own these fractional points for 13 years, and after this time we were guaranteed that the property would be sold. We were advised that when the property sells, we would be given £13,000 from the proceeds of the sale. He absolutely guaranteed we would get £13,000 back in 13 years. He advised us that we had to purchase 2,000 fractional points before we would be able to convert our existing points to the fractional system."*

I also do not agree with the Lenders position when it says that it is an illogical leap to conclude that a 'guaranteed' £13,000 being more than the purchase price implies a 'profit on the deal'. I cannot see how Mrs S getting a return of more than she put into a purchase could be seen as anything other than a profit, especially when you consider the membership also provided holidays.

The Lender has also pointed to Mrs S's dissatisfaction with holiday availability from her European Collection points holding, and I agree that it seems likely that this was the case. But I don't agree that this was her only motivation to switch to Fractional Membership. Afterall, as I said in my PD, the accommodation stock for European Collection and Fractional Membership was the same, so if Mrs S had simply wanted to improve the availability of accommodation, she could have increased her European Collection points holding to achieve the same result.

And Mrs S also highlighted the shorter membership term associated with the Fractional Membership, and how this was an attractive feature when compared with her existing European Collection. So I agree there appear to have been other reasons why she chose to take out the Fractional Membership, other than the investment element.

Whilst I accept it is *possible* that Mrs S would have purchased the Fractional Membership even if the Supplier hadn't led her to believe that there was the prospect of a financial gain from the membership, I don't think that's *probable* based on what I've seen. And as Mrs S says (plausibly in my view) that Fractional Membership was marketed and sold to her at the Time of Sale as something that offered her more than just holiday rights, on the balance of probabilities, I think her purchase was motivated by her share in the Allocated Property and the possibility of a profit, as that share was one of the defining features of membership that marked it apart from her existing European Collection membership.

Mrs S has been consistent during the course of this complaint that the potential investment return, and what she described as a guaranteed £13,000 was a central part of her reason to purchase. And with that being the case, I think the evidence suggests that:

1. Fractional Membership being presented to Mrs S as an investment was a material part of her purchasing decision; and
2. I am not persuaded that Mrs S would have continued with her purchase had it not been presented as an investment.

Conclusion

I still think that the Lender participated in and perpetuated an unfair credit relationship with Mrs S under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA. And with that being the case, taking everything into account, I am satisfied it is fair and reasonable that I uphold this complaint.

Putting things right

Having found that Mrs S would not have agreed to purchase Fractional 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 Mrs S was unfair under Section 140A of the CCA, I think it would be fair and reasonable to put Mrs S back in the position she would have been in had she not purchased the Fractional Membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement. This is on the proviso that Mrs S agrees to assign to the Lender her Fractional Points or hold them on trust for the Lender if that can be achieved.

Mrs S was an existing European Collection member, and her membership was traded in against the purchase price of Fractional Membership. Under her European Collection membership, she had 5,000 European Collection points. And, like the Fractional Membership, she had to pay annual management charges as a European Collection member. So, had Mrs S not purchased Fractional Membership, she would have always been responsible for paying an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mrs S from the Time of Sale as part of her Fractional Membership should amount only to the difference between those charges and the annual management charges she would have paid as an ongoing European Collection member.

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

(1) The Lender should refund Mrs S'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), the Lender should also refund the difference between Mrs S's Fractional Membership annual management charges paid after the Time of Sale and what her European Collection annual management charges would have been had she not purchased the Fractional Membership.

(3) The Lender can deduct:

   i. The value of any promotional giveaways that Mrs S used or took advantage of; and

   ii. The market value of the holidays* Mrs S took using her Fractional Points if her annual management charge for the year in which the holidays were taken was more than the annual management charge she would have paid as an ongoing European Collection member. However, the deduction should be a proportion equal to the difference between those annual management charges. And if any of Mrs S's European Collection annual management charges would have been higher than her equivalent Fractional Membership 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 she could have taken those holidays as an ongoing European Collection member in return for the relevant annual management charge.

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

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

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

(6) If Mrs S's Fractional Membership is still in place at the time of this decision, as long as she agrees to hold the benefit of her interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify her against all ongoing liabilities as a result of her 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 Mrs S took using her 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 her usage.

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

My final decision

I uphold this complaint, and direct Shawbrook Bank Limited to calculate and pay fair compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S to accept or reject my decision before 17 February 2025.

Chris Riggs
Ombudsman