DRN-5434767

The complaint

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

The purchase and the associated credit agreement being complained about were made in the names of Mr and Mrs W. However, since the complaint has come to this Service Mrs W has sadly died. I shall, however, refer to both Mr W and the late Mrs W where appropriate.

What happened

Mr W and the late Mrs W were longstanding members of a timeshare arrangement from a timeshare provider (the 'Supplier'), having bought their first membership, a type called the Vacation Club, in 1984.

In July 2012 Mr W and the late Mrs W traded in their Vacation Club membership for a new type – the Fractional Property Owners Club. This worked in a similar way to the Vacation Club, in that they bought a certain number of points (2,988 in this case) that they could exchange for holidays each year from the Supplier's portfolio of accommodation. But the fractional membership was also asset backed, which meant it gave Mr W and the late Mrs W more than just holiday rights. It also included a share in the net sale proceeds of a property named on their purchase agreement after their membership term ended.

On 29 December 2014 (the 'Time of Sale' being considered here) Mr W and the late Mrs W traded in their existing 2,988 fractional points towards a new fractional membership (the 'Fractional Club'). They entered into an agreement with the Supplier to buy 3,190 fractional points at a cost of £44,941 (the 'Purchase Agreement'). But after the trade-in allowance given by the Supplier for their existing points, Mr W and the late Mrs W ended up paying £6,097 for their new membership of the Fractional Club.

Like their previous fractional membership, their new Fractional Club membership was asset backed. In addition to 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 W and the late Mrs W paid for their Fractional Club membership by taking finance of £6,097 from the Lender in their joint names (the 'Credit Agreement'). It is this sale and its associated Credit Agreement that is the subject of this complaint.

Mr W and the late Mrs W's Fractional Club membership was subsequently traded in for a new membership on 28 December 2015, and the outstanding balance of the Credit Agreement was cleared by finance taken for the new purchase.

Mr W was in ongoing communication with both the Supplier and the Lender regarding problems he and the late Mrs W were experiencing with their subsequent December 2015

purchase, and a complaint was made regarding that sale and credit agreement[1].

On 25 February 2021 Mr W and the late Mrs W – using a professional representative (the 'PR') – wrote to the Lender about the Fractional Club purchase at the Time of Sale (the 'Letter of Complaint') to complain about:

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

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

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

- Told them that they were buying an interest in a specific piece of "property" when that was not true.
- Told them that Fractional Club membership was an "investment" in that it was valuable, and any future sale would make them money, when that was not true.

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

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

Mr W and the late Mrs W said that they found it difficult to book the holidays they wanted, when they wanted. As a result, Mr W and the late Mrs W said that they had a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, they had a like claim against the Lender, who, with the Supplier, is jointly and severally liable to them.

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

The Letter of Complaint set out several reasons why Mr W and the late Mrs W said 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:

- The Supplier had made the above misrepresentations, upon which they relied when deciding to make the purchase.
- The contractual terms setting out (i) that the Fractional Club membership could be taken back by the Supplier upon non-payment of the annual fee; and/or (ii) that the Supplier retained control of their 'points' were unfair contract terms[2].
- The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of

[1] A complaint regarding this has been considered separately by this Service.
[2] Although the applicable legislation was not set out by the PR, this complaint of unfair terms can only relate to the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').

those Regulations.

- The Supplier failed to provide sufficient written information in relation to the Fractional Club to enable them to make an informed choice to purchase.
- The Credit Agreement was arranged by a credit broker which was not regulated by the Financial Conduct Authority (the 'FCA') to carry out such an activity.

The Lender dealt with Mr W and the late Mrs W's concerns as a complaint and issued its final response letter on 13 April 2021, rejecting it on every ground.

Mr W referred this complaint to this Service and was no longer represented by the PR. Whilst the complaint was awaiting assessment by an Investigator, Mrs W sadly died.

An Investigator considered Mr W and the late Mrs W's complaint and thought some of it had been made too late under the regulator's rules, and the remaining aspects ought not to be upheld. In summary, he said:

- Mr W and the late Mrs W's complaint of an unfair credit relationship under Section 140A of the CCA had been made too late, so could not be considered by this Service.
- Mr W and the late Mrs W's complaint that the Lender had not been fair and reasonable when it rejected their Section 75 of the CCA claim ought not to be upheld.

Mr W did not agree, but after initially saying he wanted the complaint to be closed, he then asked for it to be reviewed by an Ombudsman, which is why it has been passed to me.

Having considered everything on file, I thought that Mr W and the late Mrs W had made their complaints in time. I proceeded to issue a provisional jurisdiction decision setting out why I thought this Service was able to consider the merits of Mr W and the late Mrs W's complaint, and this was accepted by all parties.

I then considered the merits of Mr W's complaint against the Lender, and I didn't think it ought to be upheld. I set out my initial thoughts in a provisional decision (the 'PD') and invited all parties to respond with any new evidence or arguments that they wished me to consider.

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 Contracts Regulations 1999 (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').

In my PD I said:

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 do not currently think this complaint should be upheld. I know this will likely be disappointing for Mr W, and I'm sorry about that.

But before I explain why I have reached the provisional outcome that I have, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

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

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

The CCA introduced a regime of connected lender liability under section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.

In short, a claim against the Lender under Section 75 essentially mirrors the claim Mr W and the late Mrs W could make against the Supplier.

As a general rule, creditors, such as the Lender, can reasonably reject a claim, such as Mr W and the late Mrs W's, for misrepresentations by the supplier of goods or services (like the Supplier) if it is first informed about it after the claim is likely to be time-barred under the

Limitation Act 1980 (the 'LA'). This is because it wouldn't be fair to expect creditors to look into such claims so long after the liability arose, and after a limitation defence would be available in court. So, it is relevant to consider whether Mr W and the late Mrs W's claim for misrepresentations by the Supplier was time-barred under the LA before they put it to the Lender.

The limitation period to make such a claim against the Lender for alleged misrepresentations by the Supplier expires six years from the date on which Mr W and the late Mrs W had everything they needed to make such a claim.

As the letter of complaint to the Lender makes clear, Mr W and the late Mrs W entered into the purchase of the Fractional Club membership on 29 December 2014 based on the alleged misrepresentations of the Supplier, which Mr W says he and the late Mrs W relied on. And as the loan from the Lender was used to help finance the purchase, it was when Mr W and the late Mrs W entered into the Credit Agreement that they suffered a loss – which means it was at that time that they had everything they needed to make a claim.

Mr W and the late Mrs W first notified the Lender of the claim for alleged misrepresentations by the Supplier on 25 February 2021. As that was more than 6 years after they entered into the Credit Agreement and related Purchase Agreement, I don't think it would have been unfair or unreasonable of the Lender to reject Mr W and the late Mrs W's concerns about the Supplier's alleged misrepresentations.

But in addition to the Lender most likely having a defence under the LA to a Section 75 claim for misrepresentation in this case, certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase. The purchase price must be more than £100 but no more than £30,000. So, if the purchase price of the product is in excess of £30,000 (irrespective of any trade-in allowance), a claim under Section 75 cannot succeed.

The claim under Section 75 for the Supplier's misrepresentations at the Time of Sale relates to the purchase of the Fractional Club membership. And as has been said, the purchase price for this membership was £44,941. As this purchase price was in excess of £30,000 a claim under Section 75 of the CCA cannot succeed.

So, it seems that the Lender would have had a limitation defence to a Section 75 claim for misrepresentation. But in addition to this, it appears that the purchase price of the Fractional Club was in excess of £30,000 rendering the claim for misrepresentation under Section 75 invalid in any event.

For these reasons I do not think the Lender is liable to pay Mr W any compensation for misrepresentation(s). As such I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

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

I've already summarised how Section 75 of the CCA works and why it gives consumers, in certain circumstances, a right of recourse against the Lender. So, it isn't necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, the Lender is also liable.

But as I've said, Section 75 of the CCA only allows for a claim should the price of the purchase be less than £30,000. But Section 75A of the CCA allows for a claim if the purchase price of the goods is in excess of this amount, but only in relation to a breach of contract by the Supplier. Mr W and the late Mrs W say that the Supplier breached the

purchase agreement because they found it difficult to book the holidays they wanted, when they wanted, which suggests that they consider that the Supplier was not living up to its end of the bargain.

So, I'm satisfied the claim includes an element which is an alleged breach of contract, so this could potentially be considered under Section 75A. There are other criteria in order for Section 75A to apply, but I don't consider that I need to make a finding on that because, as I go on to explain below, under Section 75A, I do not think that the Lender was unfair or unreasonable when it rejected Mr W and the late Mrs W's claim.

Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork signed by Mr W and the late Mrs W states that the availability of holidays was/is subject to demand. But I've not seen any evidence of when, or even if, Mr W and the late Mrs W tried to book a holiday using this membership and were unable to do so. After all, the membership was only in place for about one year before it was traded in. So, I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

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

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

I have already explained why I am not persuaded that the contract entered into by Mr W and the late Mrs W was misrepresented (or breached) by the Supplier in a way that makes for a successful claim under Section 75 or 75A of the CCA and outcome in this complaint. But Mr W and the late Mrs W also said that the credit relationship between them and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that they have concerns about. It is those concerns that I explore here.

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between Mr W and the late Mrs W and the Lender was unfair.

Under Section 140A of the CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

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

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

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr W and the late Mrs W's membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140A(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."[3]

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

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.

The Credit Agreement being considered here came about at the Time of Sale, and ended when the loan was consolidated into a new finance agreement on 28 December 2015. So, the credit relationship that is allegedly unfair existed over the same time period. I have considered the entirety of this credit relationship between Mr W and the late Mrs W and the Lender, along with all of the circumstances of the complaint, and I do not think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

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

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

It seems that the main reason why Mr W and the late Mrs W said their credit relationship with the Lender was unfair to them, was the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way. So that is what I have considered next.

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

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

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

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

But the PR said that the Supplier did exactly that at the Time of Sale.

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 W and the late Mrs W'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 W and the late Mrs W 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 W and the late Mrs W, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to them as an investment.

With that said, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's possible that Fractional Club membership was marketed and sold to them as an investment in breach of Regulation 14(3) given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Club membership without breaching the relevant prohibition.

Whilst the allegation that Fractional Club was sold to Mr W and the late Mrs W in breach of Regulation 14(3) is set out in the Letter of Complaint, this is not evidence of what happened. This is a third-party report, and not from the people directly involved. There has been no direct testimony submitted in this case from either Mr W or the late Mrs W setting out their recollections of the Time of Sale. But I do have a copy of an email trail between Mr W and the Lender in the run-up to the Letter of Complaint. And there is one email sent on 28 January 2021 from Mr W that is particularly relevant to this complaint. It reads:

"…The Loans are only partly (33%) to provide a Timeshare Holiday Product, the other 66% was supposed to be an Investment i.e. in our case, A Fractional Property Ownership, due to mature on 31 December 2033. On that date, the Property we "Owned" Fractions of was scheduled to be sold and the proceeds shared out between all the "Owners" in that particular Property; in our case 8.04% of the total."

So, in my view, this makes clear that the Allocated Property, and its share and sale, were likely to have been described to Mr W and the late Mrs W at the Time of Sale.

So, I have taken all of that into account. However, on my reading of the evidence provided and Mr W's recollections of the sales process at the Time of Sale, I'm not persuaded that Fractional Club was positioned as an investment. Mr W did describe being told by the Supplier that they would receive the net sale proceeds of their share in the Allocated Property once their Fractional Club membership ended, but at no point has he said or suggested that the Supplier led them to believe that their Fractional Club membership would lead to a financial gain (i.e., a profit). It seems to merely describe the Supplier setting out very factually how Fractional Club worked.

So, while the PR argues in the Letter of Complaint that the Supplier marketed and sold Fractional Club membership to Mr W and the late Mrs W as an investment, I'm not persuaded that this was the case.

But even if I am wrong to conclude that, on this occasion, membership was unlikely to have been sold in that way, I am not currently persuaded that would make a difference to the outcome in this complaint anyway. I'll explain.

<u>Was the credit relationship between the Lender and Mr W and the late Mrs W rendered unfair?</u>

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 W and the late Mrs W and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3)[4] led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

But as I've already said, Mr W and the late Mrs W's motivation to purchase has only been set out in the Letter of Complaint. The email above makes me think the Supplier described how the Allocated Property worked, and that Mr W and the late Mrs W would be entitled to their share of the sales proceeds at the end of the membership term. But there has been no suggestion that the Supplier led them to believe that the Fractional Club membership was an investment from which they would or could make a financial gain, nor was there any indication that they were induced into the purchase on that basis. Mr W and the late Mrs W had been members of the Supplier's timeshare arrangements for many years and had clearly enjoyed many holidays as part of their membership. And I've not seen any evidence which leads me to think that their purchase of Fractional Club was for any reason other than continuing to enjoy holidays, and importantly, I've seen no evidence that the Supplier positioned the membership as potentially giving them a profit at the end, or that they were motivated to make the purchase by a potential profit.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations (and as I've said, this doesn't appear likely to me) I am not persuaded that Mr W and the late Mrs W's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr W and the late Mrs W and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

Other matters

Mr W and the late Mrs W's complaint about the Lender being party to an unfair credit relationship was also made for several other reasons, all of which I set out at the start of this decision.

The PR said it considered the contractual terms setting out (i) that the Fractional Club membership could be taken back by the Supplier upon non-payment of the annual fee; and/or (ii) that the Supplier retained control of their 'points' were unfair contract terms. The legislation in place at the Time of Sale relating to this aspect of the complaint was the UTCCR, so I have considered this alongside the Timeshare Regulations.

One of the main aims of the Timeshare Regulations and the UTCCR was to enable consumers to understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. And if a supplier's disclosure and/or the

[4] which, having taken place during its antecedent negotiations with Mr W and the late Mrs W, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender

terms of a contract did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, that may lead to the Timeshare Regulations and the UTCCR being breached, and, potentially the credit agreement being found to be unfair under Section 140A of the CCA.

However, as I've said before, the Supreme Court made it clear in Plevin that it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A of the CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

To conclude that a term (or terms) in the Purchase Agreement rendered the credit relationship between Mr W and the late Mrs W and the Lender unfair to them, I'd have to see that the term was unfair under the UTCCR, and that the term was actually operated against Mr W and the late Mrs W in practice. In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mr W and the late Mrs W have flowed from such a term, because those consequences are relevant to an assessment of unfairness under Section 140A. For example, the judge in Link Financial v Wilson [2014] EWHC 252 (Ch) attached importance to the question of how an unfair term had been operated in practice: see [46].

As a result, I don't think the mere presence of a contractual term that was/is potentially unfair is likely to lead to an unfair credit relationship unless it had been applied in practice.

Having considered everything that has been submitted, it seems unlikely to me that the contract terms cited by the PR led to any unfairness in the credit relationship between Mr W and the late Mrs W and the Lender for the purposes of Section 140A of the CCA. I say this because the Purchase Agreement (and so the aforementioned terms) were only in place for one year up until December 2015, and I cannot currently see that either of the relevant terms in the Purchase Agreement were actually operated against Mr W and the late Mrs W, let alone unfairly. And the PR hasn't explained why exactly they feel these terms caused an unfairness, and as I've said, I can't see that either of these terms have been operated in an unfair way against Mr W and the late Mrs W in any event.

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mr W and the late Mrs W when they purchased membership of the Fractional Club at the Time of Sale. But the PR says that the Supplier failed to provide sufficient written information in relation to the Fractional Club to enable them to make an informed choice to purchase.

But I'm mindful of the fact that Mr W and the late Mrs W had been members of the Supplier's timeshare arrangement for many years, and had made several purchases from the Supplier over that time, including a fractional membership very similar to the one bought at the Time of Sale. So, I think it is a safe assumption that they would have had a fair understanding of the Supplier's sales practices and how the products and finance agreements worked. The PR has not explained what information was not provided to Mr W and the late Mrs W which was necessary for them to make an informed decision. But I can see from the signed purchase documentation that they were given the standard information around the purchase, the membership and the finance agreement. But in any event, I think Mr W and the late Mrs W got what they wanted here - I can't see that any lack of information led to Mr W and the late Mrs W purchasing a product that they didn't actually want or wouldn't otherwise have purchased.

Given the facts and circumstances of this complaint, I am not persuaded that the Supplier's alleged information failings are likely to have prejudiced Mr W and the late Mrs W's

purchasing decision at the Time of Sale and rendered their credit relationship with the Lender unfair to them for the purposes of section 140A of the CCA.

Finally, the PR said that the Credit Agreement was arranged by a credit broker which was not regulated by the FCA to carry out such an activity, the upshot of which is to suggest that the Lender wasn't and isn't permitted to enforce the Credit Agreement as a result.

But I don't agree. Having looked at the FCA register, I can see that the Supplier named on the Credit Agreement as the credit intermediary was, at the Time of Sale, authorised by the FCA for credit broking. And in the absence of any evidence to suggest that its authorisation did not cover credit broking, I am not persuaded that the Credit Agreement was arranged by an unauthorised credit broker.

Section 140A: Conclusion

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

Conclusion

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

If there is any further information on this complaint that Mr W wishes to provide, I would invite him to do so in response to this provisional decision.

The responses to my PD

The Lender did not respond but Mr W did. He said that all of the fractional contracts they had bought were sold to them in the same way, in that when the property was eventually sold at a stated date, they would receive a stated percentage share of the sale of their "investment". So they were all sold as investments, and this was the only reason they signed up to them, because of their ages and the large outlay it would cost. They had looked at it as a way to help to pay for a final retirement home in Spain.

And as regards to the difficulty they had experienced when trying to book a holiday, they were unable to book using their points until 1 January in the year they wished to go. And they found the times they wanted were always already booked up even if they tried to book immediately.

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 so, and having thought carefully about what Mr W has said in response to my PD, I'm afraid I have not changed my mind. I do not think this complaint ought to be upheld, for the same reasons as I've set out in the PD.

I'm not persuaded, on the evidence before me, that the Fractional Club membership being considered here was sold and/or marketed by the Supplier as an Investment.

As I said in the PD, 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]. This is the definition I have used when determining if Mr W's complaint ought to be upheld.

And as I also said, Mr W and the late Mrs W'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 W and the late Mrs W 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.

And this is important, because, on the evidence before me, I'm not persuaded that Fractional Club was positioned by the Supplier to Mr W and the late Mrs W as something that offered them the prospect of a profit. The only direct testimony that I had was the email from Mr W to the Lender in which he described how his share of the Allocated Property worked. At no point did he say or suggest that the Supplier led them to believe that their Fractional Club membership would lead to a financial gain (i.e., a profit). And in his response to the PD, there is no evidence that there was a suggestion by the Supplier of a *profit* to be made. It just suggests that there would be some sort of return which they could use to help pay for their retirement home. But a return here does not imply a profit, it just says that they would get something back when the Allocated Property was sold.

So I remain unpersuaded that the Supplier positioned the membership as potentially giving them a profit at the end, or that they were motivated to make the purchase by a potential profit.

I have also looked again at whether there was a breach of contract by the Supplier in terms of the lack of availability of accommodation.

But I am not persuaded there was a breach of contract here. As I said in the PD, some of the sales paperwork signed by Mr W and the late Mrs W stated that the availability of holidays was/is subject to demand. And although Mr W has given some more detail of the problems he and the late Mrs W had when trying to book, I have not seen enough to persuade me that there was a breach of this particular contract, which was only in existence for about one year before it was traded in.

So, having thought about what Mr W said in response to my PD, and having reconsidered everything afresh, I am not persuaded, on the balance of probabilities, that the Lender was

party to an unfair credit relationship under Section 140A of the CCA. I am also unpersuaded that the Lender was unfair and unreasonable when it rejected Mr W's claim under Section 75 of the CCA.

As such I do not think Mr W's complaint ought to be upheld.

My final decision

I do not uphold Mr W's complaint against Shawbrook Bank Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 25 April 2025.

Chris Riggs
Ombudsman