DRN-5449511

The complaint

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

Background to the Complaint

Mr and Mrs A first purchased 1,500 fractional points in October 2014 at a cost of £12,879, which was funded by another lender. Later, Mr and Mrs A purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 6 April 2015 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 2,200 fractional points at a cost of £23,129.00 (the 'Purchase Agreement'). But after trading in their existing timeshare, which was valued at £9,750, they ended up paying £13,379.00 for membership of the Fractional Club.

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

Mr and Mrs A paid for their Fractional Club membership by taking finance of £26,460.00 from the Lender (the 'Credit Agreement'), which included the consolidation of an existing loan with a different lender of £13,081.

Mr and Mrs A – using a professional representative (the 'PR') – wrote to the Lender on 25 January 2018 (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. 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.
3. The decision to lend being irresponsible because (1) the Lender did not carry out the right creditworthiness assessment and (2) the money lent to them under the Credit Agreement was unaffordable for them.

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

Mr and Mrs A say that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. told them that Fractional Club membership had a guaranteed end date when that was not true.
2. told them that they were buying an interest in a specific piece of "real property" when that was not true.
3. told them that Fractional Club membership was an "investment" when that was not true.

Mr and Mrs A say that they have 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 have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs A.

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

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

1. The contractual terms setting out (i) the duration of their Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of their membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
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 those Regulations.
3. They were pressured into purchasing Fractional Club membership by the Supplier.
4. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mr and Mrs A's concerns as a complaint and issued its final response letter on 25 September 2018, rejecting it on every ground.

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

The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr and Mrs A at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of that breach on their purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr and Mrs A was rendered unfair to them for the purposes of section 140A of the CCA.

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

On 19 March 2025, I issued a Provisional Decision ('the PD') on this complaint. In that decision, I said the following:

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, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').*

- *The UTCCR*
- *The CPUT Regulations.*
- *Case law on Section 140A of the CCA – including, in particular:*

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

Good industry practice – the RDO Code

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

My provisional findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr and Mrs A as an investment, which, in the circumstances of this complaint, rendered the credit relationship between them and the Lender unfair to them for the purposes of Section 140A of the CCA.

However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I recognise that there are a number of aspects to Mr and Mrs A's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the Supplier misrepresented the Fractional Club ownership and that the Lender ought to have accepted and paid a claim under Section 75 of the CCA, and that the Lender did not carry out reasonable and proportionate checks before deciding to lend the money to Mr and Mrs A. Because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs A in the same or a better position than they would be if the redress was limited to misrepresentation or the lending decision.

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

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

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between the Mr and Mrs A 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 and Mrs A's membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

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

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

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

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

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

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

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

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

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

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

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

I have considered the entirety of the credit relationship between Mr and Mrs A and the Lender along with all of the circumstances of the complaint and I think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

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

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

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

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

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

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

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

But Mr and Mrs A say that the Supplier did exactly that at the Time of Sale. Mr and Mrs A provided a witness statement to our service in November 2023, but was signed and dated on 12 October 2017. In that statement they explained why they were led to believe that the first Fractional Club membership they bought from the Supplier in 2014 had been sold to them as an investment. And with respect to what happened at the Time of Sale, they said:

"We were told by the salesman that there was only one [apartment available] and it would be a much better investment than what we had at [their existing fractional resort]. Again, the property would be sold in 19 years".

And:

"We decided to trade in our first week because it was a better investment and we would make more money when the property was sold."

And the PR, in its Letter of Complaint dated 25 January 2018, says:

"The [Supplier] representatives then introduced [Mr and Mrs A] to their [product name], which they said involved buying a share in a suite, for a fixed week, which would enable them to have luxury holidays every year, for 19 years, after which the property would be sold, and the proceeds of sale split between all the fractional owners. They indicated that, as property prices keep going up, [Mr and Mrs A] could expect to even make a profit. So, it would be a good investment".
…
"[Mr and Mrs A] were told by the salesman that there was only one [product name], and it would be a much better investment than what they had at [resort name]."

Mr and Mrs A allege, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because there were two aspects to their Fractional Club membership: holiday rights and a profit on the sale of the Allocated Property.

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

For example, in a document titled "Member's Declaration", which is one page long, I can see the following disclaimer:

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

When read on its own, this disclaimer does go some way to making the point that the purchase of the Fractional Club membership should not be primarily viewed as an investment. But it wasn't to be read on its own. It had to be read in conjunction with what else the Standard Information Form had to say. I have not seen the full paperwork I expect Mr and Mrs A were given at the Time of Sale, so I have referred to a copy of this paperwork that I know the Supplier used around the Time of Sale. If either party wishes to provide me with the paperwork or disagrees with my assumption that Mr and Mrs A received this, I will consider this further. Otherwise, the Form states:

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

This disclaimer seems to have been aimed at distancing the Supplier from any investment advice that was given by its sales staff by telling customers to seek their own independent advice and repeating the point that it did not guarantee any returns from the sale of the Allocated Property.

Yet I think it is fair to say that, while a prospective member might well have thought they would be wise to seek professional investment advice in relation to membership of the Fractional Club, rather than rely on what they were told by the Supplier at the Time of Sale, it would have also done nothing to dissuade them from regarding the membership as an investment. In fact, I think it would have achieved the opposite.

It is also difficult to explain why the Supplier deemed it necessary to include such a disclaimer in the paperwork if there wasn't a very real risk that it had marketed and sold the membership of the Fractional Club as an investment, given the difficulty of articulating the benefit associated with the ownership of the fraction.

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

So, I have considered:

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

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

How the Supplier marketed and sold the Fractional Club membership

Over the course of the Financial Ombudsman Service's work on complaints involving Fractional timeshare sales, the Supplier has provided a training material document called "2015 SPAIN FRACTIONALS AT SIGNATURE SUITE COLLECTION SALES TRAINING MANUAL FOR FPOC AND VACATION CLUB OWNERS" ('the Manual') used to train its sales agents in the selling of the product purchased by Mr and Mrs A.

As I understand it, the Manual was in use at the time Mr and Mrs A made their purchase. It's not entirely clear whether they would have been shown the slides included in the Manual, but it seems to me to be reasonable indicative of:

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

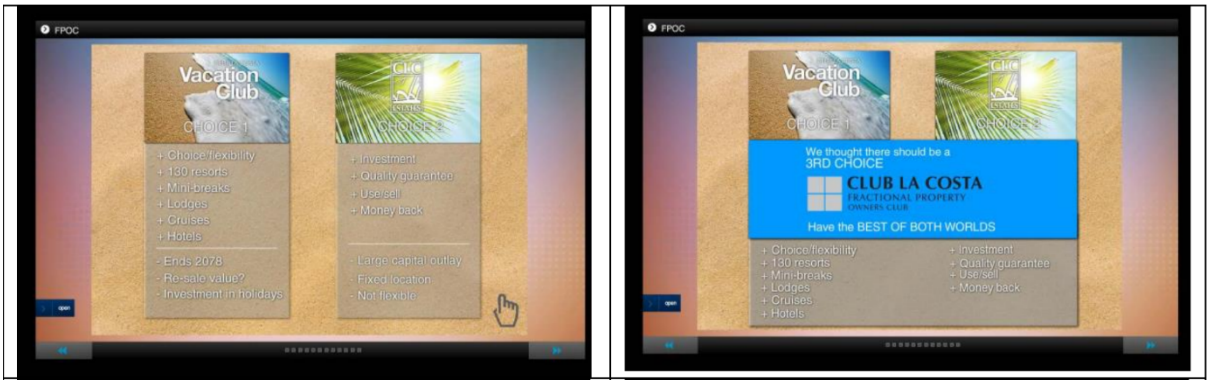
Having looked through the Manual, I am first drawn to the slide on page 11, which is the first slide that brings in the Fractional Club membership and its purpose. It says:

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

This slide strongly suggests the sales agent is likely to have made the point to the customer that purchasing the membership would allow them to own a physical asset, that being the fraction of a real property, and that this ownership would lead to "money back" at the end of the term.

From the off, therefore, it seems likely that the sales agent would have demonstrated that there was a significant financial advantage to gaining the membership that set it apart from membership of a 'standard' timeshare that only provided customers with holiday rights.

I've then considered the slides copied below, which are found on page 106:



These slides appear in a part of the presentation titled "In House Game Plan for Vacation Club Owners". Mr and Mrs A were not Vacation Club Owners but were existing Fractional Club members at the Time of Sale. However, I've thought about what these slides show as being indicative of the sales practices by the Supplier at that time. And this includes the Supplier's use of the word "investment" to describe Fractional Club membership. So, although I accept this part of the slide deck was probably not shown to Mr and Mrs A, I also think it was likely that the Supplier's sales staff would have been trained to talk about Fractional Club memberships like Mr and Mrs A's as investments at the Time of Sale. That means there was a real possibility that was done in Mr and Mrs A's sale.

I acknowledge that there may not have been a comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mr and Mrs A the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

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

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[2] The Department for Business Innovation & Skills *"Consultation on Implementation of EU Directive 2008/122/EC on Timeshare, Long-Term Holiday Products, Resale and Exchange Contracts (July 2010)".* https://assets.publishing.service.gov.uk/media/5a78d54ded915d0422065b2a/10-500-consultation-directive-timeshare-holiday.pdf

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 99 and 100 of Shawbrook & BPF v FOS when, Mrs Justice Collins Rice said the following:

"[…] I endorse the observation made by Mr Jaffey KC, Counsel for BPF, that, whatever the position in principle, ***it is apparently a major challenge in practice for timeshare companies to market fractional ownership timeshares consistently with Reg.14(3). […] Getting the governance principles and paperwork right may not be quite enough.***

The problem comes back to the difficulty in articulating the intrinsic benefit of fractional ownership over any other timeshare from an individual consumer perspective*. […]* ***If it is not a prospect of getting more back from the ultimate proceeds of sale than the fractional ownership cost in the first place, what exactly is the benefit?*** *[…] What the interim use or value to a consumer is of a prospective share in the proceeds of a postponed sale of a property owned by a timeshare company – one they have no right to stay in meanwhile – is persistently elusive."*

"[...] although the point is more latent in the first decision than in the second, it is clear that both ombudsmen viewed fractional ownership timeshares – simply by virtue of the interest they confer in the sale proceeds of real property unattached to any right to stay in it, and the prospect they undoubtedly hold out of at least 'something back' – as products which are inherently dangerous for consumers. ***It is a concern that, however scrupulously a fractional ownership timeshare is marketed otherwise, its offer of a 'bonus' property right and a 'return' of (if not on) cash at the end of a moderate term of years may well taste and feel like an investment to consumers who are putting money, loyalty, hope and desire into their purchase anyway.*** *Any timeshare contract is a promise, or 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 is my own.)*

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

So, overall, I think the Supplier's sales representative, during Mr and Mrs A's sale, was likely to have led them to believe that Fractional membership was an investment that may lead to a financial gain (i.e., a profit) in the future. And with that being the case, I don't find them either implausible or hard to believe when they say they were told this was a better investment that their previous membership. On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mr and Mrs A were led by the Supplier to believe at the relevant time. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

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

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

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

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

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

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

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

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

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

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs A and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) (which, having taken place during its antecedent negotiations with Mr and Mrs A, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender) lead them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

The Lender says that the Supplier confirmed that: "the focus of the [Fractional Club] Membership was the guaranteed usage of luxury accommodation". I have thought about what Mr and Mrs A say about the accommodation rights in their testimony, and the other evidence I've seen, to decide what was their likely motivation for entering the Purchase Agreement, and related Credit Agreement.

On my reading of Mr and Mrs A's testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. That doesn't mean they were not interested in holidays. Indeed, their own testimony demonstrates that they quite clearly were, though they also say "[Mr A] had done [his] research and found that what [the Supplier] wanted for the timeshare was not good value as [they] could get better value holidays over the internet". Regardless, they do say they used their points to stay in Turkey and Florida, but the desire to also obtain holidays is not surprising given the nature of the product at the centre of this complaint.

I've thought carefully about how much weight I can place on Mr and Mrs A's witness statement. The witness statement was only received by our service in November 2023. It is signed and dated by Mr and Mrs A on 12 October 2017. In its response to the Investigator's findings, the Lender suggests the statement was "strongly influenced" by the PR because the language closely resembles the Letter of Complaint. And it suggests that the statement is a "template". I can see the statement is reasonably well-detailed and broadly consistent with what the PR wrote in the Letter of Complaint about Mr and Mrs A's motivation to purchase the Fractional Club membership. I do not see any reason to conclude that the PR has influenced Mr and Mrs A's recollections in their statement, rather it appears the Letter of Complaint was based on their recollections as I would expect. Mr and Mrs A's statement contains specific recollections about what they say happened at the Time of Sale and other events and I've gone on to consider what I think about their testimony and their complaint as a whole.

In order to understand the full context of the events at the Time of Sale, I have first thought about what they say they were told about their October 2014 timeshare purchase with the same Supplier, and why they say they went ahead with the purchase. Here, they say:

"We were interested in buying a property as an investment, so we could rent it out and make money, to be able to send our children to university. They wanted us to buy Fractional Property which was an "investment" and we would also get points to use for holidays. We could get special offers with our points and could get 2 weeks for the price of one".

"The fractional property would be sold in 19 years and we would get a "share" of this back. We were told that property was going up in value every year in Tenerife and the implication was that we would make money when the property was sold. It would "definitely be sold" in 19 years."

"We were shown a diagram of a house with bricks in and were told we would own "bricks and mortar"."
…

"The only reason we purchased the timeshare was because this was an "investment in property" and we would make money in 19 years' time."

This earlier purchase was funded by a loan from a different lender, so things said or done by the Supplier in that sale were not said or done on behalf of the Lender at the Time of Sale. But it is important here to consider what happened in 2014 as, in my view, it gives some context to what I think most likely happened at the Time of Sale.

Mr and Mrs A say that, in 2014, they were interested in investing in property and that was the reason they ended up buying a fractional membership from the Supplier. They explain that there was a conversation with the Supplier about this at the time. Having seen the Supplier's training documents that were in use at that time, which contain references to the advantages of Fractional Club membership using monetary terms, I think their evidence on this happening is plausible.

Regarding the purchase of the Fractional Club membership at the Time of Sale, they say:

"Back at the office we told the sales people that we wanted to buy a property outright, but when they told us the price, we did say we can't afford this".

"We were told by the salesman that there was only one Signature Suite and it would be a much better investment than what we had at Monterey. Again, the property would be sold in 19 years".

…

"We decided to trade in our first week because it was a better investment and we would make more money when the property was sold".

Again, given Mr and Mrs A say they were interested in investing in property, and given what I have set out above about the how the Supplier marketed and sold Fractional Club membership at the Time of Sale, I think it's more likely than not that the investment element of the Fractional Club membership was discussed at the Time of Sale.

According to their testimony, Mr and Mrs A later paid a deposit on a freehold property purchase in Turkey, and another in Florida, although they did not proceed with either sale. So, I think Mr and Mrs A's actions are consistent with their statement that they were motivated by the prospect of investing in property, and that they were persuaded to enter the Purchase Agreement, and related Credit Agreement, because they were told the Fractional Club membership represented an investment opportunity and that they could expect to make a profit upon the sale of the Allocated Property. And I think their evidence that they upgraded their membership in 2015 as it was a 'better investment' is plausible in the context of their evidence and purchase history.

As Mr and Mrs A say (plausibly in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I think their purchase was strongly motivated by their 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 the more 'standard' type of timeshare available to them. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

Further, based on all of the evidence I have seen, although I accept Mr and Mrs A were interested in the holidays they could take using Fractional Club membership, I am not persuaded that such a benefit was enough to have convinced them to have purchased membership had the Supplier not breached Regulation 14(3) at the Time of Sale.

Conclusion

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

I then set out what I thought to a fair way for the Lender to calculate and pay redress to Mr and Mrs A.

The responses to my provisional decision

In response to my PD, the PR accepted my findings on Mr and Mrs A's behalf.

The Lender said that it did not intend to challenge my decision and provided some observations, which I have read. It also said it disagreed with my proposed method for calculating redress. It said:

"While we do not intend to challenge the Ombudsman's decision to uphold [Mr and Mrs A's] complaint, we do not agree with aspects of the Ombudsman's proposed redress methodology to calculate the deductions for holidays. We appreciate that the purpose of any redress is to put the customer back into the position that they would have been in if not for the event complained about, the proposed methodology seems disproportionately complicated and carries a real risk of the customer being put into [a] better position and therefore providing a windfall. Further to this, the time taken for the Supplier to collate this information then the time taken for us to calculate the redress due will lead to delays in our ability to provide swift redress. We propose the simplest methodology is for redress to be calculated only on the parcel of points associated with the purchase, and more in line with the Investigator's recommendation (set out in his View dated 14 November 2023)."

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.

Because Mr and Mrs A accepted my PD, and the Lender does not intend to challenge it, I don't think it's necessary for me to address all of the Lender's comments following the PD, though I confirm I have read and considered these carefully. The Lender has raised two points about what I considered to be a fair method of calculating the redress payable to put things right. I will explain why I don't agree with its proposed method of calculation.

First, the Supplier operates a points-based holiday club. It knows the holidays Mr and Mrs A took each year and, as I understand it, their points value. And it knows how many points they held prior to the upgrade at the Time of Sale. Understandably, the Lender and the Supplier need to share information and work together. But surely the Supplier can apply its own rules to the information it has and carry out some basic arithmetic – or easily provide the Lender with the information it needs to do the same. I simply don't see how it's complicated, let alone 'disproportionately' complicated. Nor do I think it's likely to be particularly time-consuming.

In any event, I've explained why I think the Lender should, as far as is practicable, put Mr and Mrs A back in the position they would have been in had they not purchased the Fractional Club. I would need to see compelling evidence that this isn't possible or that to do so would be so time-consuming or complex that it justifies doing something else. I haven't seen such evidence in this case.

Second, I do not see how the method I've proposed 'carries a real risk' of putting Mr and Mrs A in a better position than they would have been in had they not purchased the Fractional Club membership – and the Lender hasn't explained how this could happen or expanded further on this point.

Having considered the available evidence and arguments again, I have reached the same conclusions as I did in my PD. So, here's what I think needs to be done to compensate Mr and Mrs A with that being the case – whether or not a court would award such compensation:

(1) The Lender should refund the difference between Mr and Mrs A's repayments to it

under the Credit Agreement and what they would have paid under Loan 1, including the difference between any sums paid to settle the debt owing under the Credit Agreement and what would have needed to have been paid to settle Loan 1. The Lender should also reduce any outstanding balance under the Credit Agreement, if there is one, so that Mr and Mrs A would only owe now what they would have owed under Loan 1 and change any future repayments so that they are making the same repayments they were towards Loan 1.

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

(3) The Lender can deduct:

i. The value of any promotional giveaways that Mr and Mrs A used or took advantage of; and
ii. The market value of the holidays* Mr and Mrs A took using FC Membership 2 *if* the Points value of the holiday(s) taken amounted to more than the total number of Fractional Points they would have been entitled to use at the time of the holiday(s) as ongoing FC Membership 1 members. However, this deduction should be proportionate and relate only to the additional Fractional Points that were required to take the holiday(s) in question.

For example, if Mr and Mrs A took a holiday worth 2,000 Fractional Points after the Time of Sale and they would have been entitled to use a total of 1,500 Fractional Points under FC Membership 1 at the relevant time, any deduction for the market value of that holiday should relate only to the 500 additional Fractional Points that were required to take it. But as they would have been entitled to use 1,500 Fractional Points under FC Membership 1, for instance, there shouldn't be a deduction for the market value of any holidays taken worth 1,500 points or fewer.

(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 both Mr and Mrs A's credit files in connection with the Credit Agreement reported within six years of this decision.

(6) If Fractional Membership 2 is still in place at the time of this decision, as long as Mr and Mrs A both agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of Fractional Membership 2.

*I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Mr and Mrs A took using their Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

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

My final decision

For the reasons explained above, I uphold Mr and Mrs A's complaint and direct Shawbrook Bank Limited to take the actions outlined as above.

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

Andrew Anderson
Ombudsman