DRN-5620772

The complaint

Mr and Mrs W's complaint is, in essence, that Shawbrook Bank Limited 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

I recently issued my provisional conclusions setting out the events leading up to this complaint, and how I thought Shawbrook Bank should resolve it. I've reproduced my provisional findings below, which form part of this final decision:

What happened

Mr and Mrs W were long-standing customers of "D", a timeshare provider. In July 2013 (the "Time of Sale") they purchased membership of a timeshare (the "Fractional Club") from D. They traded in their (non-fractional) 'European Collection' points under their existing timeshare membership as part of this purchase, entering into an agreement (the "Purchase Agreement") with D to buy an additional 3,000 'fractional points'. Added to the 8,000 fractional points they received as a trade-in value, this gave them 11,000 fractional points in total – equivalent to two weeks of fractional rights of use – which they could use to reserve holidays in various resorts.

After trading in their existing timeshare, Mr and Mrs W ended up paying £8,743 for membership of the Fractional Club. This comprised £1,243 paid by credit card, with Shawbrook Bank providing the balance of £7,500 via a fixed sum loan in Mr and Mrs W's joint names (the "Credit Agreement"). The Credit Agreement was drawn up over a 10-year term, though I understand Mr and Mrs W settled the loan within a year.

Fractional Club membership was asset backed, giving Mr and Mrs W more than just holiday rights. Membership also included a share in the net sale proceeds of a property named on their Purchase Agreement (the "Allocated Property") after their membership term ended. The Purchase Agreement gave a proposed sale date of 31 December 2028.

As I understand it, between 2013 and 2018 Mr and Mrs W regularly used their membership to take holidays. They also attended further marketing bookings, though it hasn't been suggested they made any further purchases.

On 27 March 2019 Mr and Mrs W used a professional representative "F" to write to D and to Shawbrook Bank, seeking to rescind the contractual arrangements, citing concerns over:

- misrepresentations by D at the Time of Sale and subsequent breaches of contract, giving them a claim against Shawbrook Bank under section 75 of the CCA, which the respondent failed to accept and pay; and

- Shawbrook Bank being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of section 140A of the CCA.

Mr and Mrs W's claims under Section 75 of the CCA

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

- told them that D's holiday resorts were exclusive to its members, and were of the highest standard
- told them that Fractional Club membership was a 'mechanism for property ownership'
- told them that Fractional Club membership gave them a guaranteed exit from the timeshare contract after fifteen years without any further liability – and with a profit

when all of these were not true.

In addition, Mr and Mrs W said they found it difficult to book the holidays they wanted, when and where they wanted, which is suggestive of a breach of contract.

They said they had a claim against D and that under section 75 of the CCA, they had a like claim against Shawbrook Bank who with D is jointly and severally liable to them.

Mr and Mrs W's claim under Section 140A of the CCA: Shawbrook Bank's participation in an unfair credit relationship

Mr and Mrs W's complaint letter set out several reasons why they felt that their credit relationship with Shawbrook Bank was unfair to them under Section 140A of the CCA. In summary, they included the following:

- the terms of the agreement were unfair in themselves, as undisclosed commission was paid to D by Shawbrook Bank
- Fractional Club membership was marketed and sold to them as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the "Timeshare Regulations")
- D pressured them into purchasing Fractional Club membership. This, and other sales techniques – including failing to inform them that they could consider other lenders – were contrary to provisions of the Consumer Protection from Unfair Trading Regulations 2008 ("CPUT")

Shawbrook Bank dealt with Mr and Mrs W's concerns as a complaint and issued its final response letter on 1 May 2019, rejecting it on every ground. Mr and Mrs W then referred the complaint to us, again with the assistance of F. The complaint was assessed by an investigator who, having considered the information on file, upheld it on its merits.

The investigator found Mr and Mrs W's testimony sufficiently persuasive in relation to the marketing of Fractional Club membership notwithstanding D's paperwork stating that Fractional Club membership wasn't an investment. She considered it was more likely than not that D had marketed and sold Fractional Club membership as an investment to Mr and Mrs W at the Time of Sale, in breach of Regulation 14(3) of the Timeshare Regulations.

Given the impact of such a breach on Mr and Mrs W's purchasing decision, the investigator concluded that rendered unfair the credit relationship between Shawbrook Bank and Mr and Mrs W for the purposes of section 140A of the CCA. She proposed that (as far as it was possible to do so) Shawbrook Bank should look to restore Mr and Mrs W to the position they were was in before entering into the Credit Agreement, reimbursing – with interest – any money they were out of pocket, taking into account matters including (but not limited to) payments they'd made and benefits they'd received from Fractional Club membership.

Shawbrook Bank disagreed with our investigator's assessment and asked for the case to be reviewed by an ombudsman, as it is entitled under our rules. Again in summary, it said:

- it didn't consider that the primary reason for Mr and Mrs W's complaint was because Fractional Club membership was marketed or sold to them as an investment. The main thrust of Mr and Mrs W's complaint correspondence related to other matters, such as the availability of holidays and increasing management fees. So there was cause to conclude the credit relationship was not rendered unfair under section 140A of the CCA.
- There was clear evidence in the sales documentation to support that Fractional Club membership was not sold as an investment. Further, Mr and Mrs W's evidence was unsigned and lacked credibility, containing what it considered limited, inaccurate and/or unsupported statements lacking detail about the investment aspect.

Mr and Mrs W appeared to have been happy with their purchase and rather than being pressured into buying, had agreed to the purchase a week after the sales presentation.

What I've provisionally decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. I've taken into account relevant law and regulations, regulators' rules, guidance and standards, and codes of practice, and (where appropriate) what I consider to have been good industry practice at the relevant time[1].

Where necessary, I have made my decision on the balance of probabilities – in other words, on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

Relevant law and regulations

Of particular relevance to this complaint are:

- the CCA (including Section 75 and Sections 140A-140C)
- the law on misrepresentation
- the Timeshare Regulations
- the Unfair Terms in Consumer Contracts Regulations 1999 ("UTCCR")
- the Consumer Protection from Unfair Trading Regulations 2008 ("CPUT")
- case law on Section 140A of the CCA – including, in particular:

[1] In accordance with DISP 3.6.4R ('R' denotes a rule) – Financial Conduct Authority ("FCA") Handbook (available on the FCA website).

- 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 I've mentioned, I'm also required to take into account, where appropriate, what I consider to have been good industry practice at the relevant time. In this complaint that includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the "RDO Code").

What I've provisionally decided – and why

After careful consideration, I'm currently minded to uphold Mr and Mrs W's complaint. Before I explain why, I want to make it clear that my role as an ombudsman doesn't mean I need to address every single point that has been made to date. If I haven't commented on, or referred to, something that either party has said, that doesn't mean I haven't considered it.

I'm conscious there are various aspects to Mr and Mrs W's complaint. These include the allegations of misrepresentation (and some suggestions of breach of contract) in respect of the Fractional Club membership, and the suggestion that Shawbrook Bank ought to have accepted and met their claims under section 75 of the CCA.

However, I don't need to make formal findings on all those points in order to decide the fair and reasonable way in which the complaint should be resolved. That's because I consider the available evidence indicates D breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr and Mrs W as an investment which, in the circumstances of this complaint, rendered unfair the credit relationship between them and Shawbrook Bank for the purposes of section 140A of the CCA.

So even if those other aspects of the complaint ought to succeed, the outcome I'm proposing puts Mr and Mrs W in the same (or better) position as they would have been in if redress were limited to the remedies for misrepresentation or breach of contract.

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

As section 140A of the CCA is relevant law, I have considered it when determining what is fair and reasonable in all the circumstances of the case. That includes considering whether the credit relationship between Mr and Mrs W and Shawbrook Bank was unfair.

Under section 140A, 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)[2].

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. It also creates a statutory agency in particular circumstances. The most relevant to this complaint is negotiations "*conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement within section 12(b) or (c)*"[3].

The arrangements between Mr and Mrs W, D, and Shawbrook Bank were such that the negotiations conducted by D during its sale of Fractional Club membership to Mr and Mrs W were antecedent negotiations under section 56(1)(c) – which, in turn, meant that they were conducted by D as an agent for Shawbrook Bank 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 section 140A(1)(c).

Antecedent negotiations under section 56 cover both the acts and omissions of D, based on my understanding of relevant law[4]. I note that in the case of *Scotland and 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, 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."*[5]

It follows that I see no great difficulty with Mr and Mrs W's position that D is deemed agent of Shawbrook Bank for the purpose of the pre-contractual negotiations.

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 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.

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[2] Section 140A(1) of the CCA
[3] Section 56(1)(c) of the CCA
[4] See, for example *Plevin*, at paragraph 31, and *Shawbrook & BPF v FOS* at paragraph 135
[5] The Court of Appeal's decision in *Scotland and Reast* was followed in *Smith*.

Despite the breadth of the unfair relationship test under section 140A, 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, the Supreme Court said in *Plevin* that the protection afforded to debtors by section 140A is the consequence of all of the relevant facts.

I've considered the entirety of the credit relationship between Mr and Mrs W and Shawbrook Bank 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 section 140A purposes. In coming to that conclusion, and in carrying out my analysis, I've looked at:

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

I've considered the impact of these on the fairness of the credit relationship between Mr and Mrs W and Shawbrook Bank.

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, and if so, was this aspect material to Mr and Mrs W's decision to purchase membership?

Regulation 14(3) of the Timeshare Regulations prohibited D from marketing or selling membership of the Fractional Club as an investment. The provision at the Time of Sale said that "*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.*"

Mr and Mrs W's evidence, originally made in October 2018 and submitted as part of their complaint to Shawbrook Bank is that this is what D did at the Time of Sale, saying:

> "*We were advised that our European points were in perpetuity. Fractional points were an investment in property. The property would be sold in 15 years and we would have our money back with the potential to also make a profit.*"

They have said similar in response to enquiries made of them by our investigator.

Mr and Mrs W's original statement was not signed, but it does appear to be a record of the evidence they gave to F about why they were unhappy with Fractional Club membership. Mr and Mrs W signed a complaint form when bringing their complaint to our service, with this statement sent as part of that complaint. I'm satisfied this was their evidence despite Shawbrook Bank's concerns about the format that statement took.

Shawbrook Bank doesn't dispute (and I'm satisfied) that Mr and 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. 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*"[6]. I will use the same definition.

Mr and Mrs W's share in the Allocated Property in my view clearly 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.

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 that Fractional Club membership was marketed or sold to Mr and Mrs W as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that D marketed and/or sold membership to them as an investment; that is, told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (a profit) given the facts and circumstances of this complaint.

Not only that but, as the Supreme Court's judgment in *Plevin* makes clear, it does not automatically follow that any such regulatory breach would 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. That includes taking into account the material impact of any breach on the customer's decision whether to enter into the Purchase Agreement[7]. So I also must be satisfied that it was more likely than not that the prospect of a financial gain was a material factor in Mr and Mrs W's purchase decision.

There is evidence in this case that D made efforts to address the possibility that prospective purchasers such as Mr and Mrs W might view membership of the Fractional Club as an investment. There were, for instance, disclaimers in the paperwork D issued to Mr and Mrs W that say Fractional Club membership shouldn't be regarded as a property or financial investment.

Mr and Mrs W signed these papers to confirm they had received them. But weighing up what happened in practice is in my view rarely as simple as looking at the paperwork, particularly where (as here) that paperwork was spread over several different documents and across almost 50 pages. It's by no means clear that Mr and Mrs W would have read and understood the disclaimers, which were in any event provided after D's sales presentation and notably, after Mr and Mrs W made the decision to take out membership.

There's little that's been presented in the way of documentary evidence about how D presented Fractional Club membership. For example, I haven't been provided with any set sales presentations D confirms were used, or any other key marketing materials. Absent this, I've thought about what each of the parties has said, in order to reach a finding on the balance of probabilities.

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[6] Paragraph 56

[7] I'm mindful here of what HHJ Waksman QC (as he then was) and HHJ Worster respectively had to say in *Carney* (paragraph 51) and *Kerrigan* (paragraphs 213 and 214) on causation

Mr and Mrs W have suggested D breached Regulation 14(3) at the Time of Sale, including expressly telling them that Fractional Club membership was an investment and that there was a profit to be made on their Fractional Club membership. I find Mr and Mrs W's evidence in this respect consistent and compelling that it was more likely than not that the way in which Fractional Club membership was sold to Mr and Mrs W included elements that amounted to marketing it as an investment with the prospect of them making a profit.

I'm inclined to say that the existence of the disclaimers recognises there was a real risk of buyers forming the impression, from the way D was marketing and selling membership of the Fractional Club, that it was an investment. The difficulty of articulating the benefit of fractional ownership in a way that distinguished it from Mr and Mrs W's existing timeshare membership is a relevant factor in this case. And here, beyond the disclaimers referred to above, I don't have anything from D or Shawbrook Bank that shows how that benefit would have been presented to Mr and Mrs W.

Further, I think it would be fair to say that in light of the allegations Mr and Mrs W have made about what D told them, the disclaimer wording in the documents doesn't entirely counter what they say. A prospective member who was told what Mr and Mrs W say D told them could easily read the disclaimers in the paperwork without being dissuaded that investment was a legitimate secondary purpose of membership, even if it wasn't the primary purpose.

I accept of course that being asked to recall specific information some years later is rendered more difficult with the passage of time. But it does seem to me that Mr and Mrs W's evidence in this respect has been consistent and carries significant weight on the motivating factors in their decision to purchase membership.

There were of course other factors that affected Mr and Mrs W's decision, not least of which was the attraction of the holiday benefits conferred by Fractional Club membership over and above their existing European Collection membership. Over the preceding years they'd made good use of their membership and continued to do so as Fractional Club members. But that doesn't change whether the prospect of an investment offering a profit was a material consideration for Mr and Mrs W when they purchased Fractional Club membership.

It strikes me that if Mr and Mrs W had merely been interested in increasing the holiday rights they already held, they could simply have increased their non-fractional points again in the same way as they had before. This suggests there had to be some other reason Mr and Mrs W purchased the Fractional Club membership. That doesn't mean they weren't interested in holidays. Their use of the existing membership demonstrates this quite clearly. That is hardly surprising given the nature of a timeshare product. But on my reading of Mr and Mrs W's evidence, it was the prospect of a financial gain from Fractional Club membership that was a motivating factor when they decided to go ahead with their purchase and the associated borrowing.

Conclusion

Given the facts and circumstances of this complaint, I find it more likely than not that D marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, and that Mr and Mrs W's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (a profit). And for that reason, I'm currently inclined to think the credit relationship between Mr and Mrs W and Shawbrook Bank was unfair to them. It follows that I'm inclined to uphold their complaint.

Fair Compensation

My provisional findings are that:

1. Mr and Mrs W would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for a breach of Regulation 14(3) of the Timeshare Regulations by D (as deemed agent of Shawbrook Bank); and
2. the impact of that breach meant the relationship between Shawbrook Bank and Mr and Mrs W was unfair under section 140A of the CCA

With this in mind I propose (as far as can practically be achieved) that Shawbrook Bank puts Mr and Mrs W back in the position they would have been in had they not purchased the Fractional Club membership (that is, had they not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement. This is provided Mr and Mrs W agree to assign to Shawbrook Bank their Fractional Points or hold them on trust for Shawbrook Bank if that can be achieved.

Mr and Mrs W were existing European Collection members, and this membership was traded in against the purchase price of Fractional Club membership. Under their existing membership, Mr and Mrs W had 8,000 European Collection (non-fractional) points. As a result of the trade-in they held 11,000 ‘fractional points’ (the “Purchase Agreement”).

I’ve no reason to think that had Mr and Mrs W not purchased Fractional Club membership, they would have cancelled their European Collection membership. Like Fractional Club membership, they would always have been responsible for paying annual management charges under their European Collection membership. Any loss in this respect only arises if the European Collection fees were less than Mr and Mrs W had to pay under Fractional Club membership.

It follows that any refund of annual management charges or membership fees that Mr and Mrs W paid from the Time of Sale as part of their Fractional Club membership should be calculated based on the difference between those charges and those they would otherwise have paid as European Collection members.

So, here’s what I think Shawbrook Bank needs to do to compensate Mr and Mrs W – whether or not a court would award such compensation:

1. Refund Mr and Mrs W’s repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.
2. Pay compensation equivalent to the £1,243 paid by credit card at the Time of Sale as part of the purchase cost of Fractional Club membership.
3. Refund any loss to Mr and Mrs W arising from the difference between their Fractional Club annual management charges paid after the Time of Sale and what their European Collection annual management charges would have been had they not purchased Fractional Club membership.
4. Shawbrook Bank can deduct:

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

   ii. The market value of the holidays Mr and Mrs W took using their Fractional Points if the points value of the holidays taken amounted to more than the total number of points they would have been entitled to use at the time of the holidays as ongoing European Collection members. However, this deduction should be

proportionate and relate only to the additional Fractional Points that were required to take the holidays in question.

(I'll refer hereafter to the output of steps 1 to 4 as the 'Net Repayments')

5. Add simple yearly interest at 8% to each of the Net Repayments from the date each one was made until the date Shawbrook Bank settles this complaint[8].
6. Insofar as any adverse information has been recorded within the six years prior to this decision on Mr and Mrs W's credit files in connection with the Credit Agreement, this should be removed.
7. I understand Mr and Mrs W might already have relinquished their Fractional Club membership. However, if that's not the case and the Fractional Club membership is still in place at the time of this decision, as long as Mr and Mrs W agree to hold the benefit of their interest in the Allocated Property for Shawbrook Bank (or assign it to Shawbrook Bank if that can be achieved), Shawbrook Bank must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.

Responses to my provisional decision

F told us Mr and Mrs W accepted my intended conclusions and that it had nothing further to add.

Shawbrook Bank didn't accept my provisional decision. It provided its comments, along with opinion from D, and witness statements from both former and (at the time) existing employees of D, setting out how sales staff were trained to sell Fractional Club membership. It said these statements had been obtained in relation to previous legal proceedings at County Court level[9], and had been accepted by the respective judges. Shawbrook Bank's submissions were, in summary:

- It was concerned that in my provisional decision I had placed strong reliance on the witness testimony written from Mr W's perspective, which was neither signed nor dated, was brief, unsubstantiated, and lacked detail – particularly surrounding the extent of any possible investment profit – and contained factual inaccuracies that distorted the events surrounding the sale.
- The provisional decision did not address inconsistencies between the Letter of Claim prepared by F and Mr and Mrs W's own testimony, or how they – and the involvement of F – impact upon the veracity and reliability of that testimony.
- In contrast, there was little reliance on evidence from D as the supplier, such as its contemporaneous sales notes, which didn't contain any reference to investment or profit, and the steps D took to avoid breaching Regulation 14(3) of the Timeshare Regulations including as set out in the witness statements from D.
- Mr and Mrs W's holiday booking history shows they used their entire points allotment to book 157 nights of accommodation. They liked taking holidays and D's sales notes mentioned that they liked the Fractional 'Wish to Rent' programme, albeit that they didn't ever secure any bookings under it because of their own holiday usage. These

[8] HM Revenue & Customs may require Shawbrook Bank to deduct tax from this interest. If that's the case, Shawbrook Bank must give Mr and Mrs W a certificate showing how much tax it's deducted if they ask for one.
[9] Specifically, *Gallagher v Diamond Resorts (Europe) Limited* (21 July 2021, unreported) and *Brown v Shawbrook Bank Limited* (18 June 2021, unreported)

factors clearly demonstrated Mr and Mrs W's motivation for the purchase, rather than the prospect of investment for profit.

- The approach followed in the provisional decision went beyond the scope of an 'investment' outlined in *Shawbrook & BPF v FOS* because it conflated different meanings of the word 'return'. Referring to the prospect of a residual return on net sale proceeds did not satisfy the relevant test. Rather, it was an inherent feature of fractional products and would not automatically breach Regulation 14(3). If Fractional Club membership had been sold as an investment, then surely Mr and Mrs W would have been informed of the return.
- The test to be applied, as stated in *Carney*, was whether there was a "*material impact on the debtor when deciding whether or not to enter the agreement*." The provisional decision appeared to apply a different test – reversing the burden of proof – in saying "*the prospect of an investment offering a profit was a material consideration for Mr and Mrs W when they purchased Fractional Club membership.*"

  The starting point based on *Carney* is to assess whether there is sufficient evidence of a material impact on the decision to enter the agreement. In the absence of this, I ought not to find an unfair relationship or uphold the complaint. Instead, I had erred by starting from the position that the prospect of a financial gain existed, but that this was not insignificant enough for it not to render the relationship unfair.

Shawbrook Bank concluded its submissions by asserting that there is no clear, compelling evidence that Fractional Club membership was sold to Mr and Mrs W with the intention of financial gain, and that the complaint should therefore be rejected.

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.

Shawbrook Bank has provided lengthy and detailed submissions in response to my provisional decision, and while in the interests of informality and brevity, I have summarised them I can assure Shawbrook Bank that I have considered what it has said. But having done so, I don't find those submissions sufficiently persuasive such that I should depart from the conclusions I reached in my provisional decision.

Although Shawbrook Bank has made much of the way in which a court might approach oral testimony, that doesn't compel me to disregard what Mr and Mrs W have said about what happened at the Time of Sale. As we explain on our website, our approach – with which Shawbrook Bank is undoubtedly familiar – is that either side can tell us what they remember saying or being told. That is in the nature of the disputes we have to deal with. The extent to which such evidence is treated as reliable takes into account the surrounding circumstances and other available evidence, which might substantiate or contradict the oral testimony.

As Shawbrook Bank has sought to emphasise, there are inconsistencies between Mr W's testimony (given on behalf of Mr and Mrs W) and the submissions F made in the Letter of Complaint. I don't accept Shawbrook Bank's contention that these inconsistencies mean Mr and Mrs W's testimony lacks credibility, or that they have themselves been inconsistent. While Shawbrook Bank and D might have broader concerns about F's business practices, these don't mean that I should conclude Mr and Mrs W's complaint is invalid.

Regrettably, Mr W's personal health would seem to preclude obtaining further evidence from him, but Mrs W's more recent statement (which Shawbrook has seen) is consistent with the statement they gave in 2018.

Mr and Mrs W's statement made to F dated 29 October 2018 included that they were advised that *"Fractional points were an investment in property. The property would be sold in 15 years and we would have our money back with the potential to also make a profit…We now know that our points will not offer us a return on our money…"*. The statement from Mrs W dated 23 April 2025 includes "*We were told that all timeshare would be going fractional and we would not be able to sell whilst in the points system. This seemed realistic at the time as we had heard of people being unable to sell. We were told however that as we would actually own a part of a property we would be able to retrieve all our initial investments and make a profit.*"

That, then, is Mr and Mrs W's evidence about what they were told at the Time of Sale. Shawbrook Bank hasn't provided contradictory evidence from anyone present at the Time of Sale. It has provided statements from D's representatives, prepared for separate legal action taken in relation to a different sale. On examination, they are statements on what *should* happen during the sales process, rather than witness testimony on what *did* happen in this particular sale.

Their value in respect of Mr and Mrs W's complaint is limited. In my view, in terms of determining the issue at hand, they carry less weight than Mr and Mrs W's evidence of what happened at the Time of Sale. It is useful to know that D had sales compliance measures in place; it doesn't demonstrate that those compliance measures were followed in *this* sale. And in my view, the evidence supplied by Shawbrook Bank does not overcome Mr and Mrs W's account of how the Fractional Club membership was sold and/or marketed to them.

I recognise that it was possible to market and sell the Fractional Membership without breaching the relevant prohibition in Regulation 14(3). For instance, depending on the circumstances and when considering what an investment is, there is every chance that simply telling a prospective customer very factually that a fractional membership included a share in an allocated property, and that they could expect to receive a financial return or some money back on the sale of that property, would not breach Regulation 14(3). This, presumably, is essentially what Shawbrook Bank alludes to when it talks about "*referring to the prospect of a residual return on net sale proceeds*".

But what Shawbrook Bank has sought to suggest regarding what was meant by 'return' isn't what Mr and Mrs W said they were told. Their evidence is clear in referring to having their money back/retrieving all of their initial investment ***with a profit or the potential for a profit***. That is quite different from D and Shawbrook Bank's argument suggesting the purchase was motivated by "*the prospect of getting **something** back at the end of the 15-year term*."

Nor has Shawbrook Bank advanced evidence that D sold membership to Mr and Mrs W making clear that any return would be a residual one on the net sale proceeds. Its position is that the contemporaneous sales notes are silent on the matter of any return. That the notes make no reference to this is perhaps unsurprising in light of the prohibition against marketing and selling timeshares as an investment.

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)).[10]"

With this in mind, 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, in my view its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment.

The absence of a specific figure in terms of a profit isn't particularly unusual unless one is investing for a fixed or 'likely' return. For example, when a person invests in stocks and shares, or in property, any profit on such a transaction is unlikely to be known at the point of purchase. The absence of a defined profit doesn't mean a person can't be investing in hope or expectation of making a profit.

I again recognise that within the sales documentation, D made efforts to avoid specifically describing Fractional Club membership as an 'investment' or quantifying to prospective purchasers 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. But as I said in my provisional decision, in this case that wasn't enough to overcome the impression Mr and Mrs W received from the sales presentation.

It is clear to me that Mr and Mrs W are saying that D sold Fractional Club membership to them as an investment. While I don't discount their attraction to the holiday element, they only purchased an additional 3,000 points at a cost of nearly £9,000, which did not greatly increase their holiday rights. And if increasing their holiday rights was the only or even the main reason Mr and Mrs W made the purchase[11], I don't understand why they would not have simply increased their European Collection points again in the same way they had done before.

Further, although D's sales notes say Mr and Mrs W "*like the rental*", the Wish to Rent programme doesn't appear to have been a particular motivation for their purchase. They make no mention of it in their testimony and do not appear ever to have attempted to make use of it.

This points to there being a different motivation behind their purchase. The main thing which set Fractional Club membership apart from Mr and Mrs W's existing European Collection membership, was the share in the net sale proceeds of the Allocated Property. I am satisfied that the most likely explanation for their decision to purchase is the possible profits they would make from buying as an investment that – whether explicitly or implied – was marketed and/or sold to them as such by D, in breach of Regulation 14(3). I don't agree that the test in *Carney* has been wrongly applied in this case.

Having concluded that Shawbrook Bank's submissions do not provide suitable reason for me to reach a different set of conclusions from my provisional decision, I adopt my provisional findings in full as part of this final decision. Similarly, as neither party has made any

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[10] Department for Business, Innovation and Skills (BIS) – Consultation on Implementation of EU Directive 2008/122/EC on Timeshare, Long-Term Holiday Products, Resale and Exchange Contracts – July 2010

[11] I'm conscious that Shawbrook Bank has referred to the extent to which Mr and Mrs W used their Fractional Points to take holidays. While for the reasons I've set out I haven't found that this was their motivation for purchasing Fractional Club membership, I have sought to recognise the benefit they derived in allowing for suitable deductions to be made in the '*Putting Things Right*' section of this decision (see point 4)

comment in respect of the redress I proposed, I will also adopt that as my instruction on how Shawbrook Bank must resolve the complaint. For clarity, I've set this out again below.

Putting things right

1. Refund Mr and Mrs W's repayments to Shawbrook Bank under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.
2. Pay compensation equivalent to the £1,243 paid by credit card at the Time of Sale as part of the purchase cost of Fractional Club membership.
3. Refund any loss to Mr and Mrs W arising from the difference between their Fractional Club annual management charges paid after the Time of Sale and what their European Collection annual management charges would have been had they not purchased Fractional Club membership.
4. Shawbrook Bank can deduct:

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

    ii. The market value of the holidays Mr and Mrs W took using their Fractional Points if the points value of the holidays taken amounted to more than the total number of points they would have been entitled to use at the time of the holidays as ongoing European Collection members. However, this deduction should be proportionate and relate only to the additional Fractional Points that were required to take the holidays in question.

(I'll refer hereafter to the output of steps 1 to 4 as the 'Net Repayments')

5. Add simple yearly interest at 8% to each of the Net Repayments from the date each one was made until the date Shawbrook Bank settles this complaint[12].
6. Insofar as any adverse information has been recorded within the six years prior to this decision on Mr and Mrs W's credit files in connection with the Credit Agreement, this should be removed.
7. I understand Mr and Mrs W might already have relinquished their Fractional Club membership. However, if that's not the case and the Fractional Club membership is still in place at the time of this decision, as long as Mr and Mrs W agree to hold the benefit of their interest in the Allocated Property for Shawbrook Bank (or assign it to Shawbrook Bank if that can be achieved), Shawbrook Bank must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.

My final decision

For the reasons I've explained, my final decision is that to settle this complaint, Shawbrook Bank Limited must take the steps I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W and Mrs W to accept or reject my decision before 20 August 2025.

[12] HM Revenue & Customs may require Shawbrook Bank to deduct tax from this interest. If that's the case, Shawbrook Bank must give Mr and Mrs W a certificate showing how much tax it's deducted if they ask for one.

Niall Taylor
Ombudsman