DRN-5634380

The complaint

Mrs D's complaint is made in relation to a loan she took out in 2014 and is, in essence, that Shawbrook Bank Limited acted unfairly and unreasonably by (1) being party to an unfair credit relationship with her under Section 140A of the Consumer Credit Act 1974 (as amended) (the "CCA") and (2) deciding against paying a claim under section 75 of the CCA.

What happened

Mrs D and her daughter ("Mrs H") were long-standing customers of a timeshare provider I'll call "T". Over time they acquired points in T's 'European Collection', which entitled them to take holidays at various locations or, alternatively, to exchange their points and pay for 'experience' vouchers. Mrs D and Mrs H say that on occasion they found themselves unable to use all of their accrued points. In 2012 they sought to sell their membership, but couldn't source a buyer.

In September 2014 Mrs D and Mrs H were on holiday when they attended a sales meeting with T (the "Time of Sale"). In the course of the meeting they purchased membership of a different timeshare arrangement (the "Fractional Club"), entering into two agreements (I'll refer to these collectively as the "Purchase Agreement") with T to exchange the points they held under their existing European Collection timeshare membership, receiving 19,000 'fractional points' as trade-in value. In addition to the trade-in, Mrs D and Mrs H bought 9,000 more fractional points. This gave them 28,000 fractional points in total – equivalent to seven weeks of fractional rights of use – which they could use to reserve holidays.

To fund the purchase, Mrs D took out a £19,400 fixed sum loan in her sole name with Shawbrook Bank (the "Credit Agreement"). The Credit Agreement was drawn up over a 10-year term, though I understand Mrs D settled the loan after a year.

Fractional Club membership was asset backed, giving Mrs D and Mrs H more than just holiday rights. It 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 2029.

As I understand it, between 2014 and 2018 Mrs D and Mrs H used their membership on a handful of occasions to take holidays. Mrs D also attended a further marketing meeting, in April 2016, where she made a further purchase of (non-fractional) European Collection points. This arrangement is the subject of a separate complaint to us, which I have considered alongside this case.

On 14 May 2019 Mrs D used a professional representative "A" to write to Shawbrook Bank (the "Letter of Complaint"), citing concerns over what she and Mrs H were told by T at the Time of Sale: The Letter of Complaint went into some detail in over the specific assertions made and included a statement from Mrs D ("the "Witness Statement") setting out her recollections. For reasons of brevity I'll summarise those concerns here as:

- Poor sales practices, omissions, and misrepresentations by T at the Time of Sale, giving Mrs D a claim against Shawbrook Bank under the connected lender liability provisions in section 75 of the CCA; and
- Shawbrook Bank having responsibility for antecedent negotiations between T and Mrs D under the deemed agent provisions of section 56 of the CCA, making Shawbrook Bank party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of section 140A of the CCA.

Shawbrook Bank rejected all of the complaint points and Mrs D referred matters to us.

Our investigator thought that T had marketed and sold Fractional Club membership as an investment to Mrs D at the Time of Sale in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the "Timeshare Regulations"). Given the impact of that breach on Mrs D's purchasing decision, the investigator concluded that the credit relationship between Shawbrook Bank and Mrs D was rendered unfair to her for the purposes of s.140A CCA.

The investigator set out what she thought Shawbrook needed to do to put things right. In summary, this involved putting Ms D into a position as close as could reasonably be achieved to the position she would have been in had she not purchased Fractional Club membership or borrowed the money to do so. This included 'unwinding' the trade-in of her European Collection points at the Time of Sale.

A, responding on Mrs D's behalf, indicated she was willing to accept the investigator's assessment and resolution proposal. But Shawbrook Bank didn't agree with the investigator's conclusions. It said, again in summary:

- Mrs D had signed sales documents that made clear that Fractional Club membership was not an investment.
- The notes T compiled at the Time of Sale say that Mrs D liked the shorter term of Fractional Club membership, which also meant lower overall management charges. This was supported by comments in her Witness Statement, as well as the appeal of the luxury holidays that Fractional Club membership brought.
- Mrs D's Witness Statement was contradictory, because it gave several explanations for the Fractional Club membership purchase.

Our investigator wasn't persuaded to reach a different conclusion and so the case has been passed to me for review and determination.

The legal and regulatory context

In considering what's 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'll refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I'm satisfied that of particular relevance to this complaint is:

- the CCA (including Section 75 and Sections 140A-140C)
- the law on misrepresentation
- the Timeshare Regulations

- the Unfair Terms in Consumer Contracts Regulations 1999 ("UTCCR")
- the Consumer Protection from Unfair Trading Regulations 2008 ("CPUT")
- 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 & Reast 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 already noted, 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"). Your text here

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.

Where necessary, I've reached conclusions on the balance of probabilities – which means I have based them on what I consider more likely than not to have happened given the available evidence and the wider circumstances.

Shawbrook Bank's response to the investigator's assessment has been shared with A, who provided supplementary submissions and comments (which I have read in their entirety) on that response. A's submissions have been shared with Shawbrook Bank. I'm satisfied both parties have had ample opportunity to review and submit their evidence and to make any comments before proceeding with this decision.

After careful consideration, I'm upholding Mrs D'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 Mrs D'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 her 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 Mrs D as an investment which, in the circumstances of this complaint, rendered unfair the credit relationship between her 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've reached puts Mrs D in the same (or better) position as she 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 Mrs D 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)[1].

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 and Purchase Agreements.

Section 56 defines the terms "*antecedent negotiations*" and "*negotiator*". 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)*"[2].

The arrangements between Mrs D, T, and Shawbrook Bank were such that the negotiations conducted by T during its sale of Fractional Club membership to Mrs D (and her daughter) were antecedent negotiations under section 56(1)(c) – which, in turn, meant that they were conducted by T 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).

It's my understanding of relevant law[3] that antecedent negotiations under section 56 cover both the acts and omissions of T. 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*

[1] Section 140A(1) of the CCA.
[2] Section 56(1)(c) of the CCA.
[3] See, for example *Plevin*, at paragraph 31, and *Shawbrook & BPF v FOS* at paragraph 135.

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.[4]"

It follows that I see no great difficulty with Mrs D's position that T is deemed agent of Shawbrook Bank for the purpose of the pre-contractual negotiations. Indeed, this is not a point Shawbrook Bank has sought to contest.

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.

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 Mrs D 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 Mrs D and Shawbrook Bank.

<u>Was Fractional Club membership marketed and sold at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations, and if so, was this aspect material to Mrs D's decision to purchase membership?</u>

Regulation 14(3) of the Timeshare Regulations prohibited T 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.*"

[4] The Court of Appeal's decision in *Scotland and Reast* was followed in *Smith*.

Mrs D's Witness Statement, made in January 2019 and submitted as part of her complaint to Shawbrook Bank, indicates that this is what T did at the Time of Sale, saying:

> *"We were advised by the representative of the following benefits of becoming fractional owners…purchasing Fractional Ownership was a great investment opportunity. It was an interest in property, owning actual bricks and mortar with a great resale opportunity due to its high demand from new and existing customers…when the property was sold, we would get back the amount we paid for our fractional points plus some extra profit. The property…would definitely increase in price and we would definitely make a profit."*

Mrs D's Witness Statement appears to me to be a record of the evidence she gave to A about why she was unhappy with Fractional Club membership. While Shawbrook Bank has expressed some concern over what it says are contradictions in Mrs D's evidence, I'm not persuaded what it has identified amount to anything more than the various factors that informed Mrs D's purchase decision. I've also noted that Shawbrook Bank's own review of the complaint did not offer evidence to challenge what she said about T's sales presentation.

Shawbrook Bank also doesn't dispute (and I'm satisfied) that Mrs D'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*[5]". I will use the same definition.

Mrs D's share in the Allocated Property in my view clearly constituted an investment as it offered the prospect of a financial return – whether or not, like all investments, that was more than what she 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 Mrs D (and Mrs H) as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that T 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[6]. 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 Mrs D's purchase decision.

There is evidence in this case that T made efforts to address the possibility that prospective purchasers such as Mrs D might view membership of the Fractional Club as an investment.

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[5] Paragraph 56.

[6] 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.

There were, for instance, disclaimers in the paperwork T issued to Mrs D that say Fractional Club membership shouldn't be regarded as a property or financial investment.

Mrs D signed these papers, confirming she had received them. But that paperwork was spread over several different documents and across many pages. It's by no means clear that Mrs D would have read and understood the disclaimers, which were in any event provided after T's sales presentation and notably, after Mrs D 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 T 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.

Mrs D has suggested T breached Regulation 14(3) at the Time of Sale, including expressly telling her that Fractional Club membership was an investment and that there was a profit to be made on her Fractional Club membership. I find Mrs D'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 Mrs D included elements that amounted to marketing it as an investment with the prospect of her 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 T 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 Mrs D'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 T or Shawbrook Bank that shows how that benefit would have been presented to Mrs D.

Further, I think it would be fair to say that in light of the allegations Mrs D have made about what T told her, the disclaimer wording in the documents doesn't entirely counter what she says. A prospective member who was told what Mrs D says T told her 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'm satisfied Mrs D's evidence in this respect has been consistent and carries significant weight on the motivating factors in her decision to purchase membership.

As Shawbrook Bank has identified, there were of course other factors that might have influenced Mrs D's decision, not least of which was the attraction of the holiday benefits conferred by Fractional Club membership over and above her existing European Collection membership. Over the preceding years she and her daughter made good use of their membership, though this diminished significantly after becoming Fractional Club members. But that doesn't change whether the prospect of an investment offering a profit was a material consideration for Mrs D when she purchased Fractional Club membership.

It strikes me that if Mrs D and Mrs H 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 (and did subsequently). This suggests there had to be some other reason Mrs D purchased the Fractional Club membership.

Shawbrook Bank has pointed to T's notes from the Time of Sale, indicating that the shorter term of Fractional Club membership appealed to Mrs D. Given her earlier attempts to relinquish her non-fractional membership, I can see why this has been raised. On the face of it, Fractional Club membership would end following the sale of the Allocated Property, which

would be due to take place in or after 2029. Shawbrook Bank has compared this with the term of Mrs D's existing European Collection membership, which it says was scheduled to run until 2049. Presented in this way, I can see how that could have had a material bearing on Mrs D's decision.

However, I must also recognise that while the contractual term of Mrs D's European Collection membership was as Shawbrook Bank has described, the terms of that arrangement also provided for Mrs D to bring her membership to an end well before the scheduled date. She could do so either by paying relinquishment fees (subject to meeting qualifying criteria) or by requesting termination once she reached the age of 75. As Mrs D was 65 at the Time of Sale in 2014, she would have been eligible to terminate her membership in less than 10 years.

In this light, I can't see that the Fractional Club membership term offered a strong motivation for Mrs D to purchase it. Further, had T placed emphasis on the 15-year term being of benefit to Mrs D over her existing European Collection membership, it would at best have been quite misleading. Either way, I don't think I can properly find the evidence supports Shawbrook Bank's position in this respect.

Overall then, it seems to me it was the prospect of a financial gain from Fractional Club membership that was most likely the key motivating factor when Mrs D decided to go ahead with the purchase and the associated borrowing.

Taking all of this into account, I find it more likely than not that T marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, and that Mrs D'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 Mrs D and Shawbrook Bank was unfair to her. It follows that I uphold her complaint.

Putting things right

I consider it fair and reasonable that Shawbrook Bank put Mrs D back in the position (as far as can practically be achieved) she would have been in had she not purchased the Fractional Club membership (that is, had she and Mrs H not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement. This is provided both Mrs D and her daughter agree to assign to Shawbrook Bank their Fractional Points or hold them on trust for Shawbrook Bank if that can be achieved.

I'm not persuaded that had Mrs D not purchased Fractional Club membership, she would have cancelled her European Collection membership prior to the point at which she met the qualifying criteria to do so. Although at the Time of Sale Mrs D and her daughter were finding they had unused points, they were taking some holidays and continued to do so afterwards. Like Fractional Club membership, Mrs D and Mrs H 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 Mrs D had to pay under Fractional Club membership. It follows that any refund of annual management charges or membership fees that Mrs D paid from the Time of Sale as part of Fractional Club membership should be calculated based on the difference between those charges and those she would otherwise have paid as European Collection members.

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

1. Refund Mrs D's repayments to it under the Credit Agreement, including any sums paid to settle the debt.
2. Refund any loss to Mrs D arising from the difference between the Fractional Club annual management charges paid after the Time of Sale and what the European Collection annual management charges would have been had she not purchased Fractional Club membership.
3. Shawbrook Bank can deduct:

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

   ii. The market value of the holidays[7] Mrs D and/or Mrs H 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[8].

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

4. 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[9].
5. It's possible Mrs D and Mrs H 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 Mrs D and Mrs H 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 set out, I uphold this complaint insofar as it relates to Shawbrook Bank Limited's actions in relation to the 2014 loan. To resolve it, I direct Shawbrook Bank Limited to take the steps I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs D to accept or reject my decision before 16 July 2025.

Niall Taylor
Ombudsman

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[7] It can be difficult to reasonably and reliably determine the market value of holidays taken a long time ago and/or that might not have been available on the open market. If it isn't practical or possible to determine the market value of the holidays Mrs D and/or Mrs H 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.

[8] For example, if Mrs D took a holiday worth 5,500 Fractional Points and they would have been entitled to use a total of 5,000 European Collection Points 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.

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