DRN-5699691

The complaint

Mr and Mrs B complain 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 their claim under Section 75 of the CCA.

What happened

In 2002, Mr and Mrs B purchased a timeshare, which gave them 40 annual points to spend on holidays. These points were later converted into 4,000 annual European Collection points after the original timeshare provider was taken over by another company (the 'Supplier'). Mr and Mrs B increased their annual European Collection points through an additional purchase in 2012. This left them with 8,000 annual European Collection points to spend on holidays with the Supplier and its affiliates.

On 22 July 2014 (the 'Time of Sale'), Mr and Mrs B traded in their 8,000 European Collection points for 8,000 fractional points to become members of the Supplier's Fractional Property Owners Club (the 'Fractional Club').

The transaction was valued at £12,923, and was paid for as follows:

- Trade-in value of 8,000 European Collection points at £1 per point - £8,000
- A loan (the 'Credit Agreement') with the Lender, in Mr and Mrs B's joint names - £4,923

Fractional Club membership was asset backed – which meant it gave Mr and Mrs B 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 B – using a professional representative (the 'PR') – wrote to the Lender on 20 July 2020 (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.

<u>Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale</u>

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

1. Told them that they were investing in ownership of a fraction of a property that would be sold on a set date and make them a profit.
2. That they were guaranteed to exit from the contract when all liabilities would be terminated.
3. Failed to tell them about ever-increasing management fees and that these remained payable until the Allocated Property was sold.

4. Failed to tell them that the sale of the Allocated Property could be postponed by the trustee.

Mr and Mrs B 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 B.

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 B 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. 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').
2. They were pressured into purchasing Fractional Club membership by the Supplier.
3. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
4. The Lender had paid a secret commission to the Supplier for arranging the Credit Agreement.

The Lender issued its final response letter on 15 September 2020, saying it was unable to investigate the complaint since it hadn't been provided with a letter of authority for Mr and Mrs B.

Mr and Mrs B 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 B 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 B 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.

Having considered everything, I came to the same conclusion as our Investigator and thought Mr and Ms B's complaint should be upheld. I issued a provisional decision (PD), setting out my thoughts and invited both parties to respond with anything else they wished me to consider before I issued a further decision. The PD included 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.

The legal and regulatory context that I think is relevant in this case includes the following:

The Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) (the 'CCA')

The timeshare at the centre of the complaint in question was paid for using restricted-use credit that was regulated by the Consumer Credit Act 1974. As a result, the purchase was covered by certain protections afforded to consumers by the CCA provided the necessary conditions were and are met. The most relevant sections as at the relevant time are below.

Section 56: Antecedent Negotiations
Section 75: Liability of Creditor for Breaches by a Supplier
Sections 140A: Unfair Relationships Between Creditors and Debtors
Section 140B: Powers of Court in Relation to Unfair Relationships
Section 140C: Interpretation of Sections 140A and 140B

<u>Case Law on Section 140A</u>

Of particular relevance to the complaint in question are:

1. *The Supreme Court's judgment in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 ('Plevin') remains the leading case.*
2. *The judgment of the Court of Appeal in the case of Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast') sets out a helpful interpretation of the deemed agency and unfair relationship provisions of the CCA.*
3. *Patel v Patel [2009] EWHC 3264 (QB) ('Patel') – in which the High Court held 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 relationship or otherwise the date the relationship ended.*
4. *The Supreme Court's judgment in Smith v Royal Bank of Scotland Plc [2023] UKSC 34 ('Smith') – which approved the High Court's judgment in Patel.*
5. *Deutsche Bank (Suisse) SA v Khan and others [2013] EWHC 482 (Comm) – in Hamblen J summarised – at paragraph 346 – some of the general principles that apply to the application of the unfair relationship test.*
6. *Carney v NM Rothschild & Sons Ltd [2018] EWHC 958 ('Carney').*
7. *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm) ('Kerrigan').*
8. *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').*

<u>My Understanding of the Law on the Unfair Relationship Provisions</u>

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."

So, the negotiations conducted by the Supplier during the sale of the timeshare(s) in question was/were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140A(1)(c) CCA.

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

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

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

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

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

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

they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[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.

<u>The Law on Misrepresentation</u>

*The law relating to **misrepresentation** is a combination of the common law, equity and statute – though, as I understand it, the Misrepresentation Act 1967 didn't alter the rules as to what constitutes an effective misrepresentation. It isn't practical to cover the law on misrepresentation in full in this decision – nor is it necessary. But, summarising the relevant pages in Chitty on Contracts (33rd Edition), a material and actionable misrepresentation is an untrue statement of existing fact or law made by one party (or his agent for the purposes of passing on the representation, acting within the scope of his authority) to another party that induced that party to enter into a contract.*

The misrepresentation doesn't need to be the only matter that induced the representee to enter into the contract. But the representee must have been materially influenced by the misrepresentation and (unless the misrepresentation was fraudulent or was known to be likely to influence the person to whom it was made) the misrepresentation must be such that it would affect the judgement of a reasonable person when deciding whether to enter into the contract and on what terms.

However, a mere statement of opinion, rather than fact or law, which proves to be unfounded, isn't a misrepresentation unless the opinion amounts to a statement of fact and it can be proved that the person who gave it, did not hold it, or could not reasonably have held it. It also needs to be shown that the other party understood and relied on the implied factual misrepresentation.

Silence, subject to some exceptions, doesn't usually amount to a misrepresentation on its own as there is generally no duty to disclose facts which, if known, would affect a party's decision to enter a contract. And the courts aren't too ready to find an implied representation given the challenges acknowledged throughout case law.

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

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

The relevant rules and regulations that the Supplier in this complaint had to follow were set out in the Timeshare Regulations. I'm not deciding – nor is it my role to decide – whether the Supplier (which isn't a respondent to this complaint) is liable for any breaches of these Regulations. But they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair. After all, they signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

The Regulations have been amended in places since the Time of Sale. So, I refer below to the most relevant regulations as they were at the time in question:

- *Regulation 12: Key Information*
- *Regulation 13: Completing the Standard Information Form*
- *Regulation 14: Marketing and Sales*
- *Regulation 15: Form of Contract*
- *Regulation 16: Obligations of Trader*

The Timeshare Regulations were introduced to implement EC legislation, Directive 122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts (the '2008 Timeshare Directive'), with the purpose of achieving 'a high level of consumer protection' (Article 1 of the 2008 Timeshare Directive). The EC had deemed the 2008 Timeshare Directive necessary because the nature of timeshare products and the commercial practices that had grown up around their sale made it appropriate to pass specific and detailed legislation, going further than the existing and more general unfair trading practices legislation.[2]

The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations')

The CPUT Regulations put in place a regulatory framework to prevent business practices that were and are unfair to consumers. They have been amended in places since they were first introduced. And it's only since 1 October 2014 that they imposed civil liability for certain breaches – though not misleading omissions. But, again, I'm not deciding – nor is it my role to decide – whether the Supplier is liable for any breaches of these regulations. Instead, they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair as they also signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

Below are the most relevant regulations as they were at the relevant time:

- *Regulation 3: Prohibition of Unfair Commercial Practices*
- *Regulation 5: Misleading Actions*
- *Regulation 6: Misleading Omissions*
- *Regulation 7: Aggressive Commercial Practices*
- *Schedule 1: Paragraphs 7 and 24*

The Unfair Terms in Consumer Contract Regulations 1999 ('the UTCCR')

[2] See Recital 9 in the Preamble to the 2008 Timeshare Directive.

The UTCCR protected consumers against unfair standard terms in standard term contracts. They applied and apply to contracts entered into until and including 30 September 2015 when they were replaced by the Consumer Rights Act 2015.

Below are the most relevant regulations as they were at the relevant time:

- *Regulation 5: Unfair Terms*
- *Regulation 6: Assessment of Unfair Terms*
- *Regulation 7: Written Contracts*
- *Schedule 2: Indicative and Non-Exhaustive List of Possible Unfair Terms*

County Court Cases on the Sale of Timeshares

1. *Hitachi v Topping (20 June 2018, Country Court at Nottingham) – claim withdrawn following cross-examination of the claimant.*
2. *Brown v Shawbrook Bank Limited (18 June 2020, County Court at Wrexham)*
3. *Wilson v Clydesdale Financial Services Limited (19 July 2021, County Court at Portsmouth)*
4. *Gallagher v Diamond Resorts (Europe) Limited (9 February 2021, County Court at Preston)*
5. *Prankard v Shawbrook Bank Limited (8 October 2021, County Court at Cardiff)*

Relevant Publications

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

What I've provisionally decided – and why

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

And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr and Mrs B 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 B's complaint, it isn't necessary to make formal or detailed findings on all of them. This includes the allegation that, for example, the Supplier misrepresented the Fractional Club membership and that the Lender ought to have accepted and paid their claim under Section 75 of the CCA.

That's because, even if that aspect of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs B in the same or a better position than they would be if the redress was limited to the other points of complaint.

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

Having considered the entirety of the credit relationship between Mr and Mrs B and the Lender along with all of the circumstances of the complaint, 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;*
2. *The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*
3. *Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; and*
4. *The inherent probabilities of the sale given its circumstances.*

I have then considered the impact of these on the fairness of the credit relationship between Mr and Mrs B 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 B'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 B say that the Supplier did exactly that at the Time of Sale – saying the following during the course of this complaint:

'At this meeting we were told that we were not buying points but buying a share of a property. We could buy a share of a property and that when the 15 years is up you will receive a letter to say that we will get our money back and what profit we were getting.'

The Letter of Complaint mirrored this saying, among other things:

'The timeshare product being sold was also represented as an investment. Our client and his wife were advised that they were investing in a fraction of a property that would be sold on a set date in the future. It was represented to our client and his wife that they would receive their purchase price back and in addition in all likelihood a profit from the sale.'

Mr and Mrs B allege, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because they were told by the Supplier that they would make a profit from the sale of their Fractional Club membership.

The term "investment" is not defined in the Timeshare Regulations. In Shawbrook & BPF v FOS, the parties agreed that, by reference to the decided authorities, "an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit" at [56]. I will use the same definition.

Mr and Mrs B's share in the Allocated Property 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. 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 B 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.

I think that Mr and Mrs B's description of what happened – that they were told Fractional Club membership would result in them getting their 'money back' and in a 'profit' – reflects the fact that, as far as they recall, the Supplier marketed Fractional Club membership as an investment i.e., something that offered them the prospect of a financial gain. And, in that context, it wasn't unreasonable of them to infer, from the idea (presented to them by the Supplier) that there would be a return on their money, that the Supplier was holding out more than a mere hope of a profit. Indeed, based on what I've seen so far, I don't think it's reasonable to interpret Mr and Mrs B's recollections in a way that suggests anything other than that.

I acknowledge that 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 the financial value of Mr and Mrs B's share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. The Lender says there were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs B as an investment as follows:

- *Purchase Agreement Terms and Conditions*
  [Supplier] Fractional Points, Reservations and Rentals
  1 You should not purchase Your [Supplier] Fractional Points as an investment in real estate. The Purchase Price paid by You relates primarily to the provision of memorable holidays for the duration of Your ownership.

- *Customer Compliance Statement/Declaration to Treating Customers Fairly*
  5 We understand that the purchase of our [points] is an investment in our future holidays, and that it should not be regarded as a property or financial investment. We recognize that the sale price achieved on the sale of the Property in the Owners Club (and to which our [points] have been attributed) will depend on market conditions at that time…

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork, especially in the context of a face-to-face sale. And there are a number of strands to Mr and Mrs B's allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including 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 B 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

As a service, we have been provided with a number of documents relating to how the Supplier sold and marketed Fractional Club membership. They include:

- *'Fractional Sales Logic – 2013' document – provided a comparison between fractional ownership and owning a holiday home including advice to sales agents about what they should tell consumers including the phrase 'real estate' and 'the fractions should be compared to the purchase of a second home'.*
- *'Fractions FAQ – Early Training' document – answered FAQs about fractional ownership compared to the Supplier's European Collection, including the question 'what are the benefits of Fractional Ownership?' and in the answer: 'the chance of a return on the money they have spent on membership'.*
- *Fractional Ownership Comparison – a document comparing the pluses and minuses of four channels for purchasing holidays: rental/tour operator, timeshares, Freehold ownership, and Fractional Ownership.*
- *A set of slides produced on 14 September 2012 with the intention of using them as a training tool for the Supplier's sales staff and as a sales aide when selling Fractional Club membership to potential purchasers ('the September 2012 Slides') according to an email from the Supplier's Vice President of Legal Services and European General Counsel ('SC').*
- *A 98-page document called "Sales Representative Training Manual Europe". While the document itself is undated, it was said by the Supplier to be some basic training given to new sales representatives in 2013 (the '2013 Training Manual').*

Although the Supplier initially provided these documents to us to help us understand how it sold Fractional Club membership, it has since told us that it was mistaken in doing so as they were not used and did not inform how the Supplier sold and marketed Fractional Club membership to potential members – all of which I find curious. As such, the Lender and Supplier say we should not rely on them when deciding complaints relating to the sale of Fractional Club membership.

As I think that there is other evidence sufficient to justify this complaint being upheld, I have not made findings on these documents and whether they tell us anything useful about how the Supplier marketed and sold Fractional Club membership at the Time of Sale.

Mr and Mrs B were already members of the Supplier's European Collection at the Time of Sale – holding 8,000 European Collection points. They paid, on average, just less than £1.50 for each of those points. And if Mr and Mrs B simply wanted to increase their holiday rights, it is difficult for me to understand why they would have paid £4,923 (plus trade in their European Collection points valued at £8,000) in return for 8,000 Fractional Points. That like-for-like exchange gave them no increase in holiday rights. And it would have been much less expensive for them to simply purchase more European Collection points in the alternative if that's what they wanted to do.

So, unless the Supplier relied (explicitly or implicitly) on other benefits of Fractional Club membership to promote its sale, like its investment elements, it is difficult to understand why Mr and Mrs B made their decision to switch timeshare products and move to fractional.

The exchange of 8,000 European Collection points for 8,000 Fractional Points did not, for example, increase Mr and Mrs B's holiday purchasing power. And it didn't bring other benefits from an increase in Mr and Mrs B's membership tier.

Fractional Club membership offered Mr and Mrs B a shorter membership term of about 15 years compared to European Club membership, which could continue much longer. Mr B was 53 years old at the time of sale and Mrs B was 50 years old. And they would have been able to give up their European Collection membership once either of them reached the age of 75 (or sooner if they became unable to travel due to ill health). So, I recognise that Fractional Club membership allowed them to exit their timeshare sooner than would otherwise have been the case. It's possible that, to some extent at least, Mr and Mrs B's purchase was motivated by the shorter membership term, albeit they only allude to this in their client statement as a factor in the sale in 2012.

But it seems more likely than not that, given the circumstances of the sale in question, a share in the proceeds of sale of the Allocated Property was a major factor in the Supplier's marketing of membership to Mr and Mrs B. And as I can't currently see why other aspects of the purchase would have persuaded Mr and Mrs B to enter into the Purchase Agreement at the price they paid for it had the Supplier not held out the prospect of a profit from the sale as Mr and Mrs B say it did, based on everything I've seen so far, I think it is more likely than not that the Supplier sold and marketed Fractional Club membership to them as an investment in breach of Regulation 14(3) of the Timeshare Regulations.

Was the credit relationship between the Lender and Mr and Mrs B 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 B 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.

It also it seems to me in light of Carney and Kerrigan that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs B and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

The Lender referred to the Supplier's sales notes completed at the Time of Sale. These, it says, make no mention of the product having been purchased as an investment. I haven't been provided with a copy of the sales notes but am prepared to accept what the Lender says on this point. But I also think it's unlikely that such notes would record evidence of a regulatory breach (of, say, Regulation 14(3)) if there was one. So, I find these notes to be of limited value in this case.

Regarding Mr and Mrs B's recollections of the Time of Sale, I'm aware of the Lender's concerns that, for example, they weren't provided at the time of complaint but instead just prior to the Investigator's assessment. However, I think the recollections are largely

consistent with the contents of the Letter of Complaint which isn't in dispute as dating back to 20 July 2020. I've no reason to doubt the authenticity of Mr and Mrs B's recollections or that they genuinely date back to 8 July 2020 as the client statement indicates.

In terms of the contents of the recollections, the Lender says the allegations made 'are not in correlation' with the Letter of Complaint. I think it's fair to say that the latter is more detailed and includes more heads of complaint. But I don't find that surprising since that was drafted by a PR being paid to professionally represent Mr and Mrs B. In relation to whether or not the Fractional Club membership was marketed and sold as an investment and the impact of this on Mr and Mrs B, I find the two documents to be broadly consistent.

On my reading of Mr and Mrs B's written recollections, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with the purchase. They strongly indicate that getting some money back was an incentive to buy at the Time of Sale. This is framed in their recollections in such a way as to suggest that making a profit was important to them, to the extent that they don't for example mention a desire to exit their contract when addressing the sale in 2014.

Mr and Mrs B's own testimony demonstrates that they were interested in holidays. And that is not surprising given the nature of the product at the centre of this complaint. But as Mr and Mrs B 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 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 their existing membership. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

Mr and Mrs B have not said or suggested, for example, that they would have pressed ahead with the purchase in question had the Supplier not led them to believe that Fractional Club membership was an appealing investment opportunity. And as they faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I'm not persuaded that they would have pressed ahead with their purchase regardless.

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 B 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 also set out in the PD how I intended to direct the Lender to put things right for Mr and Mrs B.

The PR confirmed that Mr and Mrs B accepted my provisional findings, adding only that they didn't wish their timeshare to be reinstated.

The Lender said it didn't intend to challenge my PD given the specific facts of this case and would provide 'redress documentation' for Mr and Mrs B to consider. It did share its observations on some aspects of the PD that it did not agree with, but it did not ask me to revisit my provisional findings.

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.

I note the points the Lender raises in response to, and about, my decision to provisionally uphold this complaint. But, given that the Lender didn't ask me to reconsider my decision and has now agreed to make an offer to Mr and Mrs B, I won't comment further on the aspects it highlighted.

As neither party has sought to challenge my PD, I see no need to change the conclusions I reached in it or the outcome.

Putting things right

Having found that Mr and Mrs B would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable to put them back in the position they would have been in had they not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr and Mrs B agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs B were existing European Collection members and their membership was traded in against the purchase price of Fractional Club membership. Under their European Collection membership, they had 8,000 European Collection Points. And, like Fractional Club membership, they had to pay annual management charges as European Collection members. So, had Mr and Mrs B not purchased Fractional Club membership, they would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr and Mrs B from the Time of Sale as part of their Fractional Club membership should amount only to the difference between those charges and the annual management charges they would have paid as ongoing European Collection members.

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

(1) The Lender should refund Mr and Mrs B's repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.

(2) In addition to (1), the Lender should also refund the difference between Mr and Mrs B's 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.

(3) The Lender can deduct:

   i. The value of any promotional giveaways that Mr and Mrs B used or took advantage of; and
   ii. The market value of the holidays* Mr and Mrs B took using their Fractional Points *if* the Points value of the holiday(s) taken amounted to more than the total number of European Collection Points they would have been entitled to use at

the time of the holiday(s) 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 holiday(s) in question.

For example, if Mr and Mrs B took a holiday worth 2,550 Fractional Points and they would have been entitled to use a total of 2,500 European Collection Points at the relevant time, any deduction for the market value of that holiday should relate only to the 50 additional Fractional Points that were required to take it. But if they would have been entitled to use 2,600 European Collection Points, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

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

(6) If Mr and Mrs B's Fractional Club membership is still in place at the time of this decision, as long as they 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 their Fractional Club membership.

*I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Mr and Mrs B 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 Mr and Mrs B a certificate showing how much tax it's taken off if they ask for one.

My final decision

For these reasons, my final decision is that I uphold this complaint. I require Shawbrook Bank Limited to put things right for Mr and Mrs B as explained above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B and Mr B to accept or reject my decision before 15 August 2025.

Nimish Patel
Ombudsman