

## **The complaint**

Mr and Mrs B'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**

Mr and Mrs B purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 20 July 2018 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,820 fractional points at a cost of £18,151 (the 'Purchase Agreement').

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 paid for their Fractional Club membership by taking finance of £23,323 from Shawbrook (the 'Credit Agreement'), with the additional funds used to repay an existing loan Mr and Mrs B held with Shawbrook.

Mr and Mrs B – using a professional representative (the 'PR') – wrote to Shawbrook on 5 January 2022 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against Shawbrook under Section 75 of the CCA, which it failed to accept and pay.
2. Shawbrook being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.
3. The decision to lend being irresponsible because Shawbrook did not carry out the right creditworthiness assessment.
4. The Credit Agreement being unenforceable because it was not arranged by a credit broker regulated by the Financial Conduct Authority (the 'FCA') to carry out such an activity.

Shawbrook didn't uphold Mr and Mrs B's complaint, so they referred it to the Financial Ombudsman Service and it was reviewed by one of our Investigators. Our Investigator recommended that the complaint be upheld, as they thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr and Mrs B 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 Shawbrook and Mr and Mrs B was rendered unfair to them for the purposes of section 140A of the CCA.

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

## **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 to this complaint 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

#### Case Law on Section 140A

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*').

#### My Understanding of the Law on the Unfair Relationship Provisions

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.

However, in this case, Shawbrook is no longer the creditor for the purpose of an assessment of unfairness under Section 140A. It has assigned all rights under the Credit Agreement to a third party in 2019. Where the complaint is that the relationship is unfair, Section 140C(2)(a) of the CCA states that – as a matter of law – the debt acquirer is responsible:

*'references to the creditor or to the debtor under a credit agreement include references to the person to whom his rights and duties under the agreement have passed by assignment or operation of law.'*

Further, Goode: Consumer Credit Law and Practice is a widely recognised expert commentary on the application of the Consumer Credit Act 1974 and related legislation. It explains the position as follows at 45A.65:

*'For the purpose of ss 140A and 140B references to the creditor include references to the person to whom his rights and duties under the agreement has passed by assignment or operation of law, thus tracking (except in relation to green deal plans) the definition of 'creditor' in s 189(1). The general position, as with the other provisions of the Act referred to earlier, is that any order which has the effect of reducing or discharging the debtor's liability or otherwise setting aside any duty imposed on the debtor or a surety by virtue of the agreement or any related agreement binds the assignee even where the grounds for the order are acts or omissions of the assignor. This reflects the principle stated earlier that an assignee takes subject to equities.'*

### The Law on Misrepresentation

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 (33<sup>rd</sup> 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.

### 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(s) 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.<sup>1</sup>

### 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(s):

- Regulation 3: Prohibition of Unfair Commercial Practices

---

<sup>1</sup> See Recital 9 in the Preamble to the 2008 Timeshare Directive.

- Regulation 5: Misleading Actions
- Regulation 6: Misleading Omissions
- Regulation 7: Aggressive Commercial Practices
- Schedule 1: Paragraphs 7 and 24

### The Consumer Rights Act 2015 (the 'CRA')

The CRA, amongst other things, protects consumers against unfair terms in contracts. It applies to contracts entered into on or after 1 October 2015 – replacing the Unfair Terms in Consumer Contracts Regulations 1999.

Part 2 of the CRA is the most relevant section as at the relevant time(s).

### **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').

### **My provisional decision**

I issued a provisional decision on Mr and Mrs B's complaint last month, explaining why I didn't think Shawbrook was responsible for some of the matters raised and why I didn't think the remainder of the complaint should be upheld. I said:

With regard to Shawbrook's handling of Mr and Mrs B's claim under Section 75 of the CCA, I said:

The PR, on Mr and Mrs B's behalf, says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale. They include the suggestion that the Fractional Club membership had been misrepresented by the Supplier as an investment, through which Mr and Mrs B would have a share of a property and obtain a "considerable return".

I consider that Mr and Mrs B's acquisition of a share in the Allocated Property did amount to an investment – as it offered them the prospect of a financial return. Presenting the timeshare as an investment would not, therefore, have amounted to a misrepresentation. And the amount of money Mr and Mrs B receive on that investment can only be known after the membership term ends, when the Allocated Property is sold. So even if I were to accept that any such comments were made by the Supplier about the level of potential return Mr and Mrs B could expect to obtain, I cannot say they would amount to a misrepresentation.

It is also said in the Letter of Complaint that Mr and Mrs B were told that they could sell the timeshare back to the resort. No such option was available. This was clearly set out in an Information Statement that Mr and Mrs B were given at the Time of Sale. The Purchase Agreement they signed included a declaration to the effect that they had received this Information Statement. I do not find it likely that the Supplier would've suggested something so starkly contradictory to not only its standard practice, but to the terms and conditions that were provided to Mr and Mrs B at the time.

Lastly it was said in the Letter of Complaint that Mr and Mrs B were "*made to believe*

*that [they] would have access to the holiday's apartment at any time all around the year".* I understand this to mean that Mr and Mrs B thought they would be able to stay at the Allocated Property whenever they wanted, which was not the case. But it may also mean that they thought availability of accommodation more broadly was guaranteed.

Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork Mr and Mrs B would've been given stated that the availability of holidays was subject to demand. And with regard to the usage of the Allocated Property, the Purchase Agreement that Mr and Mrs B signed clearly stated that their Fractional Points "*do not transfer or grant the right of use to any allocated property*". I find it unlikely that the Supplier would've made promises of the type suggested in the Letter of Complaint. And while I accept that Mr and Mrs B may not have been able to take certain holidays, I have not seen enough to persuade me that the Supplier breached the terms of the Purchase Agreement.

For these reasons, therefore, I do not think Shawbrook is liable to pay Mr and Mrs M any compensation for the alleged misrepresentations or any breach of contract by the Supplier. And with that being the case, I do not think Shawbrook acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

With regard to the fairness of the credit relationship between Mr and Mrs B and Shawbrook, I said:

The Letter of Complaint set out why Mr and Mrs B say that the credit relationship between them and Shawbrook 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. The contractual terms setting out the obligation to pay annual management charges for the duration of their membership – and more significantly, the consequences of failing to do so – were unfair contract terms.

I do not think we can consider this aspect of Mr and Mrs B's complaint against Shawbrook. I say this because Mr and Mrs B's account was assigned to a third party in June 2019. It is, therefore, that third party, as the assignee of the debt, with whom Mr and Mrs B now hold a credit relationship and, as such, is the responsible party for any claim that it is unfair.

I understand that Mr and Mrs B initially raised this complaint with the current creditor of the debt, who issued a final response letter but only to the effect that it was not responsible for the complaint that it had forwarded on to Shawbrook to investigate and respond. As we have a copy of the 'Notice of Assignment' issued by Shawbrook, I have looked into whether it would be possible to consider this part of Mr and Mrs B's complaint against the current creditor. The regulatory authorisation of the creditor that acquired Mr and Mrs B's debt ended in 2015, which in turn means this service no longer has the power to consider such a complaint.

With regard to the allegation that Shawbrook had lent to Mr and Mrs B irresponsibly, I said:

The PR says that the right checks weren't carried out before Shawbrook lent to Mr and Mrs B. Within their own statement, Mr and Mrs B recall expressing concern about their

ability to afford the loan repayments to the Supplier at the Time of Sale. And the history of payments to the account shows that Mr and Mrs B fell into arrears shortly after the loan was taken out. So I have carefully reviewed Shawbrook's decision to lend to Mr and Mrs B at the outset.

Mr and Mrs B completed an application form that provided Shawbrook with details of their income and broader personal circumstances. Shawbrook also reviewed details of Mr and Mrs B's existing financial commitments, including their mortgage payments, utility bills and other borrowing. It also completed other creditworthiness checks, taking into account Mr and Mrs B's overall indebtedness and their credit score. I think these were reasonable and proportionate checks for Shawbrook to have carried out. And I think Shawbrook's decision to lend based on the information that these checks provided was reasonable. There is nothing, in what I have seen, that ought to have led Shawbrook to consider that the Credit Agreement would prove unaffordable for Mr and Mrs B.

If there is any further information on this (or any other points raised in this provisional decision) that Mr and Mrs B wish to provide, I would invite them to do so in response to this provisional decision.

And with regard to the suggestion that the Credit Agreement was unenforceable because it was arranged by a credit broker that was not regulated by the FCA to carry out that activity, I said:

The PR says that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that Shawbrook wasn't permitted to enforce the Credit Agreement as a result.

However, having looked at the Financial Ombudsman Service's internal records, I can see that the business named on the Credit Agreement as the credit intermediary was, at the Time of Sale, authorised by the FCA. Shawbrook says the Supplier's permissions covered credit broking. So in the absence of any evidence to the contrary, I am not persuaded that the Credit Agreement was arranged by an unauthorised credit broker.

I invited both parties to send me anything else they wanted me to take into account before I made a final decision. Shawbrook responded to confirm receipt and that it had nothing further to add.

The PR replied to request clarification of the regulatory status of the creditor that acquired Mr and Mrs B's debt, but did not reply with any further comments or evidence for me to consider insofar as the complaint against Shawbrook was concerned.

### **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.

Having done so, and with neither party having provided any further information or evidence in light of my provisional findings, I see no reason to reach a different conclusion.

So this final decision simply confirms the findings as set out in my provisional decision, as reproduced above.

**My final decision**

For the reasons I've explained, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs B to accept or reject my decision before 23 October 2025.

Ben Jennings  
**Ombudsman**