DRN-5957599

The complaint

Mrs R's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with 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 R was the member of a timeshare provider (the 'Supplier') – having purchased a number of products from it over time. But the product at the centre of this complaint is her membership of a timeshare that I'll call the 'Fractional Club' – which she bought on 29 August 2014 (the 'Time of Sale'). She traded in her existing 12,500 timeshare membership points as part of this purchase, entering into an agreement with the Supplier to buy 16,000 fractional points at a cost of £15,130 (the 'Purchase Agreement').

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

Mrs R paid for her Fractional Club membership by taking finance of £15,130 from the Lender (the 'Credit Agreement').

Mrs R – using a professional representative (the 'PR') – wrote to the Lender on 28 June 2019 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving her 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.

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

Mrs R says that the Supplier made pre-contractual misrepresentations at the Time of Sale – namely that the Supplier told her that Fractional Club membership had a guaranteed end date when that was not true.

Mrs R says that she has a claim against the Supplier in respect of the misrepresentation set out above, and therefore, under Section 75 of the CCA, she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mrs R.

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

The Letter of Complaint set out why the PR says that the credit relationship between her and the Lender was unfair to her under Section 140A of the CCA. In summary, it said:

1. the Fractional Club membership constituted an Unregulated Collective Investment Scheme (UCIS).

2. She was pressured into purchasing Fractional Club membership by the Supplier.
3. The Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs.

The PR subsequently argued that the Fractional Club membership was marketed and sold to Mrs R as an investment in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').

The Lender dealt with Mrs R's concerns as a complaint and issued its final response letter on 4 September 2019, rejecting it on every ground.

Mrs R then referred the complaint to the Financial Ombudsman Service. It was assessed by two Investigators both of whom, having considered the information on file, rejected the complaint on its merits.

Mrs R 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 a different conclusion as our Investigators and thought Mrs R's complaint should be upheld. I issued a provisional decision (PD), setting out my thoughts and invited both parties to respond with anything further they wished me to consider before I issued a final 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 to this complaint is as follows:

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').*

<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.

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

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 (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.

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 Contracts Regulations 1999 (the 'UTCCR')

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(s):

- *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

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

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 the 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 Mrs R as an investment, which, in the circumstances of this complaint, rendered the credit relationship between her and the Lender unfair to her 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 Mrs R complaint, it isn't necessary to make formal findings on all of them. This includes the allegation that, for example, the Supplier misrepresented the Fractional Club membership and the Lender ought to have accepted and paid the 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 Mrs R in the same or a better position than she would be if the redress was limited to misrepresentation.

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

Having considered the entirety of the credit relationship between Mrs R 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 Mrs R and the Lender.

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 R's decision to purchase membership?

The Lender does not dispute, and I am satisfied, that Mrs R'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 Mrs R says that the Supplier did exactly that at the Time of Sale – saying the following in her Statement of Truth dated 21 January 2021, provided to this service on 28 January 2021:

'We were told, without any doubt whatsoever, that the Fractional product was an investment unlike the… timeshares we have purchased previously. This distinction was clearly described to us both verbally and on diagrams drawn on paper.

We were told that after 15 years, we would get all our money back on the sale of the property that we would be linked to.

We asked the Rep what amount of money we would expect to be returned – the Rep categorically stated we would recover all the money which included the purchase price of the Fractional product plus the cost of all the timeshares we have previously purchased.'

Mrs R alleges, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because she was told by the Supplier that Fractional Club membership was the type of investment that would only increase in value.

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.

Mrs R's share in the Allocated Property clearly constituted an investment as it offered her the prospect of a financial return – whether or not, like all investments, that was more than what she 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 Mrs R 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 her as an investment, i.e. told her or led her to believe that Fractional Club membership offered her the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mrs R, the financial value of her share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mrs R as an investment.

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork especially when considering what's likely to have happened during a sale that took place in-person. And there are a number of strands to Mrs R's allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that membership of the Fractional Club was expressly described as an "investment" in several different contexts and (2) that membership of the Fractional Club could make her 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 Mrs R or led her to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered her 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'.

There's little that's been presented in the way of documentary evidence about how the Supplier presented Fractional Club membership. For example, I haven't been provided with any set sales presentations the Supplier 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 R has suggested the Supplier 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 their Fractional Club membership. I find Mrs R'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 her 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 the Supplier 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 R'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 the Supplier or the Lender that shows how that benefit would have been presented to Mrs R.

Further, I think it would be fair to say that in light of the allegations Mrs R has made about what the Supplier told her, the disclaimer wording in the documents doesn't entirely counter what she says. A prospective member who was told what Mrs R says the Supplier 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 accept that being asked to recall specific information some years later is rendered more difficult with the passage of time. The Statement of Truth provided is signed and dated 21 January 2021, so several years after the Time of Sale. But it does seem to me that Mrs R's evidence in this respect is detailed, plausible and carries significant weight on the motivating factors in her decision to purchase membership. She does, for instance, clearly elaborate on why she agreed to purchase Fractional Club membership:

'<u>The reason we were persuaded to purchase the Fractional product was as follows:</u>

a. We had already spent £20,649 on previous timeshares. This money was, as the Rep described, gone – there was no tangible price we could recover from these existing timeshare purchases.

b. The way the Rep described the purchase of the Fractional product – by paying a

further £15,130, we were buying an investment which in 15 years would recover all our money back that we have paid to [the Supplier] over the years - £35,779 (£15,130 + £20,649).

c. *We rechecked with the Rep and he confirmed that we would not just be recovering the Fractional product price of £15,130 but the whole £35,779.*

…

e. *We only purchased the Fractional product for no other reason than recovering all our money from purchasing the [previous] timeshares and the… Fractional product.'*

There were of course other factors that no doubt affected Mrs R'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'd made use of her membership and continued to do so as a Fractional Club member. She also gained a shorter term as the Fractional Club membership ran for 15 years. But that doesn't change whether the prospect of an investment offering a profit was a material consideration for Mrs R when she purchased Fractional Club membership.

It strikes me that if Mrs R had merely been interested in increasing the holiday rights she already held, she could simply have increased her existing points holding again in the same way as she had before. This suggests there had to be some other reason Mrs R purchased the Fractional Club membership. That doesn't mean she wasn't interested in holidays or reducing the term of her timeshare. Her use of the existing membership demonstrates the former at least. That is hardly surprising given the nature of a timeshare product. But on my reading of Mrs R's evidence, it was the prospect of a financial gain from Fractional Club membership that was a strong motivating factor when she decided to go ahead with her purchase and the associated borrowing.

Conclusion

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

I then set out in the PD how I intended to direct the Lender to put things right for Mrs R.

The PR said Mrs R accepted my PD and had no further comments to make. The Lender didn't accept my PD. In summary, it said the following:

- I'd attached insufficient weight to the contemporaneous documents from the Time of Sale, which the Lender considered to be more reliable than the PR's Letter of Complaint and Mrs R's testimony.

- More specifically regarding Mrs R's testimony, it felt this was brief, generic, vague, inconsistent with the Letter of Complaint, and inaccurate about key facts. It said it didn't see a copy of Mrs R's testimony until October 2023 – more than two years after it was said to have been written and more than nine years after the Time of Sale. As such, it said '*this allegation should therefore be time-barred*' or at least the timing of it factored into the reliability of the testimony.

- It considered I'd gone beyond the definition of '*investment*' that I said I had

adopted in my PD, conflating the return of '*some money*', which didn't imply a financial gain, with a '*return on investment*', which did imply a financial gain. It didn't consider there was compelling evidence that the Supplier had sold or marketed the Fractional Club product as an investment.

- I had reversed the burden of proof when deciding that the Supplier's alleged selling or marketing of the Fractional Club membership as an investment had played a material part in Mrs R's purchasing decision. I'd assumed it was material as a starting point, rather than looking for positive evidence that it had played a material part.

The complaint was returned to me to decide.

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, I've arrived at the same conclusions as I did in my PD, and for the same reasons. However, I'll address the Lender's key submissions in response to my PD.

Firstly, I don't agree that I adopted a more expansive definition of investment than I said I would in the PD, or that it was more likely the Supplier simply told Mrs R some money would be returned at the end of the membership. I explained little had been presented to this service in terms of the sales presentation Mrs R would have seen and that I thought that meant it was possible the Supplier's sales and marketing materials implied and led Mrs R to believe that the product was an investment as per the definition I adopted. While I appreciate the Lender disagrees, I don't think it has said anything new about this.

Secondly, I also don't agree that I reversed the burden of proof as the Lender has suggested. I don't recognise that in the PD at all, which I think was in fact focused on the positive evidence for an investment motive on Mrs R's part. I've never disputed that Mrs R may well have had multiple reasons for agreeing to the purchase – for example, as the Lender restates, in doing so she gained 3,500 additional annual points and a shorter membership term. I acknowledged as much in my PD and do so again in this decision. But I still believe that investing was at least material to her decision.

The Lender has also suggested I didn't attach appropriate weight to the contemporaneous paperwork. On this I think there's little more I can say than I did in the PD. For the reasons explained in it, I don't think the Supplier's disclaimers relating to the matter of the Fractional Club product being an investment were as effective as the Lender has suggested. In fact, to some extent I think they would have given Mrs R mixed messages.

The remainder of the Lender's concerns are about the quality of the evidence put forward by Mrs R and the PR on her behalf. I didn't think these were a reason to doubt the overall credibility of Mrs R's testimony, and my views on that haven't changed.

It may well be that the PR's Letter of Complaint is not entirely aligned with the claims made by Mrs R in her witness statement at all times, but that is (unfortunately) not unusual when claims managers are involved, who may put forward a generic set of arguments. My focus in the PD was on trying to ascertain what Mrs R's actual recollections were of the Time of Sale, and whether the words attributed to her were likely to be representative of what she recalled. For the reasons explained in that PD, I think it's likely Mrs R did recall being told by the Supplier that the Fractional Club membership was an investment in the sense that it was something from which she could hope for or expect a financial gain. And I think that's not

inconsistent with how, based on what's been provided regarding the Supplier's relevant sales and marketing materials (or lack thereof), it's likely the Supplier's representatives would have positioned the Fractional Club product.

Finally, the Lender has also suggested the PR (or other claims managers) may have influenced Mrs R's reference to '*investment*' in her testimony because of the way they were managing claims at that time. I'm not sure this assists the Lender as one would think that the reason Mrs R agreed to engage and appoint the PR was because she considered the Supplier had sold the Fractional Club product to her as an investment. In other words, she appointed the PR because she identified the Supplier as having sold the product to her in that way.

In light of the above, I remain of the view that the Supplier breached Regulation 14(3) when selling the Fractional Club membership to Mrs R, that this was material to her purchasing decision, and rendered her credit relationship with the Lender unfair to her for the purposes of Section 140A.

Putting things right

Having found that Mrs R 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 her back in the position she would have been in had she not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mrs R agrees to assign to the Lender her Fractional points or hold them on trust for the Lender if that can be achieved.

Mrs R was an existing European Collection member and her membership was traded in against the purchase price of Fractional Club membership. Under her European Collection membership, she had 12,500 European Collection points. And, like Fractional Club membership, she had to pay annual management charges as a European Collection member. So, had Mrs R not purchased Fractional Club membership, she 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 Mrs R from the Time of Sale as part of her Fractional Club membership should amount only to the difference between those charges and the annual management charges she would have paid as an ongoing European Collection member.

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

(1) The Lender should refund Mrs R'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 Mrs R's Fractional Club annual management charges paid after the Time of Sale and what her European Collection annual management charges would have been had she not purchased Fractional Club membership.

(3) The Lender can deduct:

    i. The value of any promotional giveaways that Mrs R used or took advantage of;

and

ii. The market value of the holidays* Mrs R took using her Fractional Points *if* the Points value of the holiday(s) taken amounted to more than the total number of European Collection points she would have been entitled to use at the time of the holiday(s) as an ongoing European Collection member. 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 Mrs R took a holiday worth 2,550 Fractional Points and she 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 she 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 Mrs R's credit file in connection with the Credit Agreement reported within six years of this decision.

(6) If Mrs R's Fractional Club membership is still in place at the time of this decision, as long as she agrees to hold the benefit of her interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify her against all ongoing liabilities as a result of her 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 Mrs R took using her 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 her usage.

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

My final decision

For the above reasons, my final decision is that I uphold the complaint. I require Shawbrook Bank Limited to put things right for Mrs R as explained above.

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

Nimish Patel
Ombudsman