DRN-5990485

The complaint

Mr B'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 him 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 B purchased membership of a timeshare ("the Fractional Club") from a timeshare provider ("the Supplier") on 29 October 2013 ("the Time of Sale"). He and his partner, who I will call Ms H, entered into an agreement with the Supplier to buy 1,240 fractional points at a cost of £20,088 ("the Purchase Agreement"). But after trading in his existing timeshare, he ended up paying £8,688 for membership of the Fractional Club.

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

Mr B paid for his Fractional Club membership by borrowing £8,688 from the Lender in his sole name ("the Credit Agreement"). (For that reason, he is the only person eligible to bring this complaint.)

Mr B – using a professional representative ("the PR") – wrote to the Lender on 12 August 2019 ("the Letter of Complaint") to complain that the Credit Agreement had been mis-sold. In that letter and in subsequent correspondence, the complaint issues crystallised as:

1. Misrepresentations by the Supplier at the Time of Sale giving Mr B a claim against the Lender under section 75 of the CCA, which the Lender failed to accept and pay.
2. The Fractional Club being an unregulated collective investment scheme ("CIS").
3. 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.

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

Mr B says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale. However, I think that most of these are better characterised as grounds for alleging that there was an unfair credit relationship under section 140A. The one which is unequivocally an allegation of misrepresentation is that Mr B says the Supplier told him that Fractional Club membership had a guaranteed end date, which he says is not true.

Mr B says that he has a claim against the Supplier in respect of that misrepresentation, and therefore, under section 75 of the CCA, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr B.

(2) The Fractional Club was unregulated

The PR says that the Fractional Club fell within the definition of a CIS in section 235 of the

Financial Services and Markets Act 2000 ("FSMA"), and that the Supplier had not been authorised by the Financial Conduct Authority ("the FCA") to promote a CIS, meaning that the product was unregulated. It says that promoting the Fractional Club was therefore unlawful.

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

The Letter of Complaint set out several reasons why Mr B says that the credit relationship between him and the Lender was unfair to him under section 140A of the CCA. In summary, they include the following:

1. The fact that the annual management charges would increase above the inflation rate was not explained.
2. Mr B was pressured into purchasing Fractional Club membership by the Supplier.
3. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions, which it said amounted to breaches of the FCA's Principles for Businesses. In particular, the Supplier failed to explain that his children would inherit his liability under the Purchase Agreement if he died.

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

Mr B then referred the complaint to the Financial Ombudsman Service, represented by the PR. The PR added two new arguments, which were:

1. The Credit Agreement was unenforceable because it was not arranged by a credit broker regulated by the FCA to carry out such an activity. Since the FCA was not responsible for credit brokers until 2014, and the Time of Sale was in 2013, I will treat this as a complaint that the broker was not regulated by the Office of Fair Trading ("the OFT").
2. The interest rate of 17.4% was "extortionate".

I will treat both of those points as new arguments in support of the original complaint that the credit relationship was unfair under section 140A (rather than as entirely new complaints).

Mr B's complaint was assessed by an investigator who, having considered the information on file, upheld the complaint on the ground that the Supplier had mis-sold the Fractional Club by selling and/or marketing it 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 did not accept the investigator's opinion. Mr B initially accepted the investigator's assessment, but the PR later objected to the investigator's proposed redress, which is why it was passed to me.

I wrote a provisional decision which read as follows.

My provisional decision

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under an FCA regulation (specifically rule DISP 3.6.4R) to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:

- The CCA (including sections 56, 75 and 140A to 140C);
- The law on misrepresentation;
- The Timeshare Regulations;
- The Unfair Terms in Consumer Contracts Regulations 1999 ("the UTCCR");
- The Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 ("the Collective Investment Schemes Order");
- The Consumer Protection from Unfair Trading Regulations 2008 ("the CPUT Regulations");
- The Consumer Credit (Agreements) Regulations 2010 ("the CCA Regulations");
- The FCA's Principles for Businesses;
- Case law on section 140A of the CCA – including, in particular:
    - The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ("*Plevin"*) (which remains the leading case in this area);
    - *Scotland v British Credit Trust [2014] EWCA Civ 790 ("Scotland and Reast")*
    - *Patel v Patel* [2009] EWHC 3264 (QB) (*"Patel"*);
    - The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 (*"Smith"*);
    - *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 (*"Carney"*);
    - *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) (*"Kerrigan"*);
    - *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) (*"Shawbrook & BPF v FOS"*).

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But as 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 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 do not currently think this complaint should be upheld.

But 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, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

What is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

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

The CCA introduced a regime of connected lender liability under section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.

In short, a claim against the Lender under section 75 essentially mirrors the claim Mr B could make against the Supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender does not dispute that the relevant conditions are met in this complaint. And as I'm satisfied that section 75 applies, if I find that the Supplier is liable for having misrepresented something to Mr B at the Time of Sale, the Lender is also liable.

The PR says Mr B was told that the Allocated Property would be sold on a particular date – it says he wasn't told the Supplier could postpone the sale, at its absolute discretion, for a further two years. However, there is no mention anywhere in Mr B's witness statement that the Supplier told him the property would be sold on a particular date. Nor do the sales documents say more than that the process of selling the Allocated Property will begin after 19 years – they do not go so far as to guarantee when the sale will complete. And the reference to two years is just that if the sale is not completed within two years, the sale date may only be extended if all of the Fractional holders agree unanimously.

As there's nothing else on file that persuades me that there were any false statements of existing fact made to Mr B by the Supplier at the Time of Sale, I do not think there was an actionable misrepresentation by the Supplier for the reasons the PR alleges.

Therefore, I do not think the Lender is liable to pay Mr B any compensation for the alleged misrepresentation of the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the section 75 claim in question.

Section 235 of the FSMA: was the Fractional Club an unregulated CIS?

The Fractional Club was a timeshare contract, as defined in regulation 7 of the Timeshare Regulations, under which timeshare agreements are regulated. The Collective Investment Schemes Order says (in paragraph 13 of the Schedule), *"Arrangements do not amount to a collective investment scheme if the rights or interests of the participants are rights under a timeshare contract…"* I'm therefore satisfied that it was not an unregulated CIS.

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

I have already explained why I am not persuaded that the contract entered into by Mr B was misrepresented by the Supplier in a way that makes for a successful claim under section 75 of the CCA and outcome in this complaint. But Mr B also says that the credit relationship between him and the Lender was unfair under section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that he has concerns about. It is those concerns that I explore here.

As section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between the Mr B and the Lender was unfair.

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 two 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."*

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr B's membership of the Fractional Club 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 the 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.

I have considered the entirety of the credit relationship between Mr B and the Lender along with all of the circumstances of the complaint and I do not 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; and
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;
4. The inherent probabilities of the sale given its circumstances.

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

I have then considered the impact of these on the fairness of the credit relationship between Mr B and the Lender.

The Supplier's sales and marketing practices at the Time of Sale

Mr B's complaint about the Lender being party to an unfair credit relationship was also made for several reasons, all of which I set out at the start of this decision.

They include the allegation that the Supplier misled Mr B and thereby breached the FCA's Principles 2, 6 and 7, for the same reasons they gave for his section 75 claim for misrepresentation. But given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was a breach of the Principles.

Mr B says that he was pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledge that he may have felt weary after a sales process that went on for a long time. But he says little about what was said and/or done by the Supplier during his sales presentation that made him feel as if he had no choice but to purchase Fractional Club membership when he simply did not want to. He was also given a 14-day cooling off period and he has not provided a credible explanation for why he did not cancel his membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mr B made the decision to purchase Fractional Club membership because his ability to exercise that choice was significantly impaired by pressure from the Supplier.

The interest rate was set out clearly in the Credit Agreement. On the same page of the agreement, the 14-day withdrawal period was explained. So if Mr B was not satisfied with the interest rate, he had a reasonable opportunity to change his mind and reject the loan. I think that is fair.

I'm not persuaded, therefore, that Mr B's credit relationship with the Lender was rendered unfair to him under section 140A for any of the reasons above. Of course, our investigator found that the relationship was unfair for a different reason altogether, which was that he thought the Fractional Club membership was marketed and sold to Mr B as an investment in breach of a prohibition against selling timeshares in that way. So I've carefully considered this below.

Was Mr B induced to buy the Fractional Club membership as a result of it being marketed and sold to him as an investment in breach of the Timeshare Regulations?

The Lender does not dispute, and I am satisfied, that Mr 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 membership of the Fractional Club as an investment. This is what it said:

"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."

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 paragraph 56. I will use the same definition.

Mr B's share in the Allocated Property clearly, in my view, constituted an investment as it offered him the prospect of a financial return – whether or not, like all investments, that was more than what he 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.

I accept that it's *possible* that Fractional Club membership was marketed and sold to Mr B as an investment in breach of regulation 14(3).

However, 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.

I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in *Carney* and *Kerrigan* (respectively) on causation.

In *Carney*, HHJ Waksman QC said the following in paragraph 51:

> *"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"*

So it seems to me that, if I am to conclude that a breach of regulation 14(3) led to a credit relationship between Mr B and the Lender that was unfair to him and warranted relief as a result, then an important consideration is whether any alleged breach by the Supplier of regulation 14(3) (which, due to section 56 of the CCA, is deemed to be something done on by the Lender) led Mr B to enter into the Purchase Agreement and the Credit Agreement.

On my reading of the evidence provided and Mr B's initial recollections of the sales process at the Time of Sale, even if there was such a breach, I do not think that this is what induced him to enter into the Purchase Agreement and the Credit Agreement.

Mr B's witness statement is only one paragraph long, so I think it is worth setting it out here in full:

> *"Having already purchased 1 week timeshare with [the Supplier] a representative approached me while I was in Tenerife when I explained that we were not happy with what we had purchased in so far as we were unable to book time during our preferred dates as there was no availability. I was taken in a representative's car to [the Supplier's] premises whereby I was informed that in order to secure this I would need to purchase another additional week. My partner and two young children were then subjected to a six hour ordeal frequently supplied with alcoholic drinks with scribbled presentations and that by buying more timeshare weeks we would be able to secure preferred times, and that by purchasing more time this would be a sound investment with the opportunity to sell on at a profit. The children were*

becoming increasingly irritable and after such a long time I felt the only way to get away was to sign up to a loan (Shawbrook being the provider) having felt pressured to do so. On this basis I strongly feel that [I] was mis-sold the product, being told that I had to sign up on the same day. Subsequently I paid off the loan of £8688 as the rates were punitive."

I read the reference to a sound investment as meaning the opportunity to sell on his club membership to a third party for more than he paid for it, rather that meaning his share of the proceeds of the Allocated Property at the end of the membership term. But Mr B does not actually say that this is what motivated his decision. Rather, the paragraph taken as a whole strongly suggests that his real motivations for the purchase were (1) to increase the availability of preferred booking dates, and (2) to get out of the long-running presentation.

On balance, therefore, even if the Supplier did market or sell the Fractional Club membership as an investment in breach of regulation 14(3), I am not persuaded that Mr B's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (*i.e.*, a profit). On the contrary, I think the evidence suggests he would have pressed ahead with his purchase whether or not there had been a breach of regulation 14(3). And for that reason, I do not think the credit relationship between Mr B and the Lender was unfair to him even if the Supplier had breached that regulation.

The provision of information by the Supplier at the Time of Sale

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mr B when he purchased membership of the Fractional Club at the Time of Sale. But he and his PR say that the Supplier failed to provide him with all of the information he needed to make an informed decision.

Specifically, they say the Supplier failed to explain that his children would inherit his liability under the Purchase Agreement if he died. However, that is not true, and so failing to tell him otherwise was not a misleading omission.

They also complain that the Supplier failed to explain that the annual management charges would increase above the inflation rate. However, according to the PR's own figures in its claim letter to the Lender, the maintenance fees Mr B paid actually *decreased* each year, except in 2016 when they went up by 87p. So I don't uphold that complaint point.

The PR says that the Supplier failed to describe the services it was providing and failed to itemise the cash price of the services on the Credit Agreement, which it was required to do under the CCA Regulations. But having looked at the Credit Agreement, I think it complies with both of those requirements. I don't think very much detail was required here. "Fractional Property Ownership" seems adequate to me, and the format of the agreement does not leave room for much more than that. But if more detail was required, then I can't see how Mr B was prejudiced by its omission, given that all the information he needed was in the Purchase Agreement, so I don't think this would make the relationship with the Lender unfair.

Moreover, I haven't seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Mr B was unfair to him because of an information failing by the Supplier.

The relationship was unfair because the loan was arranged by a credit broker that was not regulated by the OFT to carry out that activity

The PR says that the Credit Agreement was arranged by an unauthorised credit broker, the

upshot of which is to suggest that the Lender wasn't and isn'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 firm named by the PR as the credit intermediary did hold, at the Time of Sale, a Consumer Credit Licence issued by the Office of Fair Trading. And in the absence of any evidence to suggest that its licence did not cover credit broking, I am not persuaded that the Credit Agreement was arranged by an unauthorised credit broker.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Mr B was unfair to him for the purposes of section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr B's section 75 claims, and I am not persuaded that the Lender was party to a credit relationship with him under the Credit Agreement that was unfair to him for the purposes of section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate him.

Responses to my provisional decision

Shawbrook Bank denied that the Supplier's sales process leads its customers to conclude that the Fractional Club is an investment. It argued that Mr B's own evidence suggested that his purchase had been mainly motivated by holidays.

The PR, on behalf of Mr B, made the following submissions:

1. Notwithstanding the Collective Investment Schemes Order, the timeshare had all the hallmarks of an unregulated CIS and so I should treat it as one, as a matter of *"substance over form."*

2. The uncertain resale value and uncertain sale date of the Allocated Property meant that describing it as a sound investment, and saying that it could be sold for a profit, was a misrepresentation.

3. In considering Mr B's decision to purchase, I had not given enough weight to his evidence that the timeshare was *"a sound investment with the opportunity to sell on at a profit."* He could not have made a profit from increasing the availability of holidays or exiting a long-running presentation (the other motives he'd mentioned); he could only have made a profit from the investment. Mr B could only have realised this if there had been a breach of regulation 14(3).

4. I had not considered the Supplier's 2011 training manual, which was indicative of how the salesman would have framed the sale of the timeshare to Mr B, and this had been a pivotal selling point.

5. The reference in Mr B's statement to "a sound investment" was to the proceeds of the sale of the Allocated Property at the end of his membership – not to the alternative

opportunity to sell it earlier than that.

The PR also re-iterated that Mr B had been subjected to a high-pressure sale, and supplemented this point by observing that he had not been told he could seek advice or to consider alternatives to the loan.

Later, in response to a general enquiry by one of my colleagues (and not specifically in reference to Mr B's complaint), the PR sent us a handwritten note, dated 29 May 2019, of a phone call between Mr B and one of the PR's case handlers. (I will refer to this as "the call note".) This said (among other things): *"You will have an opportunity at the end of term to sell the fractional at a profit."* That is potentially relevant to point 5 above.

My findings

I will deal with the PR's points in the same order that I have summarised them above.

1. The question of whether a product is regulated or not is a matter of law. The timeshare was regulated under the Timeshare Regulations, and so it is not open to me to make a finding that it was unregulated or intrinsically unlawful just because it resembles some other product.

2. I think that the inherent nature of any investment is that its ultimate value when it is redeemed is always uncertain – the value of investments can go up or down. Over the term of 19 years, it can't realistically be predicted how much a property will be worth once it's sold, as property markets fluctuate. I think Mr B would have been aware of that at the Time of Sale. But it was reasonable to assume that the value of the property would probably increase, and so I don't think that was a misrepresentation. Also, it is not possible to say that it was a false statement, since the Time of Sale was twelve years ago and there are still seven years to go, and it cannot be known whether the sale of the Allocated Property will be unprofitable.

3. In my provisional decision I considered separately the two issues of (1) whether there was a breach of regulation 14, and (2) if there was, whether that breach was material to Mr B's decision to buy. And although I did not make a finding about issue (1), I assumed that there had been a breach for the purposes of assessing issue (2). So I looked at Mr B's statement to see what he said about his motives for buying, and I found that the only time he mentioned the timeshare being an investment with an opportunity to make a profit was when he was describing what the sales presentation was like. He then went on to explain why he had bought the timeshare and taken out the loan, which he did not say was for profit but because the children were getting irritable, it seemed like it was the only way to get out of the meeting, and he'd been told he had to sign up on the same day. I didn't think that was indicative of buying the timeshare because he'd hoped to make a profit.

   In other words, while I accept that Mr B recalls being told that the timeshare would be a good investment, his evidence does not state that this was the basis of his decision to buy it.

   Nevertheless, I have reconsidered his statement in a more holistic way than the compartmentalised way in which I considered it originally, in case he meant to convey that the opportunity to profit had figured in his thinking but had simply failed to express himself as clearly as he might have. And it does seem plausible to me that if a salesman told Mr B that the timeshare would be a good investment and that he might make a profit on it, then this would be a factor he would have taken into account. But even on that more generous interpretation of what he wrote, I still get the overall impression that it

was not his real motive for buying the timeshare – it still strongly comes across as him just wanting to escape from *"a six-hour ordeal."* So I have not changed my mind about this point.

4. With that being the case, it is still not necessary for me to make a finding about whether regulation 14(3) was breached – although I accept that it may have been.

   However, I have still considered the relevant training manual as additional evidence in connection with the matters discussed in paragraph 3 above – namely, to what extent this was likely to have influenced Mr B's decision. The 2011 training manual was superseded by a new manual in June 2013, about four months before the Time of Sale, and so it is the 2013 manual (titled "2013/14 Sales Induction") which I have considered. But that manual barely mentions how the product works, except that on page 27 it just says *"you buy a fraction of a … property."* So that did not change my mind about what I said above.

5. I accept that in Mr B's witness statement, the sentence *"this would be a sound investment with the opportunity to sell on at a profit"* could indeed have been referring to either (or both) of two different aspects of the timeshare, namely (1) a sound investment because the property would be worth more when it was sold after 19 years, and (2) the opportunity to sell it earlier than that.

   The call note can be read as lending support to the former interpretation. I accept that it is a genuine document, created on the date written on it, and that it is an authentic record of a phone call made on that date. However, in the context of the call note as a whole, I think the sentence I have quoted above is too ambiguous to rely on as evidence as to whether, and to what degree, Mr B was influenced by being told that he could sell the Allocated Property at a profit at the end of his membership of the club. For one thing, it is clear that the call note is not only a record of what Mr B said on the call, but also a record of what the call handler said too. For example, the first line reads *"Hi* [Mr B's first name] – *please explain how you got involved with the Timeshare"*. So the line *"You will have an opportunity at the end of term to sell the fractional at a profit"* is equally consistent with the call handler telling Mr B how the product worked, not necessarily Mr B recounting what the Supplier had told him (which would be likely to begin with "we", the word used in most of the other sentences). So I do not regard this note as very probative.

   However, as I've said above, I do think that the typed witness statement is capable of being read either way, and so I have reconsidered Mr B's evidence in that light. But this still does not affect my interpretation of Mr B's motives for buying the product. For the reasons I set out in my assessment of point 3 above, I remain of the view that Mr B's decision was motivated by other factors.

6. Finally, I have not changed my view that the 14-day cooling-off period was sufficient time for Mr B to reconsider his decision in circumstances where he was no longer under the pressure he felt in the sales meeting. That was also enough time for him to take advice, or to consider alternative ways to finance his purchase.

For these reasons, I remain of the view that the Lender does not have to take any further action.

My final decision

My decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 30 December 2025.

Richard Wood
Ombudsman