DRN-4503169

The complaint

Mr and Mrs A say that Shawbrook Bank Limited ("Shawbrook") didn't act fairly or reasonably when considering its obligations under the Consumer Credit Act 1974 ("CCA") in relation to two loans taken to pay for timeshares.

What happened

In August 2013, Mr and Mrs A took out a timeshare membership from a timeshare supplier ("the Supplier"). This was membership of the Fractional Property Owners Club ("FPOC Membership"). FPOC Membership provided Mr and Mrs A with a number of 'points' every year that they could spend to stay at properties provided by the Supplier. But this was also 'asset backed', so that their membership was linked to a specified property ("the Property"). Mr and Mrs A had no preferential right to stay at the Property, but after nineteen years, the Property would be placed for sale and the proceeds of sale would be divided amongst the people whose membership was linked to the Property. FPOC Membership cost £8,698 and if was paid for by Mr and Mrs A using a ten-year loan from Shawbrook.

In February 2014, Mr and Mrs A took out a further timeshare membership from the Supplier. This was also FPOC Membership and worked in the same way.[1] This cost £5,029 and was paid for by Mr and Mrs A taking a loan for £5,508 from Shawbrook.[2] The loan was interest free and set to run for twelve months.

In May 2017, Mr and Mrs A complained to Shawbrook using the assistance of a professional representative ("PR"). The complaint was set out at length in a ten-page letter. It's not practical nor necessary to set out in detail everything that was raised, but in summary it was said:

- Shawbrook was liable to pay Mr and Mrs A compensation in relation to the sale of the FPOC Memberships due to the operation of ss.75 and 140A CCA.
- There was no proper assessment of Mr and Mrs A's ability to repay the loans at the time of lending. This meant the relationships between Mr and Mrs A and Shawbrook arising out of both sales were unfair as defined by s.140A CCA.
- Mr and Mrs A were unduly pressured into taking out the FPOC Memberships and the associated loans.
- Mr and Mrs A were misled by the Supplier into thinking they had to take out the first FPOC Membership as the only way they could exit their existing timeshare membership and that, if they took out FPOC Membership, they would be able to exit it after a finite number of years. Both of these statements were untrue. This was something Shawbrook were liable for under s.75 CCA.
- The Supplier breached its agreements with Mr and Mrs A as the contracts didn't guarantee that the proceeds of sale of the Properties would be passed to them when they were sold. Further, the agreements stated that the Supplier couldn't guarantee

[1] It isn't clear from the paperwork, but it appears that this second fractional sale replaced the membership purchased the year before. However, if I'm wrong about that, it doesn't make a difference to the outcome of this complaint.
[2] The loan was for slightly more as it also covered the management fees due in the first year.

when the Properties were sold, so that led to the possibility that management fees would continue indefinitely. Finally, Mr and Mrs A had no control over the costs of the annual management fees. All of these were unfair terms under the Unfair Terms in Consumer Contracts Regulations 1999 ("UTCCR") and let to a liability under s.75 CCA.

- A term of the agreements between Mr and Mrs A and the Supplier had been found to lead to an unfair debtor-creditor relationship in the case of *Link Financial Ltd v Wilson* [2014] EWHC 252 (Ch).
- The payment of commission by Shawbrook to the Supplier when the loans were arranged also led to an unfair debtor-creditor relationship.

Shawbrook responded in August 2017. It said, amongst other things:

- Mr and Mrs A had the opportunity to read the documents provided by the Suppler at each purchase and signed to say they understood the memberships. Added to that, they had a fourteen-day cooling off period too, so they could have cancelled their memberships if they changed their minds.
- The Supplier didn't apply undue pressure.
- An appropriate assessment was undertaken before it decided to lend.
- The extracts of the Supplier's terms set out by PR didn't provide an accurate description of the way FPOC Memberships worked in practice.

Unhappy with Shawbrook's response, PR referred a complaint to our service on Mr and Mrs A's behalf in September 2017. One or our investigators considered the complaint, but didn't think the complaint should have been upheld. She considered both the 2013 and 2014 sales, but concluded that in neither case was she satisfied there was a misrepresentation or breach of contract by the Supplier or an unfair debtor-creditor relationship that meant Shawbrook needed to pay compensation. She also thought there was nothing to suggest the loans were unaffordable for Mr and Mrs A.

PR, on Mr and Mrs A's behalf, disagreed with our investigator. It pointed to the judgment in *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd; R. (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ("the Judicial Review") and said that, following the judgment, if the memberships had been sold to Mr and Mrs A as investments, that would be enough to cause an unfair debtor-creditor relationship. PR argued that the evidence from Mr and Mrs A showed that their memberships had been sold in that way, and therefore their complaint should lead to the same outcome as the decisions considered in the Judicial Review.

As the parties couldn't come to an informal agreement, the complaint was passed to me for a decision.

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.

When deciding complaints, I'm required by DISP 3.6.4 R of the Financial Conduct Authority's ("FCA") Handbook to take into account:

> *"(1) relevant:*
>
> > *(a) law and regulations;*
> > *(b) regulators' rules, guidance and standards;*

(c) codes of practice; and

(2) (where appropriate) what [the ombudsman] considers to have been good industry practice at the relevant time."

Where I need to make a finding of fact based on the evidence, I make my decision on the balance of probabilities. In other words, when I make a finding that something happened, that's because I think it's more likely than not that that thing did happen.

Mr and Mrs A's evidence

Mr and Mrs A have provided signed letters that set out their memories of the sales. In March 2017, they explained that in 2010 they paid for a 'trial' membership with the Supplier, which they paid in full themselves. Then later that year they purchased a full membership, using a loan from a different lender. This membership provided them 'points' to spend to stay at properties linked to the Supplier, but it wasn't linked to a specified property as with fractional membership. In September 2013, they purchased FPOC Membership from the Supplier, using a loan from Shawbrook. They paid this loan off in full by the end of 2013. I've seen in another letter that in October 2013, Mrs A wrote to Shawbrook to ask it how to make a lump sum payment to their loan as some of their savings have been '*freed up*'.

With respect to the 2014 purchase, they said:

"In April 2014, we upgraded again to two weeks in Tenerife, at Paradise as we felt it would be a better investment in the Canaries, due to the all year holiday opportunity. We paid £5,508.00 by a deposit, then £459.00 monthly (shown in our Household Budget), and paying a LUMP SUM of £4,000.00 in May 2014 […] again through CLC with Shawbrook."

Attached to the letter was a document written by Mr and Mrs A on 8 February 2017, setting out their claim against the Supplier and it '*pressured selling techniques*'. In summary, they said:

- In January 2010, they stayed at the Supplier's accommodation in the UK and were impressed by it and were interested in the possibility that there might be accommodation of a similar quality in other countries.
- In September 2010, they said that "*[a]fter a hard days sale pitch, we decided to further invest*" with the Supplier.
- In January 2011, Mr and Mrs A took out a further timeshare with the Supplier. They described that they were given a '*very hard sell over several days'*, but when they returned home they realised they couldn't afford it at the time, so cancelled within the fourteen-day cooling off period.
- Holidays were taken in 2012 and earlier 2013, with no pressure selling.
- Mr and Mrs A described the 2013 sale as a day of '*pressured selling*", during which they were told that their existing timeshare points were less valuable and they would benefit by changing to fractional membership. They said "[*t]his seemed to make sense at the time, as it would then be a more saleable asset, which we thought we could maybe leave to our children or grandchildren.*"
- The following year, Mr and Mrs A went to another sale meeting they said was pressured. They were offered FPOC Membership attached to a resort in Tenerife. They said they went ahead with the purchase as they *"felt [it] to be a better option for re-sale when we got to be unable to travel. Also the annual good weather in Tenerife seemed a better option too."*
- In 2017, they attended a meeting with the Supplier to talk about exiting their membership. That was because, due to their health and age, they no longer wanted

it and would rather have used their income toward their family. But the Supplier tried to sell them a different type of fractional membership, which they refused to purchase.

The FPOC Membership sale documents

A large number of documents were provided from the time of sale. I don't need to set them out in detail, but I have highlighted some of the relevant parts.

There were two documents, one from each sale, called a "MEMBER'S DECLARATION" that Mr and Mrs A signed when they bought the FPOC Memberships. The document was one page long and they initialled each of the 15 clauses. The declarations include the following identical clauses:

> *"4. We understand that CLC, the Trustee or the Manager does not and will not run any resale or rental programmes and will not repurchase Fractions (or Vacation Club Points) or act as an agent in the sale other than as a trade in against future purchases…*
>
> *5. We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that CLC makes no representation as to the future price or value of the Fraction.*
>
> *…*
>
> *14. We have received a copy of our Agreement together with the notices and Information Statement (which we have had adequate time to review before signing) required under the EU Timeshare Directive 2008/122/EC."*

There were also two documents called an "INFORMATION STATEMENT" provided with each sale that set out the standard information required to be provided under the Timeshare Regulations. In both sales, this document ran to nine pages and described details about the FPOC Membership, including a description of the product, as well as information about how it worked, for example, by setting out some of the maintenance costs payable by members. Extracts of that read (and were identical in the statement provided with both sales):

> *"Your Fractional Rights will start on the date shown on the Purchase Agreement and expires automatically when your Allocated Property is sold. There is a provision for distribution of funds or assets to Owners at a future Sale Date after the payment of any taxes and all costs related to that Allocated Property as described in the Rules. Fractional rights have been designed to be used and enjoyed and not bought with the expectation or necessity of future financial gain."*
>
> *"…The Vendor, Manager and the Trustee are unable to give any guarantees on the ultimate sales price as this depends on many factors including the state of the property market and supply and demand at the time of sale."*
>
> *"The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for direct purposes of a trade in nor as an investment in real estate. CLC makes no representation as to the future price or value of the Allocated Property or any Fractional rights"*
>
> *"**Investment advice***
>
> *The Vendor, any sales or marketing agent and the Manager and their related businesses (a) are not licensed investment advisors authorized by the Financial Services Authority to provide investment or financial advice; (b) all information has*

been obtained solely from their own experiences as investors and is provided as general information only and as such it is not intended for use as a source of investment advice and (c) all purchasers are advised to obtain competent advice from legal, accounting and investment advisors to determine their own specific investment needs; (d) no warranty is given as to any future values or returns in respect of then Allocated Property."

The law

I don't think the legal framework is in dispute, so I'll only set out a summary of the law relating to the complaint made:

Mr and Mrs A have said that Shawbrook is liable to pay compensation due to the operation of the CCA, specifically that there was a misrepresentation and breach of contract that Shawbrook was liable for under s.75 CCA and that Shawbrook was party to an unfair debtor-creditor relationship, as defined by s.140A CCA, caused by the sale of the FPOC Memberships. And as this is relevant law, I have to think about it when coming to what I think, is a fair and reasonable outcome to the complaint.

The sale of timeshares like Mr and Mrs A's was regulated by The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations"). The regulation referred to by PR in response to our investigator's view is Reg.14(3), which reads:

"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."

I think the following judgments, amongst others, help to set out the approach to take when thinking about unfair debtor-creditor relationships in the context of this complaint:

i. *Plevin v. Paragon Personal Finance Limited* [2014] UKSC 61 ("Plevin")
ii. *Carney v. NM Rothschild & Sons Ltd* [2018] EWHC 958 ("Carney")
iii. *Kerrigan v. Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ("Kerrigan")
iv. *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd; R. (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ("the Judicial Review")

Having considered those judgements, I think the following principles can be drawn:

i. the question of whether the relationship between a debtor and creditor is unfair is the central issue to determine. The standard of commercial conduct is relevant, as is the difference in knowledge and understanding between the parties if sufficiently extreme.
ii. the breach of a legal duty, such as the breach of the Timeshare Regulations by a supplier acting on a creditor's behalf (due to s.56 CCA), is neither necessary for a finding of an unfair debtor-creditor relationship, nor does it automatically lead to such a finding.
iii. an important consideration in a complaint such as Mr and Mrs A's can be whether the relevant misconduct caused them to enter into the agreements.

This was considered also in the Judicial Review, where it was held that a breach of Reg.14(3) meant that by law, both the timeshare agreements and loan agreements should not have been entered into in the way they were.

iv. for a breach of Reg.14(3) to lead to an unfair debtor-creditor relationship that requires relief from that unfairness, it is normally a relevant consideration whether the breach caused the debtor to enter into the timeshare and/or loan agreement. I think this accords with common sense: if events would have unfolded in the same way whether or not such a pre-contractual breach had occurred, it may be hard to attribute great importance to the breach when deciding whether an unfair debtor-creditor relationship ensued, or whether a remedy is appropriate.

My assessment of the evidence

Having considered everything, I've concluded that I don't think the FPOC Memberships were sold to Mr and Mrs A in a way that breached Reg.14(3). But if I'm wrong about that, I'm not persuaded that led to an unfair debtor-creditor relationship in this case anyway. Nor do I think there is any other reason to tell Shawbrook to do anything further. I will explain why, starting with my analysis of the allegation the sales breached Reg.14(3).

When Mr and Mrs A first complained to Shawbrook, PR set out their concerns and problems they said there were with memberships. At that stage they didn't raise an allegation that FPOC Memberships had been sold to them as investments. It was only after our investigator issued their view, and after the judgment in the Judicial Review was handed down, that such an allegation was made.

When determining what happened, I must make a finding on the balance of probabilities. In doing so, I have to consider what both parties say happened and weigh that up against the other available evidence. Here, I think Mr and Mrs A's own words and letters are the best and most direct testimony from them as to what they remember happened. I think the representations from PR are less likely to be accurate as they simply don't contain memories or recollections from Mr and Mrs A in their own words, in the way that the letters do. Rather they contain PR's arguments why they say Shawbrook needed to pay compensation. I think the starting point is to determine whether I think Mr and Mrs A were told the things they say they were in the letters. I don't think it is more likely than not that they were told the things alleged by PR not contained in their own letters.

When considering whether the sale breached Reg.14(3), it is important to consider the way in which the FPOC Memberships were positioned when they were sold to Mr and Mrs A. After all, their FPOC Memberships clearly had investment elements to them (their interest in the sale proceeds of the Properties) and merely selling such a membership didn't breach the prohibition in Reg.14(3). Rather, that provision was only breached if the Supplier sold and marketed the membership as an investment. In other words, for me to say there was a breach of Reg.14(3), I'd need to be satisfied that it was more likely than not that the Supplier used the prospect of a financial gain as a way to induce Mr and Mrs A into taking out FPOC Membership.

Mr and Mrs A have set out their recollections of the sale. With respect to the 2013 purchase, they said that there was a pressured sale, during which they were told that their existing timeshare points were less valuable and they would benefit by changing to fractional membership. They said "[*t*]*his seemed to make sense at the time, as it would then be a more saleable asset, which we thought we could maybe leave to our children or grandchildren.*" It seems to me that the primary reason that Mr and Mrs A took out FPOC Membership was because they saw a benefit in changing the type of points so they could use them to get

better holidays. This fits with their earlier memories that they enjoyed their holidays with the Supplier and were impressed with the accommodation available. Further, I think Mr and Mrs A have described the fractional element of membership when they described it as a more saleable asset, but I can't see they ever said this was sold to them as an investment, i.e. as a way of making a profit.

With respect to the 2014 purchase, they said:

> *"In April 2014, we upgraded again to two weeks in Tenerife, at Paradise as we felt it would be a better investment in the Canaries, due to the all year holiday opportunity. We paid £5,508.00 by a deposit, then £459.00 monthly (shown in our Household Budget), and paying a LUMP SUM of £4,000.00 in May 2014 […] again through CLC with Shawbrook."*

They also said they thought that the Property being in Tenerife was a better option to resell the membership when they no longer wanted it and the weather there was better too – I take it to mean in comparison with the 2013 membership, whose allocated Property was on mainland Spain. Here Mr and Mrs A did use the word '*investment*', but when looking at the context of what was said, I don't think they meant that the Supplier led them to believe that there would be a financial gain from taking out membership and, therefore, using that to persuade them to take out FPOC Membership . Rather, it appears that they thought it was important that the Property associated with membership was in the Canaries, which meant the holiday season was longer than on mainland Spain. This might well mean that the Property would be more readily sold, but I can't say they meant they bought it an expectation they would make a profit. After all, they also said they decided to '*further invest*' in September 2010, but there is no allegation that that 'non-fractional' membership was sold as an investment. So I don't think Mr and Mrs A were actually alleging that the two FPOC Memberships were sold to them as investments, therefore the sales breaching Reg.14(3).

I've looked at the FPOC Membership agreements and other documents from the time of sale, but apart from what was set out above, they don't comment on whether FPOC Memberships were to be seen as investments. So, I've considered whether this was something that could have been said orally during Mr and Mrs A's sale. I've also considered the slides that the Supplier used when selling fractional memberships to prospective members. I am aware that PR2 has access to those slides, but it hasn't pointed to anything in those slides that it argues could have given such an impression in Mr and Mrs A's sales.

In all the circumstances, I'm not persuaded, on the balance of probabilities, that the Supplier sold the FPOC Memberships to Mr and Mrs A as investments. It follows that, I don't think that there was a breach of Reg.14(3), for the reasons PR alleged, that could have led to an unfair debtor-creditor relationship. But if I'm wrong about that and the Supplier did breach Reg.14(3) in the way it sold FPOC Memberships, I don't think that breach led to them buying the FPOC Memberships. I say that because, as set out above, I think Mr and Mrs A chose to take out FPOC Memberships for different reasons. Given that, and the lack of a complaint about the investment potential when the complaint was first made, I can't say that was particularly important to them when taking out FPOC Memberships. It follows that I don't think that any such breach lead to something that requires a remedy in this specific case.

Mr and Mrs A's other points of complaint

When Mr and Mrs A first complained to Shawbrook they made a number of allegations. But when responding to our investigator's view, PR only pointed to an alleged breach of Reg.14(3). So it's not clear to me whether Mr and Mrs A want me to deal with those other concerns. But for completeness, I'll briefly deal with them.

Mr and Mrs A say they were pressured into taking out FPOC Memberships. If the levels of pressure were so extreme as to cause them to buy something that they otherwise would not have done, that's something that could lead to an unfair debtor-creditor relationship. However, I've seen that Mr and Mrs A had purchased timeshare memberships from the Supplier on several other occasions. So I think taking holidays with the Supplier was something they were interested in, after all they have set out the positive experiences they had of using the Supplier's accommodations. Further, they'd previously taken out a membership and then cancelled it in the cooling-off period, so I think they were aware that they didn't have to keep a membership if they felt it wasn't right for them shortly after. Finally, Mr and Mrs A set out reasons other than pressure that they said led to the purchase of FPOC Memberships. So, although I think it was unlikely that the sales environment was relaxed, I don't think that caused unfairness in this case.

PR said that Mr and Mrs A were misled by the Supplier into thinking they had to take out the first FPOC Membership as the only way they could exit their existing timeshare membership and that, if they took out FPOC Membership, they'd be able to exit it after a finite number of years. But neither of those statements were set out in Mr and Mrs A's own letters describing the sales, so I'm not satisfied that they were said to them by the Supplier.

PR also said that the Supplier breached its agreements with Mr and Mrs A as the contracts didn't guarantee that the proceeds of sale of the Properties would be passed to them when they were sold. Further, the agreements stated that the Supplier couldn't guarantee when the Properties were sold, so that led to the possibility that management fees would continue indefinitely. But PR hasn't pointed to any specific terms they say the Supplier breached and, on my reading of the agreements, it was clear that the proceeds of the sale of the relevant Properties would be divided up amongst the relevant members. And in the sections of the Member's Declaration and Information Statement I set out above, I think it was made sufficiently clear that the Supplier couldn't guarantee when the Property sold or for what price, something that fits with a common sense understanding of the sale of any asset.

PR argued that Mr and Mrs A had no control over the costs of the annual management fees, which could lead to a breach of UTCCR and an unfair debtor-creditor relationship. However, Mr and Mrs A haven't pointed to any increase in management fees that they say was unfair. It follows, I can't say there was an unfair debtor-creditor relationship for this reason.

PR has said that terms around the forfeiting of membership for non-payment of management fees were found to be unfair in *Link Financial Ltd v Wilson* [2014] EWHC 252 (Ch). In that case, a member of the Supplier's forfeited their membership when they failed to pay management fees. A judge found that the relevant terms were unfair and could lead to an unfair debtor-creditor relationship. But here, I've not seen that any terms were operated unfairly against Mr and Mrs A.[3] So although it's possible terms in their agreement had the potential to cause an unfairness if operated unfairly against them, as that hasn't happened in practice, I fail to see how there could be an unfair debtor-creditor relationship arising out of them.

[3] In addition, I'm aware that the Supplier changed the terms around the forfeiting of FPOC Memberships after the judgement in *Link Financial Ltd v. Wilson* to try to overcome the problem identified. I've not been asked to consider the fairness of these new terms.

It was alleged that Shawbrook lent irresponsibly by not undertaking any assessment of Mr and Mrs A's ability to repay the loan. However, in any complaint about lending there are a number of matters to consider. First, a lender had to undertake reasonable and proportionate checks to make sure a prospective borrower was able to repay any credit in a sustainable way. Secondly, if such checks were not carried out, it's necessary to determine what the right sort of checks would have shown. Finally, if the checks showed that the repayment of the borrowing was not sustainable, did the borrower lose out?

It was said that Shawbrook didn't carry out any checks at all when deciding to lend to Mr and Mrs A. But even if that was the case, I've not been provided with anything to show that the lending was not affordable for them. I've seen nothing to suggest there were any affordability issues, such as missed payments or other financial difficulties at the time of the loan. So I'm not persuaded that the complaint should be upheld on this basis.

Finally, it was said that Shawbrook paid the Supplier a commission when the loan was granted and that could have created an unfair debtor-creditor relationship. Shawbrook has confirmed to our service that if it paid any commission, its average rate was under 5% and the highest paid was 10.25%.[4] I'm satisfied Shawbrook did not breach any duty in making such a payment, nor was it under any regulatory duty to disclose the amount of commission paid in these circumstances. Further, I don't think the levels of commission that were sometimes paid in this situation were sufficiently high to mean that the relationship was unfair under s.140A CCA.

It follows, I don't think there is any other reason to say Shawbrook are responsible under any claims that could be made under s.75 CCA or are a party to an unfair debtor-creditor relationship as defined by s.140A CCA. And I see no other reason why it would be fair to direct Shawbrook to pay anything to Mr and Mrs A arising out of the sale of FPOC Memberships.

My final decision

I don't uphold Mr and Mrs A's complaint against Shawbrook Bank Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs A to accept or reject my decision before 4 April 2024.

Mark Hutchings
Ombudsman

[4] Shawbrook provided the Financial Ombudsman Service with information on its commission rates – which I accept in confidence under DISP 3.5.9 [R]. But, in keeping with that rule, one of Shawbrook's Managing Directors (who is responsible for its consumer finance and who is a FCA Approved Person) confirmed this information