DRN-5028683

The complaint

Ms C's complaint is, in essence, that Shawbrook Bank Limited ("Shawbrook") acted unfairly and unreasonably by being party to an unfair credit relationship with her under Section 140A of the Consumer Credit Act 1974 (as amended) (the "CCA").

What happened

Ms C had been a member of a timeshare programme run by a timeshare provider ("the Supplier") since 1995. As a member, every year she was granted a number of 'points' that she could exchange for holidays at the Supplier's holiday resorts. Different accommodation had different points values, depending on factors such as location, size and time of year, so, for example, a larger apartment in peak season would cost more to a member in their points than a smaller apartment outside of school holiday periods. By 2013, Ms C had 30,000 points.

In March 2013, Ms C was sold a new type of membership by the Supplier called 'Fractional Ownership'. This type of membership worked in a similar way, in that a member was granted 'fractional points' every year they could exchange for holidays. But their membership was also asset backed, in that they bought a share in the sale proceeds of a property ("the Allocated Property") that they would get once the Allocated Property was sold at the end of their membership term.

Ms C traded in 7,000 of her original points for 7,000 fractional points at a cost of £4,760. She says she did this as she was attracted to the idea of investing in property. She paid for this using a credit card that was not provided by Shawbrook.

In June 2013, Ms C traded in a further 7,000 points for 7,000 fractional points at a cost of £4,760. This purchase was funded by a loan from a lender other than Shawbrook.

In September 2013 ("the Time of Sale"), Ms C traded in 12,000 of her points for 12,000 fractional points at a cost of £8,160 ("the Purchase Agreement"). This was paid for by way of a loan from Shawbrook for the full amount ("the Credit Agreement"). It is this purchase that is the subject of this complaint

Ms C went on to make further purchases for fractional points from the Supplier between May 2014 and September 2015, trading in the remainder of her original points and buying more fractional points, but these were paid for using credit from Shawbrook.

In March 2017, Ms C, using the help of a professional representative ("PR"), made a complaint to Shawbrook in respect of the September 2013 purchase. The complaint was that the Supplier had misrepresented the nature of Fractional Ownership and, under s.75 CCA, Shawbrook was jointly liable for these misrepresentations. Further, PR said that the way Fractional Ownership had been sold and the way it operated led to Shawbrook being a party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of s.140A CCA.

Shawbrook responded, rejecting the complaint on every ground.

Ms C then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, upheld the complaint on its merits.

The Investigator thought that the Supplier had marketed and sold Fractional Ownership as an investment to Ms C at the Time of Sale in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ("the Timeshare Regulations"). And, given the impact of that breach on her purchasing decision, the Investigator concluded that the credit relationship between the Shawbrook and Ms C was rendered unfair to her for the purposes of s.140A CCA.

The investigator said the following in respect of what he thought Shawbrook needed to do to put things right:

> *"As I think [Ms C] would not have purchased [Fractional Ownership] but for the Supplier's failings, I think it would be fair and reasonable to put her back in the position she would have been in had she not purchased membership or borrowed the money to do so. So, assuming [Ms C]'s membership hasn't already been terminated, in return for her agreeing to give up her membership and hold the benefit of her interest in the Allocated Property for the Business (or assign it to the Business, if that can be achieved) the Business should:*
>
> > *a. Ask the Supplier to reinstate [Ms C]'s 12,000 European Collection Points membership given the way in which it was traded in at the Time of Sale.*
> >
> > *b. Return to [Ms C] the repayments made towards the loan and the annual management charges she paid the Supplier as a result of entering [Fractional Ownership] less:*
> >
> > > *i. the cost of any promotional giveaways given to her at the Time of Sale; and*
> > > *ii. the market value of the holidays she took using her [Fractional Ownership]*
> > > *– if any.*
> >
> > *(the 'Net Repayments').*
> >
> > *If it isn't possible to determine the market value of such holidays, I don't think it would be unreasonable to use annual management charges as guide as to what a reasonable deduction for usage might look like.*
> >
> > *c. Write off any outstanding balance if [Ms C] still owes the Business money under the credit agreement entered into at the Time of Sale.*
> >
> > *d. Pay 8% simple interest per annum on each of the Net Repayments from the date each payment was made to the date this complaint is settled.*
> >
> > *e. Remove any adverse information recorded on [Ms C]'s credit file as a result of the loan.*
> >
> > *f. Indemnify [Ms C] against all ongoing liabilities as a result of her purchase of [Fractional Ownership]."*

Ms C, through PR, accepted our investigator's view, save that she did not wish for her earlier membership to be reinstated under point (a) above. That was because of the following

reasons:

- doing so was neither fair and reasonable, nor practicable, as Ms C did not want to have any further dealings with the Supplier due to the breakdown in trust following what happened at the Time of Sale (and other sales March 2013 onwards);
- she was worried she would be trapped in a new membership with the Supplier in a club she has not been a member of for over ten years;
- there was no financial implication on Shawbrook whether or not Ms C was reinstated to that earlier membership type; and
- the Supplier passed new articles of association in January 2023 in respect of the earlier membership type that fundamentally changed the nature of membership. Ms C would need to join this new type of membership with all of the protections given to her under the Timeshare Regulations, including a cooling off period, under which she would immediately exercise her right to terminate any agreement.

Shawbrook wrote to PR to make an offer to Ms C to settle her complaint in line with our Investigator's recommendation. As part of the settlement offer, Shawbrook said acceptance would be in full and final settlement of any claim against itself, but also against the Supplier, in relation to both the Credit Agreement and the Purchase Agreement. Further, such offer was dependant on Ms C agreeing for her previous membership with the Supplier to be reinstated.

Our Investigator then wrote to Shawbrook to say it was his view that, given Ms C's position, there was no need for Shawbrook to arrange the reinstatement of an earlier membership. In response, Shawbrook said that any questions about reinstatement needed to be discussed between Ms C (or PR) and the Supplier directly.

PR wrote to the Supplier to ask whether, if Ms C accepted the offer, it would agree not to reinstate any earlier membership or not to seek payment of any maintenance fees arising out of either the membership arising from the Purchase Agreement or from any reinstated membership.

In response, the Supplier said that the basis of the complaint was the Purchase Agreement was voidable and that Ms C was entitled to rescind her agreement. But the follow on from that was that Ms C would be placed in the position she was in immediately prior to her entering into Fractional Ownership. The Supplier said Shawbrook's offer had to involve reinstatement due to our Investigator's view and her earlier membership would be reinstated. The Supplier said that it would not seek payment of any historic management fees, but fees would fall due on any reinstated timeshare membership – full details of which would be provided to Ms C *after* she agreed to accept Shawbrook's offer. She could then relinquish her membership pursuant to the Supplier's standard relinquishment options.

The Supplier also pointed to the judgment of HHJ Beech in a County Court case (*Gallagher v. Diamond Resorts (Europe) Limited*, 24 September 2021, Lancaster County Court). This case concerned claims of misrepresentation made by Mr Gallagher against the Supplier where Mr Gallagher was seeking rescission of the timeshare contract. Mr Gallagher's claim was not successful and the judge said, at paragraph 51:

> *"Mr Gallagher's claim fails on every point. If he had succeeded on any point and persuaded the Court to rescind the contract, Mr Gallagher would have been returned to the position that he was in immediately prior to upgrading to the FOC. He would have been entitled to the reimbursement of the cost of the FOC upgrade; the maintenance charges paid under that upgrade would not have been reimbursed as Mr Gallagher would have been liable to pay the same level of maintenance fees for his ECP points; he would have been returned to the ECP platinum membership with*

a liability to pay maintenance charges to 2054 subject to him taking advantage of any relinquishment rights which have since been introduced by DR. From Mr Gallagher's reaction when Mr Finch explained the position, it would appear that the consequences of rescission, which Sarah Waddington Solicitors have previously accepted in other similar cases, had not been explained to him."

The Supplier argued that this meant that, had Ms C succeeded in a claim for recission, a court would have ordered that the previous membership be reinstated. In response, PR argued, amongst other things, that Ms C's claim is different as the Investigator upheld it due to their being an unfair debtor-creditor relationship and not because he thought there was an actionable misrepresentation.

Our Investigator wrote again to Shawbrook to explain that it was his view that compensation was not contingent on Ms C accepting reinstatement. In response, Shawbrook provided further detailed submissions written by the Supplier. The Supplier said, amongst other things, that our Investigator's later email was inconsistent with his earlier view and suggested redress. The Supplier said that Ms C would not need to enter into a new contact with it, rather it would simply reinstate the earlier agreement – this would also mean that she would not have a fourteen-day withdrawal period, as that had already elapsed several years previously. The Supplier reiterated its argument that on rescission of the Purchase Agreement, the legal effect would be the reinstatement of her earlier agreement. Finally, the Supplier said that the remedy sought by Ms C was the same as Mr Gallagher sought in the above referenced claim, and therefore the part of the judgment quoted above applies.

As the parties did not agree with our Investigator, Ms C's complaint was passed to me for a decision. Having considered everything, I agreed with our Investigator that Ms C's compensation ought not to be contingent on her earlier membership being reinstated. I explained my reasons for thinking that in a provisional decision and invited both parties to respond to what I had said.

The relevant parts of my provisional decision read as follows:

"I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

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.

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 Section 75 and Sections 140A-140C).*
- *The law on misrepresentation.*
- *The Timeshare Regulations.*
- *The Unfair Terms in Consumer Contracts Regulations 1999.*
- *The Consumer Protection from Unfair Trading Regulations 2008.*
- *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 (which remains the leading case in this area).*
- *Scotland v British Credit Trust [2014] EWCA Civ 790.*
- *Patel v Patel [2009] EWHC 3264 (QB).*
- *The Supreme Court's judgment in Smith v Royal Bank of Scotland Plc [2023] UKSC 34.*
- *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).*

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. And 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').

I also 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 I will start by setting out what it is I need to address in this decision.

Our investigator thought that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Ownership to Ms C as an investment, which, in the circumstances of this complaint, rendered the credit relationship between her and Shawbrook unfair to her for the purposes of s.140A CCA. It followed that, as he found Shawbrook was a party to an unfair credit relationship with her, Shawbrook needed to do something to remedy the unfairness found. In a subsequent email sent to our Investigator, Shawbrook said "we have accepted that redress is required following your View received 10 July 2023", so it appears that Shawbrook has accepted our Investigator's findings (or at least does not dispute them)[1]. I will proceed on the basis that it is not in dispute (even if it not necessarily accepted by Shawbrook) that there was an unfair debtor-creditor relationship for the reasons found by our Investigator.

It also appears that much of what is in dispute is between Ms C and the Supplier. But this complaint is about the relationship between Ms C and her creditor, Shawbrook, and the Supplier is not (nor can it be) a party to this complaint. So I am not able to direct the Supplier to do, or not do, anything, rather the only power I have is to decide the complaint between Ms C and Shawbrook. Here Shawbrook has said it will comply with our Investigator's first recommendation (but not with his subsequent recommendation) and Ms C says that she agrees with the first recommendation, save that she does not want an earlier membership reinstated. As the Supplier has said it will reinstate the membership, it seems to me the only issue I must determine is whether Shawbrook's offer of compensation is contingent on Ms C agreeing to the reinstatement of the earlier membership.

[1] I invited Shawbrook to let me know in response to my provisional decision if it disagreed with this approach, nothing that, for the avoidance of doubt, I agreed with our Investigator on the merits of this complaint for the same reasons. Shawbrook did not ask me to change my approach in this case.

The legal position

I am mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in Carney and Kerrigan (respectively) on relief in s.140A CCA claims.

In Carney, HHJ Waksman QC said the following in paragraph 101:

> *"Finally, and as noted above, the Court has a wide discretion as to any relief to be ordered once the unfair relationship has been found. In that regard I adopt paragraph 71 of the Bank's written closing submissions which I did not understand to be challenged. This is that if the court decides to make an order, then it "should reflect and be proportionate to the nature and degree of unfairness which the court has found": Patel v Patel [2010] 1 All ER (Comm) 864 at [79]-[80]. It should not give the Claimant a windfall, but should approximate, as closely as possible, the overall position which would have applied had the matters giving rise to the perceived unfairness not taken place: Link Finance Limited v Wilson [2014] C.T.L.C. 145 at [77]; Chubb & Bruce v Dean.[2013] EWHC 1282 (Ch) at [24]; Nelmes v NRAM Pic [2006] EWCA Civ 491 at [116]."*

And in Kerrigan, HHJ Worster said this in paragraphs 213 and 214:

> *"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court may make an order if it determines that the relationship is unfair to the debtor. […]*
>
> *[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"*

So here, when granting relief under s.140B CCA, a court's approach is the need to remedy whatever unfairness is found in the credit relationship. The relief granted ought to be proportionate and linked to the unfairness found, having regard to all of the relevant circumstances. And, from Carney, the relief ought to approximate the position that would have applied had the matters giving rise to the unfairness not taken place and ought to not give the Claimant a windfall.

This is different to the remedy normally sought by a Claimant in a claim for misrepresentation (as in the case of Gallagher v. Diamond Resorts referred to by the Supplier) which is the legal remedy of recission. That would be to restore the parties, so far as possible, to the legal position that they were in before the contract was entered into. It is possible that in some instances the two remedies could effectively be the same or similar, but they are answering two different legal claims.

What I consider to be fair compensation

As set out above, I must take into account the relevant law, but ultimately I must

reach an outcome I find to be fair and reasonable. I am also mindful that I am not deciding a legal claim made under s.140A CCA as a court would do, rather I am considering what I find to be fair compensation for Shawbrook participating in an unfair credit relationship. Having considered everything, I do not think it would be fair and reasonable to make the payment of compensation to Ms C contingent on her agreeing to be reinstated as a member to the Supplier's timeshare scheme. For the avoidance of doubt, I think that is the position a court could properly reach when determining a claim under s.140A CCA, but if I am wrong about that, I would depart from the law to reach what I find to be a fair and reasonable outcome.

I think the Supplier's arguments (adopted by Shawbrook) are misconceived, as in Ms C's complaint, the remedy the Investigator recommended was not the rescission of the Credit Agreement and the Purchase Agreement. I say that for two reasons. First, the Financial Ombudsman Service has no power to direct the recission of an agreement between a consumer and a third party which is not a respondent business to a complaint. Secondly, the Investigator specifically envisioned the continuation of the Purchase Agreement as he asked Ms C to either assign the benefits in the Allocated Property to Shawbrook or, alternatively, hold such benefits in trust for Shawbrook. So the starting point here is not to consider the legal effects of rescinding the two agreements, but what is needed to remedy the unfairness in the credit relationship.

Here, the unfairness that our Investigator found in the credit relationship between Ms C and Shawbrook was as a result of the way the Supplier sold Fractional Ownership, due to the operation of s.56 CCA. In my view, considering whether or not Ms C remains in a contractual relationship with the Supplier arising out of an earlier purchase (unrelated to Shawbrook) sits outside of what needs to happen to remedy the unfairness in the relationship between Ms C and Shawbrook. However, I do think it is necessary to consider whether Ms C is obtaining any advantage or 'windfall' by not having to have an earlier membership reinstated.

Ms C was in a contractual relationship with the Supplier prior to taking out the Purchase Agreement and Credit Agreement. Under the contracts she entered into before March 2013, Ms C paid for the Supplier to provide her with a fixed number of points every year which she could use to purchase holidays from the Supplier. Ms C paid for this in two ways – first, an upfront fee to 'buy' her points entitlement and, secondly, an annual maintenance fee she paid to be able to use her points the following year. Between May 1995 and September 2011, Ms C entered into six separate contracts with the Supplier to purchase 30,000 points. It is not clear to me whether these contracts ran alongside each other or if one contract replaced another, i.e. whether Ms C had a total of 30,000 available points from six concurrent agreements or whether the September 2011 agreement provided her all of the 30,000 points rights alone (or some combination of the two). Between March 2013 and May 2014, Ms C exchanged these for fractional points, entering into four further contracts. It is not clear to me to which earlier agreement(s) the 7,000 points that she exchanged at the Time of Sale were connected to, and therefore which, if any, contract(s) ended at the Time of Sale. It follows, I cannot be certain what, if any, cancellation terms applied to the 7,000 points traded at the time of sale.

From what I know about how the Supplier operated, timeshare members were able to give up their timeshare membership without further charge (with the Supplier's agreement) either when they reached 75 or if they suffered from a serious medical condition – I cannot see either of those situations applied to Ms C. I am also aware that the Supplier said that it would release members from their timeshare agreements, and therefore the obligation to pay maintenance fees, if they paid an

exit fee.[2] So it could be argued that Ms C being able to effectively relinquish 7,000 points at the Time of Sale without paying an exit fee to the Supplier was a windfall. However, without knowing which contract these points came from I cannot say what, if any, exit fee would have been charged.[3]

It follows that it is arguable that Ms C is in a better position if an earlier membership is not reinstated. But I do not think it is as simple as that. I say that as Ms C did not end her contractual relationship with the Supplier at the Time of Sale, so I do not think looking at what it would have cost her to end the contract at that time is the obvious way to work out what compensation is due as a result of the unfairness found – I cannot see that she took out fractional points in an attempt to end her earlier agreement, instead she actually wanted to continue her relationship with the Supplier. Further, from looking at her earlier purchase history, her 7,000 points would have cost her over £7,000 to take out, but the proposed remedy does not grant any monetary sum for the amount she paid for those earlier points of which she no longer has the benefit. Finally, I think there is some force in the argument that it would not necessarily be a fair way to remedy the unfairness in the credit relationship caused by the Supplier, to say compensation is contingent on Ms C agreeing to have an ongoing (and uncertain) future relationship with the Supplier. That is especially so when she understandably does not wish to have any further dealings with the Supplier, when the Supplier has said it will tell her what maintenance fees it would ask her to pay after she agreed to reinstatement and where is it unclear what, if anything, the Supplier would expect from Ms C to end any reinstated agreement. On balance, I do not think it is fair or reasonable for Ms C's compensation to be contingent on her consenting to the reinstatement of an earlier membership."

I then went on to say that I agreed with our Investigator that had Ms C decided not to purchase Fractional Ownership, she would not have entered into the Credit Agreement. But here the unfairness our Investigator found was fundamental to the way in which the Credit Agreement came about, so I thought the fair way to remedy that unfairness was to put Ms C in the position she would have been in now, so far as was possible. had that Credit Agreement not come about. But I was also mindful that it would be a windfall for Ms C to keep the Fractional Ownership she purchased with the use of Shawbrook's credit if she did not need to repay that credit. So I found it conditional that any compensation is paid on the condition that Ms C agrees to assign to Shawbrook her fractional points or hold them on trust for Shawbrook if that cannot be achieved. I then set out the steps I proposed to direct Shawbrook to take remedy the unfair relationship, including refunding what Ms C paid under the Purchase Agreement and Credit Agreement, with interest, for Shawbrook to remove any adverse information recorded on Ms C's credit file and for it to provide Ms C an indemnity against any ongoing liabilities arising from her Fractional Membership.

In response to my provisional decision, Shawbrook made a further offer to Ms C to resolve her complaint. Its offer broadly reflected what I had said I intended to direct it to do.

PR, on Ms C's behalf, said the offer was not sufficient as it did not include the indemnity that I proposed to direct Shawbrook to provide to her.

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[2] I said that I was aware that PR said these terms are unfair with reference to The Unfair Terms in Consumer Contracts Regulations 1999. However, I noted that such a finding was outside the scope of my decision.

[3] On a practical note, the Supplier had not said which contract it thought ought to be reinstated nor had it said what it would now charge, if anything, to allow Ms C to exit any agreement to which it reinstated her. Again, I noted that these issues fell outside the scope of my decision.

What I have 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.

As neither party has provided me anything further to consider, I see no reason to depart from the provisional findings I reached as set out above. It follows that I will direct Shawbrook to do what I proposed in my provisional decision, including to indemnify Ms C against all ongoing liabilities as a result of her Fractional Ownership.

Putting things right

On the basis that any compensation is paid on the condition that Ms C agrees to assign to Shawbrook her fractional points or hold them on trust for Shawbrook if that cannot be achieved, I direct Shawbrook does the following, whether or not a court would award such compensation:

(1) Shawbrook should refund Ms C's repayments to it made under the Credit Agreement and cancel any outstanding balance if there is one.
(2) In addition to (1), Shawbrook should also refund the annual management charges Ms C paid as a result of Fractional Ownership.
(3) Shawbrook can deduct

   i. The value of any promotional giveaways that Ms C used or took advantage of; and
   ii. The market value of the holidays* Ms C took using her fractional points.

   (the 'Net Repayments')

   *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 is not practical or possible to determine the market value of the holidays Ms C took using her fractional points, deducting the relevant annual management charges (that correspond to the years 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.

(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 Shawbrook settles this complaint.
(5) Shawbrook should remove any adverse information recorded on Ms C's credit file in connection with the Credit Agreement.
(6) If Ms C's Fractional Ownership 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 Shawbrook (or assign it to Shawbrook if that can be achieved), Shawbrook must indemnify her against all ongoing liabilities as a result of her Fractional Ownership.

**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 they ask for one.

My final decision

I uphold Ms C's complaint against Shawbrook Bank Limited and direct it to take the steps I have set out above.

Under the rules of the Financial Ombudsman Service, I am required to ask Ms C to accept or reject my decision before 24 October 2024.

Mark Hutchings
Ombudsman