

The complaint

Mrs N's complaint is, in essence, that Oplo PL Ltd¹ (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with her under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

The timeshare in question was bought jointly by Mr and Mrs N. But as the loan used to make the purchase was in Mrs N's sole name, she is the only eligible complainant here. I will, however, refer to both Mr and Mrs N where it is appropriate to do so.

What happened

Mr and Mrs N purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 23 April 2019 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,300 fractional points at a cost of £18,433 (the 'Purchase Agreement') for membership of the Fractional Club.

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

Mr and Mrs N paid for their Fractional Club membership by taking finance of £18,433 from the Lender in Mrs N's sole name (the 'Credit Agreement').

Mrs N – using a professional representative (the 'PR') – wrote to the Lender on 26 July 2022 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving her a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

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

Mrs N says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

- Told them that in addition to holidays, they were buying an "investment" that could be sold and their money recouped.
- Told them that they would own part of a property which would grow in value like normal property which they could sell in 19 years and recoup their total investment.

Mrs N says that she has a claim against the Supplier in respect of one or more of the

¹ The finance to which this complaint relates was originally provided by Honeycomb Finance Ltd. It is now the responsibility of Oplo PL Ltd and as such Oplo is the respondent in this complaint

misrepresentations set out above, and therefore, under Section 75 of the CCA, she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mrs N.

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

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

- Fractional Club membership was an Unregulated Collective Investment Scheme ('UCIS') the selling and/or marketing of which was illegal.
- There were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR') in the Purchase Agreement and Credit Agreement, namely:
 - There had been no choice of lender given to Mrs N;
 - The interest rate applied to the Credit Agreement (6.9%) was extortionately high; and
 - Commission was paid to the Supplier by the Lender which had not been disclosed to Mrs N
- The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
- The Supplier had pressured Mr and Mrs N into purchasing Fractional Club membership.

The Lender dealt with Mrs N's concerns as a complaint and issued its final response letter on 18 September 2022, rejecting it on every ground.

The PR, on Mrs N's behalf, then referred the complaint to the Financial Ombudsman Service. As part of its submissions, it provided a statement from Mrs N. Although it was unsigned and undated, the PR said it had been written by Mrs N on 14 December 2021. As far as is relevant to the sale in question here, Mrs N said in her statement:

"We eventually agreed to buy a Fractional. We were told about all of the benefits that a Fractional would bring such as great holidays and that we would own part of the property which would be sold in the future and we would get our money back and more"

Mrs N's complaint was assessed by an Investigator who, having considered the information on file, upheld it on its merits. The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr and Mrs N at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of that breach on their purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mrs N was rendered unfair to her for the purposes of Section 140A of the CCA.

The Lender disagreed with the Investigator's assessment. It said, in summary:

- The statement is undated and unsigned. It does not agree the statement can be admitted or considered in evidence following the judgement in *Shawbrook & BPF v FOS*² (the 'JR')

1. ² *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*

- Meta data indicates the statement was created on 6 December 2023, after the JR.
- It was confirmed in the JR that Fractional Club was not a UCIS.
- Mr and Mrs N did not view the presentation which was fundamental to the JR. So the presentation and training material is not applicable in this case.
- The contemporaneous customer notes show they were happy with their purchase during the recission period.
- In September 2019 they wanted to cancel the membership and finance as their daughter was going to university and had not been given a student loan.
- The 2020 management fee has not been paid. At no time have they mentioned any issue or concern with the membership or how it was sold, which demonstrates that their claim regarding 'investment' has been fabricated by the PR.
- The sales meeting was not pressured
- Fractional Club was not marketed as an investment
- Mr and Mrs N were told they would receive a share of the proceeds of the sale of the Allocated Property, which is different to being sold an investment.
- Mr and Mrs N were first introduced to the concept of purchasing a holiday home valued at about £200,000. They were not interested. Given this they cannot accept Mr and Mrs N would consider the purchase of a 2.42% share in the net sale proceeds bought for £18,433 as an investment.
- The sales representatives are not trained to predict future values of fractions.
- Mr and Mrs N did not request to see the Allocated Property, which would be expected if someone thought they were buying a property.
- Mr and Mrs N had their statutory 14-day recission period.

The Lender concluded by saying that the JR had shown the PR's allegation that the Fractional Club is a UCIS was incorrect. It thought that this should be the only allegation that this Service ought to consider in this case.

The PR then provided some additional evidence that it said showed that Fractional Club had been sold to Mr and Mrs N as an investment:

- On 9 January 2020 Mrs N left a message on a timeshare advice line asking for them to contact her. The message from Mrs N read:

"They pressure [sic] me to sign and promised my money back at the end. They never told me about maintenance I cant afford this"

- On 13 December 2021 one of the PR's call handlers made notes of a telephone conversation held with Mrs N. These were as follows³:

2019 Fractional
 why - good hols - own part of prop
 will be sold in few years get money back +
 Mene = profit. - Now told we want sell
 what r we paying for?
 years - c earns more
 22k
 P

In response to this new evidence, the Lender maintained that the complaint ought not to be upheld. It said, in summary:

- No attempt was made by Mr and Mrs N to cash in on the investment – they had just asked to cancel it as their daughter had not received a loan to go to university.

It said the statement also:

- Does not indicate that any sales material was shown to Mr and Mrs N which would have indicated the membership was an investment.
- Does not indicate that Mr and Mrs N were unclear about any of the content of the sales presentation or that they felt the need to ask more questions due to any uncertainty about the nature of the product and its purpose.
- Lacks any context in respect of what conversations were had with the sales representative about the membership and there is nothing in the statement which indicates why or how the presentation led them to believe this was an investment.

The second Investigator's view

The complaint was then considered afresh by a second Investigator at this Service. And having considered everything that had been submitted, he too thought the complaint ought to be upheld. He said:

"Did the Supplier breach Regulation 14(3) of the Timeshare Regulations?"

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives. A large number of ombudsman decisions have been issued concerning the material the Supplier used at the time of [Mrs N's] sale, so I won't set out the detail of the training material here. However, in summary, I think the following matters can be drawn out from the material:

- the Supplier's sales staff were instructed to highlight the idea of ownership in the Allocated Property and that being an advantage over 'renting' your holiday accommodation (e.g. booking a hotel through a travel agent), and*
- it was highlighted to prospective customers that they would get a return when the Allocated Property was sold at the end of their membership term.*

³ Redacted to remove names

I don't think the Supplier explicitly set out the likely return that a customer might expect to get, but it was implied that the return was likely to lead to an overall profit or financial gain and that was a good reason to purchase a membership, which is likely to have breached the prohibition in Regulation 14(3).

Here, [Mrs N] has said:

"We were told about all of the benefits that a fractional would bring such as great holidays and that we would own part of the property which would be sold in the future, and we would get our money back and more."

I have also thought about the disclaimers that there were in the Supplier's sales documents, however I don't think they are enough to make me think the Supplier didn't breach Regulation 14(3) during the sale. That is because they were only shown to [Mrs N] after they'd been through the oral sales process and after they'd decided to take the Membership out. And I don't think they were drawn to [Mrs N's] attention, nor are they sufficiently strong to overcome the problems in the sales presentation.

On balance, given the evidence I've seen, including the training material and [Mrs N's] own memories of the sale, I think it's likely that the Supplier did lead her to believe that the Membership was an investment that might lead to a financial gain. So, I think the Supplier did breach Regulation 14(3) of the Timeshare Regulations.

Did the breach of the Timeshare Regulations mean the credit relationship was unfair?

I think that for me to conclude that a breach of Regulation 14(3) led to a credit relationship between [Mrs N] and the Business that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led her to enter into the Membership and the Credit Agreement is an important consideration.

I think it can be drawn from the statement above that [Mrs N's] motivation was the prospect of a financial gain given she believed she'd get back her money and more. So it seems to me that the prospect of a profit or financial gain from the Membership was an important and motivating factor when she decided to take it out.

That doesn't mean that [Mrs N] wasn't also interested in the holidays she could've taken using her membership, which isn't surprising given its nature. But based on everything I've seen, I don't think she would've gone ahead with her purchase if Regulation 14(3) hadn't been breached.

I've noted the Business' challenges here that state the focus in the complaint was on the UCIS and credibility of the witness statement. However, the basis of the complaint in the original claim letter sent on 26 July 2022 included the following allegation:

"They would own a part of the CLC asset which would grow in value like normal property and which they could sell in 19 years times as per Fractional Rights Certificate and recoup their total investment. Our Clients state that they was pressurised to purchase the product and that it would be an investment for the future."

I've no reason to doubt the credibility of the witness statement either. I've provided the Business with evidence that pre-dates the claim being made where [Mrs N] has been consistent in her recollection that the Timeshare itself was sold to her as giving her money back and more at the end of the term.

Furthermore, I don't think the lack of raising a concern in the way it was sold is persuasive enough as a defence to [Mrs N's] recollection that would suggest that a financial gain wasn't a key incentive in making this purchase.

Neither is declining to invest in a £200,000 holiday home evidence that [Mrs N] was not interested in an investment as part of this purchase. I say this because a £200,000 holiday home would come with a much greater cost and commitment compared to the Fractional membership, so I don't think the two are comparable.

Conclusion

Given everything, I think the Business was a party to an unfair credit relationship with [Mrs N], so I think this complaint should be upheld."

The second Investigator then went on to set out how he thought the Lender should calculate and pay fair compensation to Mrs N.

Mrs N accepted what the second Investigator had said, but the Lender did not reply.

As no agreement could be reached, the complaint has been passed to me for a decision.

The legal and regulatory context

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

The legal and regulatory context that I think is relevant to this complaint is set out below:

The Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) (the 'CCA')

The timeshare(s) at the centre of the complaint in question was/were paid for using restricted-use credit that was regulated by the Consumer Credit Act 1974. As a result, the purchase(s) was/were covered by certain protections afforded to consumers by the CCA provided the necessary conditions were and are met. The most relevant sections as at the relevant time(s) are below.

Section 56: Antecedent Negotiations

Section 75: Liability of Creditor for Breaches by a Supplier

Sections 140A: Unfair Relationships Between Creditors and Debtors

Section 140B: Powers of Court in Relation to Unfair Relationships

Section 140C: Interpretation of Sections 140A and 140B

Case Law on Section 140A

Of particular relevance to the complaint in question are:

1. The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') remains the leading case.
2. The judgment of the Court of Appeal in the case of *Scotland v British Credit Trust* [2014] EWCA Civ 790 ('*Scotland and Reast*') sets out a helpful interpretation of the deemed agency and unfair relationship provisions of the CCA.

3. *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*') – in which the High Court held that determining whether or not the relationship complained of was unfair had to be made “*having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination*”, which was the date of the trial in the case of an existing relationship or otherwise the date the relationship ended.
4. The Supreme Court’s judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*') – which approved the High Court’s judgment in *Patel*.
5. *Deutsche Bank (Suisse) SA v Khan and others* [2013] EWHC 482 (Comm) – in Hamblen J summarised – at paragraph 346 – some of the general principles that apply to the application of the unfair relationship test.
6. *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
7. *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
8. *Shawbrook & BPF v FOS*.

My Understanding of the Law on the Unfair Relationship Provisions

Under Section 140A of the CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor’s behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms “antecedent negotiations” and “negotiator”. As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as “*a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier [...]*”. And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to “*finance a transaction between the debtor and a person (the ‘supplier’) other than the creditor [...]*” and “*restricted-use credit shall be construed accordingly.*”

So, the negotiations conducted by the Supplier during the sale of the timeshare(s) in question was/were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were “any other thing done (or not done) by, or on behalf of, the creditor” under s.140A(1)(c) CCA.

Antecedent negotiations under Section 56 cover both the acts and omissions of the Supplier, as Lord Sumption made clear in *Plevin*, at paragraph 31:

"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.' [...] Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. [...] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."

And this was recognised by Mrs Justice Collins Rice in *Shawbrook & BPF v FOS* at paragraph 135:

"By virtue of the deemed agency provision of s.56, therefore, acts or omissions 'by or on behalf of' the bank within s.140A(1)(c) may include acts or omissions of the timeshare company in 'antecedent negotiations' with the consumer".

In the case of *Scotland & Reast*, the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that *"negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law"* before going on to say the following in paragraph 74:

*"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."*⁴

So, the Supplier is deemed to be Lender's statutory agent for the purpose of the pre-contractual negotiations.

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in *Patel* (which was recently approved by the Supreme Court in the case of *Smith*), that determining whether or not the relationship complained of was unfair had to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"* – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in *Plevin* (at paragraph 17):

"Section 140A [...] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with [...] whether the creditor's relationship with the debtor was unfair."

Instead, it was said by the Supreme Court in *Plevin* that the protection afforded to debtors by Section 140A is the consequence of all of the relevant facts.

⁴ The Court of Appeal's decision in *Scotland* was recently followed in *Smith*.

The Law on Misrepresentation

The law relating to misrepresentation is a combination of the common law, equity and statute – though, as I understand it, the Misrepresentation Act 1967 didn't alter the rules as to what constitutes an effective misrepresentation. It isn't practical to cover the law on misrepresentation in full in this decision – nor is it necessary. But, summarising the relevant pages in *Chitty on Contracts (33rd Edition)*, a material and actionable misrepresentation is an untrue statement of existing fact or law made by one party (or his agent for the purposes of passing on the representation, acting within the scope of his authority) to another party that induced that party to enter into a contract.

The misrepresentation doesn't need to be the only matter that induced the representee to enter into the contract. But the representee must have been materially influenced by the misrepresentation and (unless the misrepresentation was fraudulent or was known to be likely to influence the person to whom it was made) the misrepresentation must be such that it would affect the judgement of a reasonable person when deciding whether to enter into the contract and on what terms.

However, a mere statement of opinion, rather than fact or law, which proves to be unfounded, isn't a misrepresentation unless the opinion amounts to a statement of fact and it can be proved that the person who gave it, did not hold it, or could not reasonably have held it. It also needs to be shown that the other party understood and relied on the implied factual misrepresentation.

Silence, subject to some exceptions, doesn't usually amount to a misrepresentation on its own as there is generally no duty to disclose facts which, if known, would affect a party's decision to enter a contract. And the courts aren't too ready to find an implied representation given the challenges acknowledged throughout case law.

The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations')

The relevant rules and regulations that the Supplier in this complaint had to follow were set out in the Timeshare Regulations. I'm not deciding – nor is it my role to decide – whether the Supplier (which isn't a respondent to this complaint) is liable for any breaches of these Regulations. But they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair. After all, they signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

The Regulations have been amended in places since the Time of Sale. So, I refer below to the most relevant regulations as they were at the time(s) in question:

- Regulation 12: Key Information
- Regulation 13: Completing the Standard Information Form
- Regulation 14: Marketing and Sales
- Regulation 15: Form of Contract
- Regulation 16: Obligations of Trader

The Timeshare Regulations were introduced to implement EC legislation, Directive 122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts (the '2008 Timeshare Directive'), with the purpose of achieving 'a high level of consumer protection' (Article 1 of the 2008 Timeshare Directive).

The EC had deemed the 2008 Timeshare Directive necessary because the nature of timeshare products and the commercial practices that had grown up around their sale made it appropriate to pass specific and detailed legislation, going further than the existing and more general unfair trading practices legislation.⁵

The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations')

The CPUT Regulations put in place a regulatory framework to prevent business practices that were and are unfair to consumers. They have been amended in places since they were first introduced. And it's only since 1 October 2014 that they imposed civil liability for certain breaches – though not misleading omissions. But, again, I'm not deciding – nor is it my role to decide – whether the Supplier is liable for any breaches of these regulations. Instead, they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair as they also signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

Below are the most relevant regulations as they were at the relevant time(s):

- Regulation 3: Prohibition of Unfair Commercial Practices
- Regulation 5: Misleading Actions
- Regulation 6: Misleading Omissions
- Regulation 7: Aggressive Commercial Practices
- Schedule 1: Paragraphs 7 and 24

The Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR')

The UTCCR protected consumers against unfair standard terms in standard term contracts. They applied and apply to contracts entered into until and including 30 September 2015 when they were replaced by the Consumer Rights Act 2015.

Below are the most relevant regulations as they were at the relevant time(s):

- Regulation 5: Unfair Terms
- Regulation 6: Assessment of Unfair Terms
- Regulation 7: Written Contracts
- Schedule 2: Indicative and Non-Exhaustive List of Possible Unfair Terms

The Consumer Rights Act 2015 (the 'CRA')

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

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

County Court Cases on the Sale of Timeshares

1. *Hitachi v Topping* (20 June 2018, Country Court at Nottingham) – claim withdrawn following cross-examination of the claimant.

⁵ See Recital 9 in the Preamble to the 2008 Timeshare Directive.

2. *Brown v Shawbrook Bank Limited* (18 June 2020, County Court at Wrexham)
3. *Wilson v Clydesdale Financial Services Limited* (19 July 2021, County Court at Portsmouth)
4. *Gallagher v Diamond Resorts (Europe) Limited* (9 February 2021, County Court at Preston)
5. *Prankard v Shawbrook Bank Limited* (8 October 2021, County Court at Cardiff)

Relevant Publications

The Timeshare Regulations provided a regulatory framework. But as the parties to this 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 agree with the outcomes reached by both Investigators, for broadly the same reasons. I think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr and Mrs N as an investment, which, in the circumstances of this complaint, rendered the credit relationship between Mrs N and the Lender unfair to her for the purposes of Section 140A of the CCA.

However, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I recognise that there are a number of aspects to Mrs N's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the Supplier misrepresented the Fractional Club membership and that the Lender ought to have accepted her Section 75 claim. That is because, even if that aspect of the complaint ought to succeed, the redress I will direct the Lender to calculate and pay puts Mrs N in the same or a better position than she would be if the redress was limited to misrepresentation.

Mrs N's testimony and the other contemporaneous notes

The Lender (and the Supplier) have provided copies of the customer contact notes which were recorded post Time of Sale. These are as follows:

TSW Contact Note	icl	23/04/2019	18:16	Client Liaison
Note: Nice couple, happy with their purchase and confirmed that they had enough time to discuss. 1300 points, they do holiday without the 3 kids of 19, 11 & 4 as well as with them in school holidays. Understand they will use II along with their pts. Honeycomb 60m in Mrs name, PCCI shown, explained and e-signed in my presence. Confirmed monthly payments are affordable, explained over payments as they are looking to make them in the future. Explained II, BB, BP & iPad. No other questions.				
TSW Contact Note	dga	24/04/2019	15:3	Client Liaison
Note: Lovely happy couple, they are a family of 5, having 3 children aged between 4 and 19, they will holiday in school holidays with the children but they also travel just the 2 of them when, they have much more flexibility with dates when just the 2 of them. They came as a referral, referred by a friend who is a member and they will referral friends/family themselves, shown and discussed how. BB will be 5 of them, ideally December, will come Tenerife, will confirm when back in the UK. Payments are comfortable, no pressure and happy to sign. They don't really have any questions at this stage, everything has been well explained, just asked if can book for family, yes, discussed and happy with. Membership cards given and discusses, members area accessed, shown and discussed, happy finding their way around and no questions regarding the members area so far. Shown all contact numbers, aware to call reservations for bookings and offers through the members area. All happy and excited to be members.				
TSW Contact Note	icl	30/04/2019	14:9	Client Liaison
Note: Spoke to Mrs, they had a wonderful holiday with us and no Qs so far.				

And then later:

TSW Contact Note	Eqf	09/09/2019	15:32	Member Services
Note: Call from mrs. Wants to cancel membership as daughter is going to university and has not been given a student loan. Advised not possible to cancel and should speak to Honeycomb to discuss rescheduling loan. Number given.				

The Lender has said that these notes show that Mr and Mrs N bought the Fractional Club membership for the holidays it would provide them, and not because it was an investment. But having considered them, as I will go on to explain later in this decision, whilst it is clear that the holidays were a motivation, I do not agree that the notes show they *did not* buy the membership because it had been sold and/or marketed as an investment.

As I've said, Mrs N has also submitted a written statement, which the PR says was taken on 14 December 2021. I have considered the Lender's argument that it thinks this statement was taken much later than this date, and after the JR, because the meta data on the document that was submitted shows it was created on 6 December 2023. But I do not agree that this time-stamp is persuasive evidence that the statement was taken on this later date. I say this because 6 December 2023 was the date the document was sent to this Service, and it appears that it was sent on a PDF that was created from an older document. And the date the PR says the statement was written coincides with handwritten notes of the conversation between Mrs N and the PR.

So, I have considered everything that has been submitted by the Lender in relation to the testimony given by Mrs N. But having done so, I feel able to place weight on, and rely on what she has said. I acknowledge that there are some inconsistencies in her testimony, but I do not think these fundamentally undermine the core of acceptable evidence it contains. Whilst being cognisant of the fact that memories can fade over time, I am satisfied that it is a reliable reflection of her memories of the Time of Sale.

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

Having considered the entirety of the credit relationship between Mrs N and the Lender along with all of the circumstances of the complaint, I think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale;
2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;
3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; and
4. The inherent probabilities of the sale given its circumstances.

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

The Supplier's breach of Regulation 14(3) of the Timeshare Regulations

The Lender does not dispute, and I am satisfied, that Mr and Mrs N's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling Fractional Club membership as an investment. This is what the provision said at the Time of Sale:

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

But as has been set out, Mrs N says that the Supplier did exactly that at the Time of Sale.

Mrs N alleges, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because:

- (1) There were two aspects to their Fractional Club membership: holiday rights and a profit on the sale of the Allocated Property.
- (2) They were told by the Supplier that they would get their money back or more during the sale of Fractional Club membership.

The term "investment" is not defined in the Timeshare Regulations. In *Shawbrook & BPF v FOS*, the parties agreed that, by reference to the decided authorities, "*an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit*" at [56]. I will use the same definition.

Mr and Mrs N's share in the Allocated Property clearly constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they 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.

Therefore, to conclude that Fractional Club membership was marketed or sold to Mr and Mrs N as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

And, for the same reasons as set out by the Investigators in this case, and having considered everything that has been said and submitted, I am satisfied that the Supplier breached Regulation 14(3) at the Time of Sale. I'll explain.

How the Supplier marketed and sold the Fractional Club membership

As has been set out, Mr and Mrs N went through a sales presentation from one of the Supplier's sales staff. The type of membership being sold here was the Supplier's second version of what it called the 'Fractional Property Owners Club' (FPOC2 - I shall continue to refer to it as the Fractional Club).

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives to sell FPOC2. The contents of this training material is well known to both sides, so I do not intend to repeat it here, but I am satisfied the Supplier's sales representatives were likely to have been encouraged to make prospective Fractional Club members consider the advantages of owning something and view membership as an opportunity to build equity in an allocated property rather than simply paying for holidays in the usual way. That was likely to have been reinforced throughout the Supplier's sales presentations by the use of phrases such as "bricks and mortar" and notions that prospective members were building equity in something tangible that could make them some money at the end. And this seems to be reflected in what Mrs N says in her statement:

"We eventually agreed to buy a Fractional. We were told about all of the benefits that a Fractional would bring such as great holidays and that we would own part of the property which would be sold in the future and we would get our money back and more".

And indeed, as the Fractional Club training manual suggests that much would have been made of the possibility of prospective members maximising their returns (e.g., by pointing out that one of the major benefits of a 19-year membership term was that it was an optimum period of time to see out peaks and troughs in the market), I think the language used during the Supplier's sales presentation was likely to have been consistent with the idea that Fractional Club membership was an investment.

Overall, therefore, as the training slides seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members, they indicate that the Supplier's sales representative was likely to have led Mr and Mrs N to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e., a profit) in the future. And with that being the case, I don't find Mrs N either implausible or hard to believe when she says that was how the Supplier led them to view Fractional Club membership.

On the contrary, on the balance of probabilities, I think that's likely to be what Mr and Mrs N were led by the Supplier to believe at the relevant time.

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

However, the relevant sales paperwork was not given to and signed by Mr and Mrs N until after the sales presentation and after they had agreed to make the purchase, and in any event they do not seem to have been focussed on by Mr and Mrs N at the Time of Sale.

So, for all of these reasons, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale.

Was the credit relationship between the Lender and the Consumer rendered unfair?

Having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mrs N and the Lender under the Credit Agreement and related Purchase Agreement.

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.

It also seems to me in light of *Carney* and *Kerrigan*, that if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mrs N and the Lender that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and Mrs N into the Credit Agreement is an important consideration.

And I think what Mrs N said in her initial contact with the timeshare advice line, and the handwritten notes of her initial call with the PR, is strong evidence of what Mrs N remembers being told by the Supplier at the Time of Sale and what motivated them to make the purchase.

On my reading of Mrs N's testimony, when taken in conjunction with the text of her initial contact with a timeshare advice line, and the contemporaneous notes taken by the PR during their initial call, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when Mr and Mrs N decided to go ahead with their purchase. As I've said, that doesn't mean they were not interested in holidays, and this seems to be born out by the Supplier's post-sale notes. But I don't agree that the Supplier's notes show that they were *not* motivated by the investment element. After all, I would be surprised if the Supplier had recorded that Mr and Mrs N had bought the membership because of the prospect of a profit, given that the sales staff would most likely have known they should not sell and/or market the membership in that way.

I do acknowledge that Mrs N has called the Supplier to try and cancel the membership in September 2019 due to a change in the financial situation of her family. And the Supplier says this shows the investment element was *not* important to them. But this was a change of circumstances that Mr and Mrs N did not foresee when they made the purchase, and it was a change that had a significant financial impact on them. And what this particular note does not show, is what Mr and Mrs N's motivations were at the Time of Sale, which is what is

important here. And as Mrs N says (plausibly and consistently in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit, as that share was one of the defining features of membership that marked it apart from the more 'standard' type of timeshare available to them.

Mrs N has not said or suggested, for example, that they would have pressed ahead with the purchase in question had the Supplier not led them to believe that Fractional Club membership was an appealing investment opportunity. And as she faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I'm not persuaded that they would have pressed ahead with their purchase regardless.

And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

Conclusion

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

Putting things right

Having found that Mr and Mrs N would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and Mrs N was unfair under Section 140A of the CCA, I think it would be fair and reasonable to put her back in the position she would have been in had they not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore had she not entered into the Credit Agreement. This is on the proviso that Mr and Mrs N agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Here's what I direct the Lender to do to compensate Mrs N with that being the case – whether or not a court would award such compensation:

- (1) The Lender should refund Mrs N's repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.
- (2) In addition to (1), the Lender should also refund the annual management charges Mrs N paid (if any) as a result of Fractional Club membership.
- (3) The Lender can deduct:
 - i. The value of any promotional giveaways that Mr and/or Mrs N used or took advantage of; and
 - ii. The market value of the holidays* Mr and/or Mrs N took using their Fractional Points.

(I'll refer to the output of steps 1 to 3 as the 'Net Repayments' hereafter)

- (4) Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.
- (5) The Lender should remove any adverse information recorded on Mrs N's credit file in connection with the Credit Agreement reported within six years of this decision.
- (6) If Mr and Mrs N's Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.

*I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays, if any, that Mr and Mrs N took using their Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

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

My final decision

I uphold this complaint and direct Oplo PL Ltd to calculate and pay fair compensation to Mrs N as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs N to accept or reject my decision before 10 September 2025.

Chris Riggs
Ombudsman