DRN-5197542

The complaint

Mr and Mrs H complain that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

What happened

I issued a provisional decision on Mr and Mrs H's complaint on 18 October 2024, in which I set out the background to the complaint and my provisional findings on it. A copy of that provisional decision is appended to and forms a part of this final decision.

Because of this, it's not necessary for me to go into great detail about the events leading up to the provisional decision. However, I could summarise the background to the complaint briefly as follows:

- Mr and Mrs H had purchased a number of timeshare products from a particular timeshare supplier (the 'Supplier), from at least as early as 2000. They had, by the end of 2012, amassed 50,000 'points' in the Supplier's holiday club.

- In February 2013 Mr and Mrs H purchased a type of timeshare which was different to the previous products they'd bought. This was a membership to the 'Fractional Club'. They purchased 13,500 points in the Fractional Club, trading in an equal number of points they already held in the Supplier's holiday club. After discounts and an allowance for trading in their existing points, Mr and Mrs H were expected to pay £8,100. This was financed by a loan (the 'Credit Agreement') with the Lender, arranged by the Supplier.

- Fractional Club membership was different to Mr and Mrs H's previous products in that it was asset backed. As well as giving Mr and Mrs H rights to exchange their points for holidays, it included a share in the proceeds of the sale of a property named on their Purchase Agreement (the 'Allocated Property'), which was to be sold when their membership came to an end.

- In March 2017 Mr and Mrs H complained to the Lender about, broadly speaking:

    - Misrepresentations by the Supplier giving them a right to claim against the Lender under section 75 of the CCA.

    - The Lender being a party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of section 140A of the CCA, due to certain acts or omissions of the Supplier.

    - The Lender having lent to them irresponsibly.

In my appended provisional decision, I outlined the legal context to the complaint in detail before going on to make several findings on the balance of probabilities. These findings

were fully explained in the provisional decision but, briefly:

- I found that the Supplier had, at the time it had sold the Fractional Club membership to Mr and Mrs H (the 'Time of Sale') more likely than not breached Regulation 14(3) of The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 ('Timeshare Regulations').

    - The Supplier had breached Regulation 14(3) of the Timeshare Regulations because it had sold or marketed the Fractional Club membership as an investment, which was prohibited under that Regulation.

- I found that the Supplier's breach of the Timeshare Regulations had had a material impact on Mr and Mrs H's decision to go ahead with their purchase in the Fractional Club and their consequent entry into the Credit Agreement with the Lender.

    - This had rendered the credit relationship between Mr and Mrs H, and the Lender, unfair for the purposes of section 140A of the CCA, entitling Mr and Mrs H to fair compensation from the Lender.

What constituted fair compensation was again set out in the provisional decision. However, in general terms it involved the refund of all payments made under the Credit Agreement, plus management charges paid by Mr and Mrs H as a result of the Purchase Agreement, minus the value of the benefits received by Mr and Mrs H as a result of the Purchase Agreement. To the net refund, compensatory interest would be applied. I also proposed that amendments be made to Mr and Mrs H's credit file to remove any negative data associated with the Credit Agreement, and that the Lender provide an indemnity in respect of any ongoing liabilities under the Purchase Agreement.

I asked the parties to the complaint to provide any further submissions they wanted me to consider. Mr and Mrs H said they accepted the provisional decision. The Lender disagreed with the provisional decision and sent in submissions which, including various supplementary documents, ran to many hundreds of pages. The Lender's central arguments against the provisional decision however, I could summarise as follows:

- I had erred in my approach to Regulation 14(3) of the Timeshare Regulations. The Supplier had been required to tell prospective purchasers, under other parts of the Timeshare Regulations, about the *"exact nature and content of [their] right(s)"*. The Lender said the Fractional Club, as a product, did not in itself breach this regulation, and it was not a breach of Regulation 14(3) to describe *how* the Fractional Club product worked, in that it involved the sale of the Allocated Property at the end of the term, and a return of money to a prospective purchaser.

- I had used an expansive definition of "investment" in my provisional decision which was incorrect and not in line with the definition used in *Shawbrook & BPF v. FOS*. In particular, I had defined investment to include any money back at all, rather than an actual or potential profit.

- I had not asked, or answered, the right question in my provisional decision, regarding the sale or marketing of the Fractional Club product as an investment. The question to ask was whether there was sufficiently clear, compelling evidence that the product was marketed or sold as an investment, and in its view, the only reasonable answer to that question was "no".

- It considered there was no real evidence that the Supplier had marketed or sold the Fractional Club membership to Mr and Mrs H as an investment, other than their own

testimony and a Letter of Complaint. And it considered these pieces of evidence were neither clear, nor contemporaneous, nor credible.

- It noted that evidence from the Supplier I had relied on in my provisional decision to support my contention that it had marketed the Fractional Club membership to Mr and Mrs H as an investment, could not reasonably be relied on because:

    - The Supplier's director, SC, had retracted her statement that the September 2012 slides had been used to train salespeople or as a sales aide when selling Fractional Club membership.

    - The June 2013 Sales Policy had not been developed in response to concerns that the product was being marketed by the Supplier's sales representatives as an investment. There had in fact been a policy issued prior to Mr and Mrs H's purchase, in late 2012, which contained substantially the same content.

- Other training material produced by the Supplier had not made any reference to the product being an investment and had clearly prohibited sales representatives from discussing resale values.

- I had not attached sufficient weight to the documentation dating to the Time of Sale, in particular several disclaimers which had made it clear that the Fractional Club membership was not intended to be purchased as an investment and that the Supplier did not make representations about resale values.

- There were good reasons to doubt the credibility of Mr and Mrs H's witness testimony. For example:

    - It was of uncertain provenance, and it was unknown when it had been taken or drafted. Given the passage of time, it lacked specific detail around the events of 2013, who Mr and Mrs H had spoken to and when certain discussions were alleged to have taken place.

    - There were material differences between the way Mr and Mrs H had articulated how the Fractional Club membership had been sold to them as an investment in their 2017 Letter of Complaint, and in their witness statement. There was a lot more nuance in the latter and it was difficult to reconcile the two different accounts or to understand how Mr and Mrs H would have authorised a Letter of Complaint that was so different to their witness statement.

- There were other important reasons why Mr and Mrs H had decided to purchase Fractional Club membership, which I had not given enough weight to. In particular:

    - Mr and Mrs H had said they had less use for their points due to a reduced demand for big family holidays and travelling generally, but that they'd still wanted to have access to exclusive holidays and an "exit strategy".

    - As I had recognised, Mr and Mrs H's long-term liabilities for management charges would have been reduced with even a partial conversion of their holiday club points to Fractional Club points.

    - Overall, Mr and Mrs H's circumstances at the Time of Sale were such that the

future sale of the Allocated Property did not have a material impact on their decision to purchase Fractional Club membership.

- I had used the wrong legal test for determining if the credit relationship between it and Mr and Mrs H had been rendered unfair. I had decided that an absence of evidence that the Supplier's alleged wrongdoing had *not* had a material impact on their purchasing decision, meant the credit relationship had been rendered unfair. This was wrong because the burden of proof was on the complainant to show that the Supplier's alleged wrongdoing *had* been material to their purchasing decision.

The case has now been returned to me to review once more.

While reviewing the case again, I had some reflections on what would constitute fair compensation, which led me to the conclusion that it was necessary to make small amendments to my redress directions. I shared these proposals with both parties. PR said it had no objections. The Lender did not reply.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I've arrived at the same conclusions I did in my appended provisional decision, and for essentially the same reasons. However, I will address the key points made by the Lender.

I don't accept the Lender's contention that I have applied the wrong test to the question of whether the credit relationship was rendered unfair by the Supplier's wrongdoing, or that I have adopted an inappropriately expansive definition of the word "investment".

I think I was clear in the provisional decision about the definition of investment that I intended to use, and I note the Lender hasn't disagreed that this is the appropriate definition. The Lender has argued that, in reality, I went on to deviate from that definition, but I don't think that's a fair characterisation of the content of the provisional decision. The allegations made by Mr and Mrs H involved the Supplier having explained that they'd be able to make a "potential profit" on the sale of the Allocated Property, and that although the value of the property could go up or down, it was more likely to go up. I think that, if the Supplier did market the product to Mr and Mrs H in those terms, then this falls squarely within the definition of investment I set out in my provisional decision and would constitute a breach of the prohibition on marketing or selling timeshares as investments.

That brings me to the next point made by the Lender, which is that it considers there is inadequate evidence that the Supplier did in fact market the Fractional Club membership in the way I've described above and set out in further detail in the appended provisional decision.

I've carefully considered the additional evidence the Lender has put forward in relation to the Supplier's sales processes. These include a general statement by the Supplier in respect of the provisional decision, copies of other versions of the Sales Policy, and a witness statement made by SC which comments on the September 2012 slides.

Having considered this evidence I can see that the Supplier had issued a Sales Policy in late 2012 which had outlined certain practices it considered unacceptable by its sales representatives, including marketing Fractional Club membership as an investment or discussing the future value of fractional assets with customers. So I accept that it was not

the case that the June 2013 Sales Policy was developed as a result of concerns that sales representatives were selling the Fractional Club product as an investment. Indeed, it appears that the June 2013 Sales Policy was developed in response to other concerns which aren't relevant to this complaint.

Regarding the September 2012 slides, I've been directed to a witness statement in which SC says she was wrong to have said previously that the September 2012 slides were used by the Supplier to sell Fractional Club membership. She explained that, at the time she had originally informed the Financial Ombudsman Service about the September 2012 slides, she had been unable to obtain confirmation from a sales manager who had been in the role at the relevant time. Having now done so, she understood that the slides were in fact *"never used during the sales presentation of the fractional product."* SC went on to say that the Supplier's Fractional Club product had been developed further after September 2012 and so the slides were not reflective of the final product offered to customers four months later. SC added that certain content within the slides was likely to have raised "compliance concerns" – including content I referred to in my provisional decision.

I've also seen another witness statement, from an individual ("GH") who was a sales manager for the Supplier in Tenerife. In this statement, GH says he'd never seen the September 2012 slides before.

I think it's worth noting the context in which the September 2012 slides were received by the Financial Ombudsman Service. The slides were attached to an email from SC, in which she said the following:

"The Power Point was dated 14 September 2012 (which was a couple of months before we started selling Fractional points).

I am advised that this Power Point was used as a training tool for our sales reps. I am also advised that the Power Point was converted into an A1 size flip presenter (and that the pages were laminated) and that this was used by sales team members as a sales aide."

SC then went on to describe conversations she'd had with a sales manager ("AS") based at a site called "Pine Lake" in the UK, about what materials had been used to assist with sales of the Fractional Club product, but it's unclear if AS was also the person who had originally advised SC of how the September 2012 slides had been used by the Supplier.

It seems SC received two very different accounts of how the September 2012 slides were used by the Supplier's sales teams. It appears that one source advised her the slides were never used to sell the product, while another source said they had been used in training and blown up to A1 size to be "used…as a sales aide".

I think it's possible for both accounts to be at least partially accurate. I note the Supplier had multiple sites in different countries through which it conducted sales of the Fractional Club product. These included the Tenerife site at which GH was based, and the Pine Lake site at which AS was based and at which Mr and Mrs H had purchased their Fractional Club membership in February 2013. It's possible that different materials were used in different ways at different sites by different sales teams.

I note SC does not say in her witness statement that the slides were never used in training – she refers to them not having been used to sell the Fractional Club product to customers. So I think it remains plausible, notwithstanding SC and GH's witness statements, that the September 2012 slides were used in some capacity within the Supplier's business, be it in the training of sales representatives or in sales presentations to potential customers.

Ultimately, however, I don't think the outcome of this complaint turns on how the September 2012 slides were used. And that's because I think Mr and Mrs H's own testimony is sufficient evidence that, at least on the specific occasion the Supplier sold them membership to the Fractional Club, it went beyond simply describing how the sale of the Allocated Property worked, and strayed into discussion of the likely resale value, leaving them with the impression its value would go up over time. As I noted in my appended provisional decision, Mr and Mrs H *"…[said] the Supplier's sales representative informed them that the future value of their share in the Allocated Property could go up or down, but left them with the impression that it was more likely that the value would go up due to that being the historic trend with property prices."*

In my view, this would have fallen foul of the prohibition on marketing or selling timeshares as an investment, and I remain of the view, on balance, that the Supplier was therefore in breach of Regulation 14(3) of the Timeshare Regulations when it sold the Fractional Club membership to Mr and Mrs H.

I have read and considered the Lender's concerns about Mr and Mrs H's testimony. These appear to be similar to the concerns it expressed prior to my provisional decision and which I have already addressed. I do not think the Lender has said much new on the subject of Mr and Mrs H's testimony following the provisional decision, other than to invite a comparison between the brief way in which PR represented how the Supplier had sold the Fractional Club membership as an investment in the Letter of Complaint, and the rather more considered way in which Mr and Mrs H described it themselves.

I think the Lender is restating its view that either the original Letter of Complaint or the witness statement which was received later, or possibly both, are not representative of Mr and Mrs H's concerns about how the Supplier sold the Fractional Club membership to them. The Lender has questioned how Mr and Mrs H could possibly have signed off on the Letter of Complaint, given the different way it had articulated their concerns, or if they had even seen it. While it may be relevant to a discussion of PR's business practices or whether it gave proper voice to Mr and Mrs H's concerns, I don't think the point the Lender has made is especially relevant to whether or not Mr and Mrs H's statement can be relied on. I remain of the view, on balance, that it is likely to be a genuine reflection of their recollections from the Time of Sale.

As the Lender points out, and as I in fact noted in my provisional decision, the Supplier's breach of regulation 14(3) of the Timeshare Regulations needed to be material to Mr and Mrs H's purchasing decision in order for the credit relationship between them and the Lender to have been rendered unfair. The Lender considers I reversed the burden of proof when arriving at my conclusions on this point, taking issue with a particular paragraph in which I noted that I'd not seen enough to persuade me that Mr and Mrs H would have pressed ahead with their purchase regardless of the Supplier's breach of Regulation 14(3). I don't accept the Lender's point here, and I think it has not taken sufficient account of the paragraphs which preceded the one it highlighted. In my provisional decision I said the following:

"On my reading of Mr and Mrs H's testimony and taking into account their situation at the time, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. That doesn't mean they were not interested in holidays or in taking fewer holiday club points with them into their retirement. Their own testimony, and their booking history with the Supplier, demonstrates that they quite clearly were interested in these things. And that is not surprising given the nature of the product at the centre of this complaint.

But I'd observe that the facts of Mr and Mrs H's situation meant it was more likely, in my view, that their purchase was motivated by something other than obtaining enhanced holiday rights or reducing the term of their membership with the Supplier, as the Lender has suggested.

Mr and Mrs H's purchase didn't involve them purchasing more points than they already had, and they were already in the Supplier's top membership tier and therefore notionally entitled to the best level of holiday-related benefits. They were simply trading in a portion of their holiday club points for points in the Fractional Club. They didn't obtain any increased or enhanced holiday-related benefits that I can see, other than the possibility of renting out their fractional weeks (which they never did and which doesn't appear to have been important to them). So it's difficult to see how their motivation for trading in their points could have been holiday-related.

It was true that Fractional Club membership was for a shorter period than holiday club membership (and indeed the Supplier appears to have promoted this as a benefit of converting from one product to the other), but Mr and Mrs H only converted a relatively small proportion of their holiday club points into points in the Fractional Club. So it appears their purchase didn't result in them being tied in to the Supplier for a shorter period of time overall. That said, I recognise that Mr and Mrs H's long-term liabilities for things such as management fees would have been reduced even with a partial conversion of their holiday club points, and this is something they themselves recognise in their witness statement, where they say they were looking to carry fewer holiday club points into their retirement.

But as Mr and Mrs H say (plausibly 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 their existing membership. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made."

This sets out clearly, in my view, why I found provisionally that the Supplier's breach of Regulation 14(3) was material to Mr and Mrs H's purchasing decision and therefore rendered their credit relationship with the Lender unfair. I've seen no reason to depart from those provisional findings, and it follows that my findings and conclusions remain the same on this point.

In light of the above, given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs H under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. And with that being the case, I remain of the view that it is fair and reasonable that I uphold this complaint.

Fair Compensation

My views on what would constitute fair compensation are slightly different to those expressed in my provisional decision. And that's because I'm mindful of the fact that, had Mr and Mrs H not gone ahead with their purchase of the Fractional Club membership, they'd have 13,500 more points in their other holiday club membership with the Supplier. They'd have been able to take holidays using these points, but would also have needed to pay management charges in relation to them. So that needs to be taken into account.

(1) The Lender should refund Mr and Mrs H repayments to it under the Credit Agreement and cancel any outstanding balance if there is one.

(2) In addition to (1), the Lender should also refund the difference between the management charges Mr and Mrs H would have paid, had they left their 13,500 points in the Supplier's holiday club, and the management charges they actually paid.
(3) The Lender can deduct

i. The value of any promotional giveaways that Mr and Mrs H used or took advantage of; and
ii. The market value of the holidays* Mr and Mrs H took using their Fractional Points if their annual management charge for the year in which the holidays were taken was more than the annual management charge they would have paid as ongoing members of the Supplier's holiday club. However, the deduction should be a proportion equal to the difference between those annual management charges. And if any of Mr and Mrs H's holiday club annual management charges would have been higher than their equivalent Fractional Club annual management charge, there shouldn't be a deduction for the market value of any holidays taken using Fractional Points in the years in question as they could have taken those holidays as ongoing holiday club members in return for the relevant annual management charge..

(I'll refer to the output of steps 1-3 as 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 isn't practical or possible to determine the market value of the holidays Mr and Mrs H 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.

(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 Mr and Mrs H's credit files in connection with the Credit Agreement.
(6) If Mr and Mrs H'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.

**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

For the reasons explained above, and in my appended provisional decision, I uphold Mr and Mrs H's complaint and direct Shawbrook Bank Limited to take the actions outlined in the "Fair Compensation" section above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H and Mr H to accept or reject my decision before 12 February 2025.

Will Culley
Ombudsman

COPY OF PROVISIONAL DECISION

Note: due to the way in which this document has been produced, the redress paragraphs in the "Fair Compensation" section of the provisional decision have been re-numbered from 1-6 to 7-12.

I've considered the relevant information about this complaint.

Having done so, I've arrived at a different set of conclusions to our Investigator in some respects, so I need to give the parties to the complaint an opportunity to respond and provide further submissions before I make my decision final.

I'll look at any more comments and evidence that I get before 1 November 2024. But unless the information changes my mind, my final decision is likely to be along the following lines.

The complaint

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

Background to the Complaint

Mr and Mrs H have a long history of purchases with a particular timeshare provider (the 'Supplier'), going back at least as far as the year 2000. This complaint concerns events that occurred in February 2013, but I think it would be helpful to outline very briefly Mr and Mrs H's historical dealings with the Supplier, to put the complaint in its proper context.

The earliest purchase I have any details about was made in August 2000, when Mr and Mrs H purchased a number of 'points' in a holiday club run by the Supplier or one of its predecessors. They went on to make further purchases of points from the supplier on eight subsequent occasions between May 2001 and August 2012, and by the time of this last purchase of points in the holiday club, they'd amassed a portfolio of 50,000 points. These points could be exchanged for holidays each year, and larger portfolios corresponded with different 'levels' of membership within the club, which came with increased holiday-related benefits.

Mr and Mrs H purchased membership of a different type of timeshare product (the 'Fractional Club') from the Supplier on 21 February 2013 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 13,500 fractional points at a cost of £22,680 (the 'Purchase Agreement'). As part of the Purchase Agreement, Mr and Mrs H traded in an equal number of points in the holiday club, for which they were given consideration of £13,500. They were also given a further discount of £1,080, meaning the total price they were expected to pay for the 13,500 fractional points was £8,100.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs H 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 H paid for their Fractional Club membership by taking finance of £8,100 from the Lender Mr and Mrs H's name (the 'Credit Agreement'). Mr and Mrs H settled the finance early, about five months after having taken it out.

I'm aware of one further purchase made by Mr and Mrs H after this, when they purchased a further 6,500 fractional points from the Supplier on 28 August 2013, again trading in an equivalent amount of holiday club points. This purchase was not financed by the Lender and does not form a part of this complaint.

Mr and Mrs H – using a professional representative (the 'PR') – wrote to the Lender on 8 March 2017 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them 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.
3. The decision to lend being irresponsible because (1) the Lender did not carry out the right creditworthiness assessment and (2) the money lent to them under the Credit Agreement was unaffordable for them.

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

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

1. told them that Fractional Club membership had a guaranteed end date when that was not true because it was necessary to find a buyer.
2. told them that they were buying an interest in a specific piece of "real property" when that was not true.
3. told them that Fractional Club membership was an "investment" which would generate a "massive return" when that was not true.
4. told them that Fractional Club membership was the only way to avoid passing on the liabilities associated with their holiday club membership to their family, when this was not true.

Mr and Mrs H says that they have a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs H.

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

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

1. Fractional Club membership was marketed and sold to them as an investment on which they'd receive a 'massive return'.
2. They were pressured into purchasing Fractional Club membership by the Supplier.
3. The decision to lend was irresponsible because the Lender didn't carry out the right affordability assessment and had been in breach of relevant industry codes.
4. The Supplier received an undisclosed commission from the Lender.

The Lender dealt with Mr and Mrs H's concerns as a complaint and issued its final response letter on 10 May 2017, rejecting it on every ground.

Mr and Mrs H then referred the complaint to the Financial Ombudsman Service. There was a delay in the Financial Ombudsman Service being in a position to assess the complaint. In

the meantime, in November 2023, PR supplied a witness statement from Mr and Mrs H which set out their recollections of their experiences with the Supplier. The complaint was assessed in December 2023 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 Club membership as an investment to Mr and Mrs H 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 Mr and Mrs H was rendered unfair to them for the purposes of section 140A of the CCA.

The Lender disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

The Lender said it disagreed with the Investigator's assessment because:

1) It questioned the credibility of Mr and Mrs H's witness statement, which was unsigned and appeared to have been produced 10 years after the events complained of.
2) It felt there had been inconsistency in Mr and Mrs H describing the Fractional Club membership having been marketed to them as an investment, and that the allegations made had evolved over time.
3) It felt the evidence was suggestive of Mr and Mrs H having made their purchase due to concerns over increasing fees and difficulty booking under the holiday club system, and their motivation for upgrading to the Fractional Club was to take more holidays and stay in better resorts.
4) It felt the reduced term of the Fractional Club membership, compared to Mr and Mrs H's holiday club membership, may have been a factor in their purchase 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.

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, Holiday Products, Resale and Exchange Contracts Regulations 2010 ('Timeshare Regulations').
- The Unfair Terms in Consumer Contract Regulations 1999 ('UTCCR')
- The Consumer Protection from Unfair Trading Regulations 2008 ('CPUT').
- Case law on Section 140A of the CCA – including, in particular:

    - The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') (which remains the leading case in this area).
    - *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
    - *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*').
    - The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*').
    - *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').

- *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
- *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time – which, in this complaint, includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code').

What I've provisionally decided – and why

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr and Mrs H as an investment, which, in the circumstances of this complaint, rendered the credit relationship between them and the Lender unfair to them for the purposes of Section 140A of the CCA.

However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I recognise that there are a number of aspects to Mr and Mrs H complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that:

1) The Supplier misrepresented the Fractional Club membership to Mr and Mrs H and the Lender therefore should have honoured a claim under section 75 of the CCA.
2) The Lender failed to carry out a proper assessment of affordability when agreeing to lend to Mr and Mrs H, causing it to lend to them irresponsibly.
3) The Lender paid an undisclosed commission to the Supplier as part of the deal, leading to an unfair debtor-creditor relationship between Mr and Mrs H and the Lender.

And that's because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs H in the same or a better position than they would be if the redress was limited to what would have been possible were the heads of complaint I've outlined just above were to have been successful.

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

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

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

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

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out 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."*

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr and Mrs H's membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

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

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

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

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

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

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

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

What's more, the scope of that responsibility extends to both acts and omissions by the Supplier as the Supreme Court in *Plevin* made clear when it referred to 'acts or omissions' when discussing Section 56. And as Section 56(3)(b) says that an applicable agreement can't try to relieve a person from liability for 'acts or omissions' of any person acting as, or on behalf of, a negotiator, it must follow that the reference to 'omissions' would only be necessary because they can be attributed to the creditor under Section 56.

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

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

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

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

I have considered the entirety of the credit relationship between Mr and Mrs H and the Lender along with all of the circumstances of the complaint and 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; and
2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;

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

3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;
4. The inherent probabilities of the sale given its circumstances.

I have then considered the impact of these on the fairness of the credit relationship between Mr and Mrs H 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 H'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 Mr and Mrs H say that the Supplier did exactly that at the Time of Sale – saying the following during the course of this complaint:

- They were told they could realise a 'potential profit' on the funds they'd invested in the Fractional Club membership, when the Allocated Property was sold.
- They were told they were converting a product with no resale value, to a product with a resale value.
- While they were given a warning by the Supplier that all investments could go up or down in value, they were led to believe that it was more likely they'd receive a return on investment than not when the Allocated Property was sold, because property prices historically trended upwards.

Mr and Mrs H allege(s), therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because:

(1) The Fractional Club membership had as one of its features, a potential profit on the sale of the Allocated Property.
(2) They were led to believe by the Supplier that Fractional Club membership was the type of investment that would be more likely to increase in value than not.

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 H's share in the Allocated Property clearly, in my view, 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.

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr and Mrs H 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.

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 H, 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 H as an investment.

On the reverse of the front page of the Purchase Agreement signed by Mr and Mrs H, for example, the first point stated that the product should not be purchased *'as an investment in real estate'* and that the price paid was 'primarily' so Mr and Mrs H could go on holidays. Mr and Mrs H were also required to sign a 'Compliance Statement' which said, among other things, that *'the purchase…is an investment in…future holidays, and…should not be regarded as a property or financial investment'.* A disclaimer followed which noted that the sale price of the Allocated Property would depend on market conditions at the relevant time.

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And there are a number of strands to Mr and Mrs H allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that membership of the Fractional Club was expressly described as an *"investment*" in several different contexts and (2) that membership of the Fractional Club was likely to increase in value.

So, I have considered:

(1) whether it is more likely than not that the Supplier, at the Time of Sale, sold or marketed membership of the Fractional Club as an investment, i.e. told Mr and Mrs H or led them to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered them the prospect of a financial gain (i.e., a profit); and, in turn
(2) whether the Supplier's actions constitute a breach of Regulation 14(3).

And for reasons I'll now come on to, given the facts and circumstances of this complaint, I think the answer to both of these questions is 'yes'.

How the Supplier marketed and sold the Fractional Club membership

I've seen a variety of training and marketing materials used by the Supplier, including::

- A set of slides produced on 14 September 2012 and used as a training tool for its sale staff and as a sales aide when selling Fractional Club membership to potential purchasers ('the September 2012 Slides') according to an email from the Supplier's Vice President of Legal Services and European General Counsel ('SC') that confirmed this was the case;

- A 98-page document called "*Sales Representative Training Manual Europe"*. While the document itself is undated, it was said by the Supplier to be some basic training given to new sales representatives in 2013 (the '2013 Training Manual'); and
- The Supplier's internal policy on 'sales misrepresentation' dated 28 June 2013 – which replaced a previous version of the policy dated up until August 2011 (the 'June 2013 Sales Policy').

The 2013 Training Manual looks like a set of instructions to and guidance for new sales representatives on how to interact with prospective members. And with that being the case, both the September 2012 Slides and 2013 Training Manual seem to me to be reasonably indicative of:

(1) the training the Supplier's sales representatives would have got before selling Fractional Club membership; and
(2) how the sales representatives would have framed the sale of Fractional Club membership to prospective members – including Mr and Mrs H.

I'll come on to the relevance of the June 2013 Sales Policy later in this decision.

Slides 28 to 34 of the September 2012 Slides focused on Fractional Club membership, and I think the following aspects of those slides are particularly important.

Slide 29, which was titled *"What is fractional ownership?"*, was the first slide to set out how Fractional Club membership worked. When doing that, it read:

"Fractional ownership is the division of a ***high value asset*** *into fixed segments whereby the owner can enjoy the advantages and eventual residual value of what they own, use it for a fixed period of time and only pay management fees and upkeep costs proportionate to their share of the property.*

Differing from timeshare ownership *which affords a right to use for a fixed period of time and the ownership of the property always remains with the developer,* ***fractional ownership is tied to a piece of real estate with a clearly defined exit strategy****.* ***Purchasers actually own a piece of the property.*** *Once the term finishes at a predetermined point the real estate is sold on the open market and after sales costs and taxes are deducted the proceeds of the sale are split proportionately based on the size of the fraction owned."*

(my emphasis added in bold type)

From the off, therefore, it seems sales representatives would have demonstrated that there were financial advantages to Fractional Club membership rather than being a member of a 'standard' timeshare.

One of those advantages referred to in the slide above is the ownership of a *"high value asset"* and *"actually [owning] a piece of the property"*. And as an owner's equity in their property is built over time as the value of the asset increases relative to the size of any mortgage secured against it, this particular advantage of Fractional Club membership was portrayed in terms that played on the opportunity ownership gave prospective members of the Fractional Club to accumulate wealth in a similar way.

Slide 30 went on to set out a number of other advantages of *"owning a […] property fractional"*, which included management by a major brand, residence size and capacity, *"great locations in highly popular tourist destinations"* and ongoing refurbishment – all of which were said on the slide to *"enhance the residual value of the real estate at the end of the term"*.

Slide 31 also said that the 15-year membership term of the Fractional Club was aligned with the *'historic property growth cycle in high demand tourist destinations' while members could also hand down their membership to family*.

I acknowledge that the slides don't include express reference to an "investment" benefit of Fractional Club membership. But the slides above alluded to much the same concept. It was simply phrased in the language of building equity in property. And with that being the case, it seems to me that the Supplier's approach to marketing Fractional Club membership involved implying that *"owning a […] property fractional"* was a way of building wealth over time, similar to home ownership.

I also recognise that, on page 53 of the 2013 Training Manual, sales representatives were told by the Supplier not to talk to prospective members of the Fractional Club about values or returns as it wasn't an investment product – which is consistent with the fact that the September 2012 Slides don't include a comparison between the expected level of financial return and the purchase price of Fractional Club membership.

However, if I were to only concern myself with express efforts to quantify to Mr and Mrs H the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that *'[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).'"*[2] And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.

So, if a supplier *implied* to consumers that future financial returns (in the sense of possible profits) from a timeshare were a good reason to purchase it, I think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment. Indeed, if I'm wrong about that, I find it difficult to explain why, in paragraphs 77 and 78 followed by 99 and 100 of S*hawbrook & BPF v FOS* when, Mrs Justice Collins Rice said the following:

"[…] I endorse the observation made by Mr Jaffey KC, Counsel for BPF, that, whatever the position in principle, ***it is apparently a major challenge in practice for timeshare companies to market fractional ownership timeshares consistently with Reg.14(3). […] Getting the governance principles and paperwork right may not be quite enough.***

[2] The Department for Business Innovation & Skills *"Consultation on Implementation of EU Directive 2008/122/EC on Timeshare, Long-Term Holiday Products, Resale and Exchange Contracts (July 2010)".* https://assets.publishing.service.gov.uk/media/5a78d54ded915d0422065b2a/10-500-consultation-directive-timeshare-holiday.pdf

The problem comes back to the difficulty in articulating the intrinsic benefit of fractional ownership over any other timeshare from an individual consumer perspective*. […]* ***If it is not a prospect of getting more back from the ultimate proceeds of sale than the fractional ownership cost in the first place, what exactly is the benefit?*** *[…] What the interim use or value to a consumer is of a prospective share in the proceeds of a postponed sale of a property owned by a timeshare company – one they have no right to stay in meanwhile – is persistently elusive."*

"[...] although the point is more latent in the first decision than in the second, it is clear that both ombudsmen viewed fractional ownership timeshares – simply by virtue of the interest they confer in the sale proceeds of real property unattached to any right to stay in it, and the prospect they undoubtedly hold out of at least 'something back' – as products which are inherently dangerous for consumers. ***It is a concern that, however scrupulously a fractional ownership timeshare is marketed otherwise, its offer of a 'bonus' property right and a 'return' of (if not on) cash at the end of a moderate term of years may well taste and feel like an investment to consumers who are putting money, loyalty, hope and desire into their purchase anyway.*** *Any timeshare contract is a promise, or at the very least a prospect, of long-term delight. [...] A timeshare-plus contract suggests a prospect of happiness-plus. And a timeshare plus 'property rights' and 'money back' suggests adding the gold of solidity and lasting value to the silver of transient holiday joy."*

What's more, while the 2013 Training Manual suggests that sales representatives were told by the Supplier not to present Fractional Club membership as an investment, the June 2013 Sales Policy casts some doubt over how effective that training was actually likely to be. After all, the Supplier felt it necessary, following feedback from existing Fractional Club members, to update and supersede a previous version of the policy in light of what it considered to be unacceptable practices by its sales representatives when selling Fractional Club membership – saying:

"With regards to the presentation of the Fractional product:

- *Sales Team members will not represent the Fractional product as an investment.*
- *Sales Team members will not discuss any predictions with regards to the residual value.*
- *Sales Team members will not misinform clients by indicating that they have to purchase more points for the purpose of being eligible to convert their points to Fractional ownership (unless additional points are necessary in order to meet the minimum level of points required to convert points to Fractional ownership"*

In my view, this update suggests that Supplier knew by June 2013 (which was a number of months after it started selling Fractional Club membership) that some sales of Fractional Club had been presented as an investment contrary to Regulation 14(3) of the Timeshare Regulations.

That doesn't necessarily mean that every sale of the Fractional Club in that time was marketed and sold as an investment in breach of the relevant prohibition. Just as contemporaneous documents don't always reflect the conversations that a consumer had with a supplier at the relevant time, training and guidance isn't necessarily reflective of how each and every sale of a product was made by each individual member of staff to each consumer.

With that said, nonetheless, I think the Supplier's sales representatives were encouraged to make prospective Fractional Club members consider the advantages of owning something and view membership as a way of generating a return, 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 "high value asset". And as the September 2012 Slides suggest that much would have been made of the possibility of prospective members maximising their returns (e.g., by pointing out that one of the benefits of a 15-year membership term was that it aligned with the historic property growth cycle in high demand tourist destinations), I think the language used during the Supplier's sales presentations was likely to have been consistent with the idea that Fractional Club membership was an investment.

Indeed, Mr and Mrs H's recollections are consistent with the suggestion that Fractional Club membership was marketed and sold to them in that way. They say the Supplier's sales representative informed them that the future value of their share in the Allocated Property could go up or down, but left them with the impression that it was more likely that the value would go up due to that being the historic trend with property prices. I don't find them either implausible or hard to believe when they say that given the sales and training material I've referred to above. And in the absence of evidence to persuade me otherwise, given all of the facts and circumstances of this complaint, I think that's likely to be what Mr and Mrs B were led by the Supplier to believe at the relevant time. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

I think it's worth addressing at this point the concerns the Lender has about Mr and Mrs H's testimony. Mr and Mrs H's witness statement is undated and unsigned, and I understand the Lender's concern that it has surfaced only recently, in November 2023, many years after the Time of Sale and after the outcome of *Shawbrook & BPF v FOS*. The conclusion I think the Lender is inviting me to reach, is that the witness statement may have been produced with the benefit of hindsight, and therefore lacks credibility. It may or may not be the case that the witness statement was produced more recently than 8 March 2017, but the complaint as originally made did contain an allegation from Mr and Mrs H that the Fractional Club membership was sold as an investment – this is not a new point. The witness statement is also quite detailed and contains what appears to me to be a balanced set of reflections from Mr and Mrs H on their relationship with the Supplier over the years, with a focus (as might be expected) on the particular sale which is the subject of this complaint. There are no obvious errors or inconsistencies with other pieces of evidence.

Overall, I think the witness statement is likely to contain a fair reflection of Mr and Mrs H's memories of how the Supplier sold the Fractional Club membership to them.

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 Mr and Mrs H 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.

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

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

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

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, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs H and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) (which, having taken place during its antecedent negotiations with Mr and Mrs H, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender) lead them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On my reading of Mr and Mrs H's testimony and taking into account their situation at the time, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. That doesn't mean they were not interested in holidays or in taking fewer holiday club points with them into their retirement. Their own testimony, and their booking history with the Supplier, demonstrates that they quite clearly were interested in these things. And that is not surprising given the nature of the product at the centre of this complaint.

But I'd observe that the facts of Mr and Mrs H's situation meant it was more likely, in my view, that their purchase was motivated by something other than obtaining enhanced holiday rights or reducing the term of their membership with the Supplier, as the Lender has suggested.

Mr and Mrs H's purchase didn't involve them purchasing more points than they already had, and they were already in the Supplier's top membership tier and therefore notionally entitled to the best level of holiday-related benefits. They were simply trading in a portion of their holiday club points for points in the Fractional Club. They didn't obtain any increased or enhanced holiday-related benefits that I can see, other than the possibility of renting out their fractional weeks (which they never did and which doesn't appear to have been important to them). So it's difficult to see how their motivation for trading in their points could have been holiday-related.

It was true that Fractional Club membership was for a shorter period than holiday club membership (and indeed the Supplier appears to have promoted this as a benefit of converting from one product to the other), but Mr and Mrs H only converted a relatively small proportion of their holiday club points into points in the Fractional Club. So it appears their purchase didn't result in them being tied in to the Supplier for a shorter period of time *overall*. That said, I recognise that Mr and Mrs H's long-term liabilities for things such as management fees would have been reduced even with a partial conversion of their holiday club points, and this is something they themselves recognise in their witness statement, where they say they were looking to carry fewer holiday club points into their retirement.

But as Mr and Mrs H say (plausibly 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 their existing membership. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

Mr and Mrs H have 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. They faced the prospect of borrowing and repaying a substantial sum of money while getting no better holiday rights or benefits, and only a limited reduction in their long-term liabilities, so had they not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I have not seen enough to persuade me that they would have pressed ahead with their purchase regardless.

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs H 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.

Fair Compensation

Having found that Mr and Mrs H would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable to put them back in the position they would have been in had they not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr and Mrs H agree(s) 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 think needs to be done to compensate Mr and Mrs H with that being the case – whether or not a court would award such compensation:

(7) The Lender should refund Mr and Mrs H repayments to it under the Credit Agreement and cancel any outstanding balance if there is one.
(8) In addition to (1), the Lender should also refund the annual management charges Mr and Mrs H paid as a result of Fractional Club membership.
(9) The Lender can deduct

iii. The value of any promotional giveaways that Mr and Mrs H used or took advantage of; and
iv. The market value of the holidays* Mr and Mrs H took using the Fractional Points bought during this purchase only, and not any Fractional Points they bought in a subsequent sale or with the points they already held in the Supplier's holiday club which were not 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 isn't practical or possible to determine the market value of the holidays Mr and Mrs H took using the Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken using the Fractional Points bought during this purchase) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

(10) 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.
(11) The Lender should remove any adverse information recorded on Mr and Mrs H's credit files in connection with the Credit Agreement.
(12) If Mr and Mrs H'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.

**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 provisional decision

For the reasons explained above, I'm currently minded to uphold Mr and Mrs H's complaint and direct Shawbrook Bank Limited to take the actions outlined in the "Fair Compensation" section of this provisional decision.

I now invite the parties to the complaint to let me have any further submissions they'd like me to consider, before 1 November 2024. I will review the case again on or after that date.

Will Culley
Ombudsman