DRN-5221801

The complaint

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

What happened

Mr and Mrs M purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 6 March 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to trade in their existing 10,000 points towards the purchase of 10,000 fractional points at a cost of £6,800 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs M 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 M paid for their Fractional Club membership by taking finance of £6,800 from the Lender in their joint names (the 'Credit Agreement').

Mr and Mrs M – using a professional representative (the 'PR') – wrote to the Lender on 7 September 2020 (the 'Letter of Complaint') to complain about 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.

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 M say 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 in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.

The Lender dealt with Mr and Mrs M's concerns as a complaint and issued its final response letter on 23 September 2021, rejecting it on every ground.

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

The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr and Mrs M 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 M 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.

Having considered everything, I came to the same conclusion as our Investigator and thought Mr and Mrs M's complaint should be upheld. I issued a provisional decision (PD), setting out my thoughts and invited both parties to respond with anything further they wished me to consider before I issued a final decision. The PD included the following:

'***The legal and regulatory context***

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

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

- *The CCA (including Section 75 and Sections 140A-140C).*
- *The law on misrepresentation.*
- *The Timeshare Regulations.*
- *The UTCCR.*
- *The CPUT Regulations.*
- *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 M 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 M's complaint, it isn't necessary to make formal findings on all of them.

Because, even if the other aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs M in the same or a better position than they would be if the redress was limited to those aspects.

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 Mr and Mrs M 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 M'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.

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

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

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 M 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;*
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 M 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 M 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 M say that the Supplier did exactly that at the Time of Sale – saying the following during the course of this complaint:

"The sales representative told us that "Fractional" would provide us with an asset that could be sold on the term ending and that we would get some money back on that sale!

…

The sales representative then told us that, even though we would still be members for a lengthy period, unlike Points, we would be purchasing a piece of property. We were told that "Fractional" was an extremely good financial investment. We were told that it was an "investment in bricks and mortar" and that at the end of the term, we would receive a return on our investment."

Mr and Mrs M allege, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because 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 M'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 M 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 M, 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 was, for instance, a Customer Compliance Statement signed by Mr and Mrs M at the Time of Sale that included the following:

"We understand that the purchase of our [Fractional Points] is an investment in our future holidays, and that it should not be regarded as a property or financial investment."

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And Mr and Mrs M allege that the Supplier breached Regulation 14(3) at the Time of Sale by expressly describing membership of the Fractional Club as an "investment".

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 M 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') in which she confirmed that 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 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 M.*

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 exist strategy***. ***Purchases 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)

From the off, therefore, it seems that 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 the 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 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. And as an allocated property was 'owned' by Fractional Members only to the extent that they participated in the net proceeds from its sale (they didn't have any preferential rights to stay in their allocated property or to use it in any other way), the notion of property ownership promoted by the Supplier was specifically its potential investment benefit.

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 M 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 Shawbrook & 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.***

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***

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[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

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."*

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.

With that said, therefore, I think it is more likely than not that the Supplier did, at the very least, imply that future financial returns (in the sense of possible profits) from a Fractional Membership were a good reason to purchase it – particularly in light of the circumstances of their sale.

Mr and Mrs M were already members of the Supplier's European Collection at the Time of Sale – holding 10,000 European Collection points. And if they simply wanted to increase their holiday rights, I don't understand why they would have paid £6,800 in return for 10,000 fractional points that gave them no additional holiday rights, unless the Supplier had relied on other aspects of Fractional Membership to promote its sale.

I acknowledge that Fractional Membership offered Mr and Mrs M a shorter term. But the investment elements of Fractional Membership were plainly major parts of its rationale and justification for its cost. And as it was designed to offer its members a way of making a financial return from the money they invested – whether or not, like every investment, the return was more, less or the same as the sum invested, it would not have made much sense if the Supplier included the features in the product without relying on them to promote sales – especially when the reality was that, as existing European Collection members with significant holiday rights, the principal benefits of the move to Fractional Membership were its investment elements i.e. the share in the net sale proceeds of the Allocated Property and the potential financial returns from the Fractional Wish to Rent Programme.

Indeed, Mr and Mrs M's recollections are consistent with the suggestion that Fractional Club membership was marketed and sold to them in that way. In their witness statement, Mr and Mrs M are clear that the Supplier told them Fractional Club membership would provide them with an asset that represented "an extremely good financial investment", that was an

"investment in bricks and mortar". I think the implication was that Fractional Club membership would, as such, possibly yield a profitable return on their investment.

Their written recollections are quite detailed and contain what appears to me to be a balanced set of reflections 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. So, I think the witness statement is likely to contain a fair reflection of Mr and Mrs M's memories of how the Supplier sold the Fractional Club membership to them.

Overall, therefore, when I consider all the evidence as a whole, and in combination with the particular circumstances of Mr and Mrs M's sale, I don't find them either implausible or hard to believe when they say they were led to believe by the Supplier that Fractional Club membership was an appealing investment opportunity. On the contrary, given what I've seen so far, I think that's likely to be what Mr and Mrs M were led by the Supplier to believe at the relevant time. And for these reasons, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

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 M 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 M 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 M, 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 M's testimony, 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. Their own testimony demonstrates that they quite clearly were. And that is not surprising given the nature of the product at the centre of this complaint and the fact that they were European Collection members when they purchased Fractional Membership. But if increasing their holiday rights was the only or even the main reason they made the purchase, I don't understand why they would not have simply increased their European Collection points.

I recognise that Fractional membership offered Mr and Mrs M a shorter membership term than the European Collection. But as they say that they were still concerned about the length of Fractional membership even though it was shorter than their European Collection membership, I'm not persuaded that it was the prospect of a shorter Fractional membership term that motivated their move to it rather than their share in the Allocated Property.

As Mr and Mrs M 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 profit as that share was one of the defining features of membership that marked it apart from their existing membership. After all, as I've said before, the reality was that, as Mr and Mrs M already had the holiday rights to which they were entitled under the Purchase Agreement, the principal benefits to them of moving to Fractional Club membership were its investment elements i.e. the share in the net sale proceeds of the Allocated Property and the potential financial returns from the FWTR Programme. 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 M 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. And as they 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 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 M 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.'

At that point in my PD, I set out what I thought the Lender should do to put things right for Mr and Mrs M.

The PR confirmed Mr and Mrs M's acceptance of the PD. The Lender didn't agree with my PD. Its submissions, which included various supplementary documents, ran to several dozens of pages. Its central arguments can be summarised 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 PD which was incorrect. 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 PD, 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 M 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 submitted that evidence from the Supplier I had relied on in my PD to support my contention that it had marketed the Fractional Club membership to Mr and Mrs M 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.
- 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, to 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 M's witness testimony. For example, their witness testimony came in two forms, with an initial document being unsigned and undated and the other – received much later – being more detailed than the first.
- There were other important reasons why Mr and Mrs M had decided to purchase Fractional Club membership, which I had not given enough weight to. In particular, Mr and Mrs M wanted to reduce their points holding based on future holiday needs. They also wanted to shorten the term of the existing timeshare and Fractional Club membership offered them the '*exit strategy*' they desired.
- I had used the wrong legal test for determining if the credit relationship between it and Mr and Mrs M had been rendered unfair. I had decided that it was for the Lender to show that the prospect of a financial gain was immaterial to their decision to enter into the Credit Agreement. 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 was returned to me to review once more.

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 PD. As I've said before, my role as an Ombudsman is not to address every single point that has been made in response. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I've read the Lender's further submissions in full, I will confine my findings to what I find are 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 PD about the definition of investment that I used, 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 PD. The allegations made by Mr and Mrs M involved, among other things, the Supplier having explained to them that Fractional Club membership represented '*an extremely good financial investment*'.

I see the point argued by the Supplier in its comments to the Lender that Mr and Mrs M also say they were told they'd '*get some money back*'. And that this isn't indicative of a profit. But it's difficult to envisage what else was meant by '*an extremely good investment*', in the context of their recollections when taken as a whole, other than a profit. I think that, if the Supplier did market the product to Mr and Mrs M in those terms or similar, then this falls squarely within the definition of investment I set out in my PD and would constitute a breach of the prohibition on marketing or selling timeshares as investments.

That brings me to another point made by the Lender, which is that it considers there's 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 PD.

I've considered the additional evidence the Lender has put forward in this case in relation to the Supplier's sales processes. These include a general statement by the Supplier in respect of the PD, copies of other versions of the Sales Policy, and a witness statement made by SC in which she comments on the September 2012 slides. For completeness, I've also considered the Lender's response to questions asked by one of my ombudsman colleagues in relation to sales documentation provided following a similar complaint involving the sale of the same Fractional Club membership to two other consumers. The response relates to:

- 'Fractional Ownership Comparison' document – which compared fractional ownership to other options, including owning a holiday home, including that they both involved a '*future residual value*' and '*rental income*' as benefits of ownership. And that Fractional Ownership is an '*alternative to a second home*'.
- 'Fractional Sales Logic – 2013' document – provided a comparison between fractional ownership and owning a holiday home including advice to sales agents about what they should tell consumers including the phrase '*real estate*' and '*the fractions should be compared to the purchase of a second home*'.
- 'Fractions FAQ – Early Training' document – answered FAQs about fractional ownership compared to the Supplier's European Collection, including the question '*what are the benefits of Fractional Ownership?*' including in the answer '*the chance*

of a return on the money they have spent on membership'.

I've also considered the further evidence the Lender has provided in relation to these documents, including further witness statements from two other members of the Supplier's staff ('RW' and 'PP'), the 'final version' of the FAQs document described above, and the 'standard operating procedure' documents signed in 2012 and 2013. I believe that evidence and information to be relevant to my consideration of Mr and Mrs M's complaint.

Having considered the Lender's 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 PD.

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 Resort 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. 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.

The Lender provided witness statements from PP, a sales representative for the Supplier and from RW, the Director of EU Sales Operations for the Supplier, both of which I've considered.

I note that, in relation to the 'Fractional Sales Logic – 2013' document, RW said this was developed by an individual ('JA') who was a sales representative in Spain. And, that it wasn't used as a training document and wasn't used in sales presentations. RW also says JA wasn't part of the team responsible for developing the formal documentation to be used in training or sales presentations. But RW doesn't explain why a sales representative would develop such a document with that being the case or provide any assurance that the document wasn't shared at least informally with other sales representatives, for example.

RW only says that JA had been "*trying to be helpful*". The document provides a comparison between fractional ownership and owning a holiday home including advice to sales representatives about what they should tell consumers including the phrase "real estate" and "the fractions should be compared to the purchase of a second home". I think this demonstrates that there was a risk that sales representatives could and would draw such comparisons, despite any training they may have been given not to – such that the governance principles and paperwork might not have been quite enough to mitigate this.

And while the Supplier's centralised training documents and policies may have emphasised compliance with Regulation 14(3), it's important to consider what is more likely than not to have happened in each individual case.

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 M'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 that they stood to profit from the deal. As I noted in my PD, Mr and Mrs M said '*We were told that "Fractional" was an extremely good financial investment. We were told that it was an "investment in bricks and mortar" and that at the end of the term, we would receive a return on our investment.*'

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 M.

I have read and considered the Lender's concerns about Mr and Mrs M's testimony. Many of these appear to be similar to the concerns it expressed prior to my PD and which I have already addressed. Although the Lender did question the fact that there appeared to be two sets of testimony from Mr and Mrs M – one being unsigned and undated and, it argued,

including little detail and another signed and dated 17 September 2018, which it says it didn't receive until it also received the Investigator's assessment of January 2024.

I note the Lender's point that the dated testimony pre-dated the Letter of Complaint by around two years, but the contents of those two documents do appear to me to be broadly consistent. For example, the Letter of Complaint includes the allegation that Mr and Mrs M were told '*Fractional is an extremely good financial investment*', which echoes very closely parts of their testimony. And the Lender doesn't suggest that the two testimonies themselves are inconsistent. In fact, I consider them to overlap one another in key aspects, including in terms of investment. Further, I also note that the signed and dated witness statement is relatively long (as opposed to, the Lender argues, the written recollections it originally received) but that can reasonably be explained by the fact that it addresses Mr and Mrs M's long purchase history with the Supplier, covering several sales dating back to the 2000s.

Overall, I see no reason to conclude that the signed and dated witness statement is anything other than a genuine reflection of Mr and Mrs M's recollections of the Time of Sale.

Even if I confined myself to relying on Mr and Mrs M's unsigned recollections, as the Lender suggests I should and without reference to the signed testimony dated 2018, I note they do refer to Mr and Mrs M being told Fractional Club membership was an extremely good financial investment in bricks and mortar. And one that would see them receive a return on their investment.

As the Lender points out, and as I in fact noted in my PD, the Supplier's breach of regulation 14(3) of the Timeshare Regulations needed to be material to Mr and Mrs M'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 made a finding that Mr and Mrs M's purchase was significantly motivated, albeit among other things, by their share in the Allocated Property and the possibility of profit. I don't accept the Lender's point here, and I think it's important take sufficient account of the paragraphs which preceded the one it highlighted, as well as the one it specifically refers to, for context. In my PD I said the following:

'*On my reading of Mr and Mrs M's testimony, 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. Their own testimony demonstrates that they quite clearly were. And that is not surprising given the nature of the product at the centre of this complaint and the fact that they were European Collection members when they purchased Fractional Membership. But if increasing their holiday rights was the only or even the main reason they made the purchase, I don't understand why they would not have simply increased their European Collection points.*

I recognise that Fractional membership offered Mr and Mrs M a shorter membership term than the European Collection. But as they say that they were still concerned about the length of Fractional membership even though it was shorter than their European Collection membership, I'm not persuaded that it was the prospect of a shorter Fractional membership term that motivated their move to it rather than their share in the Allocated Property.

As Mr and Mrs M 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 profit as that share was one of the defining features of membership that marked it apart from their existing membership. After all, as I've said before, the reality was that, as Mr and Mrs M already had the holiday rights to which

they were entitled under the Purchase Agreement, the principal benefits to them of moving to Fractional Club membership were its investment elements i.e. the share in the net sale proceeds of the Allocated Property and the potential financial returns from the FWTR Programme. 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 M's purchasing decision and, therefore, rendered their credit relationship with the Lender unfair. I was persuaded of this not only by Mr and Mrs M's recollections of the sale but also by the remaining circumstances at the time, which included them trading in their existing points holding but only for the same number of fractional points and their continuing concern at the length of time they were tied into the contract for, notwithstanding the shorter term that came with Fractional Club membership. I've seen no reason to now 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 M 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.

Putting things right

Having found that Mr and Mrs M 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 M 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 think needs to be done to compensate Mr and Mrs M with that being the case – whether or not a court would award such compensation:

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

    Had Mr and Mrs M not been sold membership of the Owners Club, they would not have converted their 10,000 European Collection Points into Fractional Points. And I'm aware that the Supplier had in place an exceptional circumstances policy that European Collection members could take advantage of in certain circumstances to give up their membership at little to no cost – such as reaching the age of 75. So, Mr and Mrs M could have simply continued to holiday as European Collection members and apply to the Supplier to surrender their European Collection membership in line with its policy on exceptional circumstances. I'm persuaded that they would have done that as soon as Mr M turned 75 because of the more general concerns they had about the length of time they were tied into an agreement with the Supplier for.

    If an application to surrender had been granted by the Supplier, which I think would have been in light of the policy set out in the EC Relinquishment Fact Sheet, this means that Mr and Mrs M would have stopped being liable for their European Collection membership management charges from roughly 2024 onwards. And with

that being the case, it is appropriate to consider that when thinking about whether it would be fair and reasonable to ask the Lender to refund any of the management charges paid by Mr and Mrs M.

I don't think it would be in relation to the annual management charges Mr and Mrs M paid between 2014 and 2023 because they would have always paid very similar annual management charges in those years as European Collection members. But the same can't be said for the annual management charge that Mr and Mrs M would have paid in 2024.

(2) So, in addition to (1), the Lender should also refund the annual management charge Mr and Mrs M paid in 2024 as a result of Fractional Membership provided they have not used and don't intend to use their membership to holiday.
(3) The Lender can also deduct the value of any promotional giveaways that Mr and Mrs M used or took advantage of.

(The 'Net Repayments')

(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 M's credit files in connection with the Credit Agreement.
(6) If Mr and Mrs M'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 Fractional Points, including the interest in the Allocated Property, for the Lender (or assign them to the Lender if that can be achieved), the Lender must indemnify Mr and Mrs M 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 Mr and Mrs M a certificate showing how much tax it's taken off if they ask for one.

My final decision

For the reasons explained, I uphold Mr and Mrs M's complaint and direct Shawbrook Bank Limited to put things right for them as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M and Mr M to accept or reject my decision before 13 June 2025.

Nimish Patel
Ombudsman