DRN-5228638

The complaint

Mr B'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.

What happened

Mr B purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 19 August 2013 (the 'Time of Sale'). He entered into an agreement with the Supplier to buy 1820 fractional points at a cost of £9,163 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr B more than just holiday rights. It also included a share in the net sale proceeds of a property named on his Purchase Agreement (the 'Allocated Property') after his membership term ends. (Mr B had previously owned a timeshare with this Supplier but it hadn't included such a share in an allocated property and hadn't been asset backed.)

Mr B paid for his Fractional Club membership by taking finance of £23,688 from the Lender, which also consolidated debt from previous timeshare purchase (the 'Credit Agreement').

Mr B – using a professional representative (the 'PR') – originally wrote to the Lender on 09 October 2017 (the 'Letter of Complaint') to complain about the mis-sale of the timeshare membership. This letter says Mr B has been treated unfairly under Section 75 of the Consumer Credit Act 1974. In short it says Mr B has been sold the membership contrary to the law, that Mr B has lost out due to misrepresentations being made to him at the point of sale of the membership and that implied terms within the contract have been breached.

The Lender dealt with Mr B's concerns as a complaint and issued its final response letter on 05 February 2018, not accepting any grounds of the complaint.

Mr B then referred the complaint to the Financial Ombudsman Service. In November 2020, an Investigator at this service issued an assessment which didn't uphold Mr B's complaint. Mr B's PR responded to say it didn't agree with the Investigator's position. It was assessed again in 2023 by an Investigator who, having considered the information on file, upheld the complaint on its merits. 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 the entire matter on the 28 October 2024 I issued a provisional decision upholding Mr B's complaint. An extract of that provisional decision reads as follows (italicised for clarity).

> ***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 (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').

My provisional findings

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 B 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 B complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the Lender unfairly declined a claim made under section 75 of the CCA because, even if that aspect of the complaint ought to succeed, the redress I'm currently proposing puts Mr B in the same or a better position than he would be if the redress was limited to a successful claim for misrepresentation. 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 B 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 B'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 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 B 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 B 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 B'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."

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

But Mr B say that the Supplier did exactly that at the Time of Sale. I've seen Mr B's handwritten comments in his witness statement which is dated 21 August 2017 where he says "the new fractional points offer meant better value, more resorts, guaranteed booking, and once the property was sold our money plus profit back-an investment".

The Lender has sought to argue that, as its not seen direct testimony from Mr and Mrs B, any representations by the PR on his behalf are in essence unpersuasive and therefore the complaint shouldn't be upheld. However there is direct testimony as I've described above from Mr B which, if the Lender hasn't seen or hasn't considered, I'm happy to arrange to be supplied to it.

Mr B alleges, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because there was the opportunity to make a profit on the sale of the Allocated Property.

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 B'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 he 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 <u>as an investment</u>. 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 B 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 B, the financial value of his 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 B as an investment.

Here I note that in the documentation signed by Mr B points to the object of the transaction being that he wished to purchase a flexible system of worldwide holidays. I also note that he were required to acknowledge receipt of the information statement that was required under the EU Timeshare Directive 2008/122/EC. And within the Members Declaration he signed at the point of sale was the following wording:

"We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that (the Supplier) makes no representation as to the future price or value of the Fraction."

There was also the following:

"The Vendor, any sales or marketing agent and the Manager and their related businesses (a) are not licensed investment advisors authorized by the Financial Services Authority to provide investment or financial advice; (b) all information has been obtained solely from their own experiences as investors and is provided as general information only and as such it is not intended for use as a source of investment advice and (c) all purchasers are advised to obtain competent advice from legal, accounting and investment advisors to determine their own specific investment needs; (d) no warranty is given as to any future values or returns in respect of an Allocated Property."

I'm not persuaded that such disclaimers would have done much to dissuade a prospective member (who happened to read the disclaimers) from regarding such a membership as an investment if that was the impression had been given during the sale – which, for reasons I'll come on to, I think Mr and Mrs B were. And I question why it was necessary to include such disclaimers in the paperwork unless there was a certain degree of difficulty to selling such membership consistently with Regulation 14(3).

Indeed, 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 B's 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" and (2) that membership of the Fractional Club could make them a financial gain and/or would retain or 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 B 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

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives – including:

1. *a document called the 2013/2014 Sales Induction Training (the '2013/2014 Induction Training');*
2. *screenshots of an Electronic Sales Aid (the 'ESA'); and*
3. *a document called the "FPOC2 Fly Buy Induction Training Manual" (the 'Fractional Club Training Manual').*

Neither the 2013/2014 Induction Training nor the ESA I've seen included notes of any kind. However, the Fractional Club Training Manual includes very similar slides to those used in the ESA. And according to the Supplier, the Fractional Club Training Manual (or something similar) was used by it to train its sales representatives at the Time of Sale. So, it seems to me that the Training Manual is 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 Supplier's multimedia presentation (i.e., the ESA) during the sale of Fractional Club membership to prospective members – including Mr B.*

The "Game Plan" on page 23 of the Fractional Club Training Manual indicates that, of the first 12 to 25 minutes of the sales presentation, most of that time would have been spent taking prospective members through a comparison between "renting" and "owning" along with how membership of the Fractional Club worked and what it was intended to achieve.

Page 32 of the Fractional Club Training Manual covered how the Supplier's sales representatives should address that comparison in more detail – indicating that they would have tried to demonstrate that there were financial advantages to owning property, over 10 years for example, rather than renting.

Indeed, one of the advantages of ownership referred to in the documentation used is that it makes more financial sense than renting because owners "are building equity in their 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 the mortgage secured against it, one of the advantages of ownership over renting was portrayed in terms that played on the opportunity ownership gave prospective members of the Fractional Club to accumulate wealth over time.

I acknowledge that this documentation doesn't include express reference to the "investment" benefit of ownership. But the description alludes to much the same concept. It was simply rephrased in the language of "building equity". And with that being the case, it seems to me that the approach to marketing Fractional Club membership was to strongly imply that 'owning' fractional points was a way of building wealth over time, similar to home ownership.

Page 33 of the Fractional Club Training Manual then moved the Supplier's sales representatives onto a cost comparison between "renting" holidays and "owning" them. Sales representatives were told to ask prospective members to tell them what they'd own if they just paid for holidays every year in contrast to spending the same amount of money to "own" their holidays – thus laying the groundwork necessary to demonstrating the advantages of Fractional Club membership. With the groundwork laid, sales representatives were then taken to the part of the ESA that explained how Fractional Club membership worked. And, on pages 41 and 42 of the Fractional Club Training Manual, this is what sales representatives were told to say to prospective members when explaining what a 'fraction' was:

"FPOC = small piece of […] World apartment which equals ***ownership of bricks and mortar*** *[…]*

Major benefit is the property is sold in nineteen years ***(optimum period to cover peaks and troughs in the market)*** *when sold you will get your share of the proceeds of the sale*
SUMMARISE LAST SLIDE:
FPOC equals a passport to fantastic holidays for 19 years ***with a return at the end of that period.*** *When was the last time you went on holiday and* ***got some money back? How would you feel if there was an opportunity of doing that?***
[…]
LINK: Many people join us every day and one of the main questions they have is ***"how can we be sure our interests are taken care of for the full 19 years?*** *As it is very important you understand how we ensure that, I am going to ask Paul to come over and explain this in more details for you.*
[…]
*"Handover: (Manager's name) John and Mary love FPOC and have told me the best for them is……..****Would you mind explaining to them how their interest will be protected over the next 19 year[s]****?"*
(My emphasis added)

The Fractional Club Training Manual doesn't give any immediate context to what the manager would have said to prospective members in answer to the question posed by the sales representative at the handover. Page 43 of the manual has the word "script" on it but otherwise it's blank. However, after the Manual covered areas like the types of holiday and accommodation on offer to members, it went onto "resort management", at which point page 61 said this:

"T/O will explain slides emphasising that they only pay a fraction of maintaining the entire property. It also ensures property is kept in peak condition to maximise the return in 19 years['] time.
[…]

CLOSE: ***I am sure you will agree with us that this management fee is an extremely important part of the equation as it ensures the property is maintained in pristine condition so at the end of the 19 year period, when the property is sold, you can get the maximum return.*** *So I take it, like our owners, there is nothing about the management fee that would stop you taking you holidays with us in the future?..."*

(My emphasis added)

By page 68 of the Fractional Training Manual, sales representatives were moved on to the holiday budget of prospective members. Included in the ESA were a number of holiday comparisons. It isn't entirely clear to me what the relevant parts of the ESA were designed to show prospective members. But it seems that prospective members would have been shown that there was the prospect of a "return". For example, on page 69 of the Fractional Club Induction Training Manual, it included the screenshots of the ESA along with the context the Supplier's sales representatives were told to give to them:

[…]

"We also agreed that you would get nothing back from the travel agent at the end of this holiday period. Remember with your fraction at the end of the 19 year period, you will get some money back from the sale, so even if you only got a small part of your initial outlay, say £5,000 it would still be more than you would get renting your holidays from a travel agent, wouldn't it?"

I acknowledge that this documentation set out a "return" that is less than the total cost of the holidays and the "initial outlay". But that was just an example and, given the way in which it was positioned in the Training Manual, the language did leave open the possibility that the return could be equal to if not more than the initial outlay. Furthermore, this documentation represent Fractional Club membership as:

(1) *The right to receive holiday rights for 19 years whose market value significantly exceeds the costs to a Fractional Club member; plus*
(2) *A significant financial return at the end of the membership term.*

And to consumers (like Mr B) who were looking to buy holidays anyway, the comparison the slides make between the costs of Fractional Club membership and the higher cost of buying holidays on the open market was likely to have suggested to them that the financial return was in fact an overall profit.

I also acknowledge that there was no 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 B the financial value of the proprietary interest he was 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 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 an opportunity to build equity in an allocated property rather than simply paying for holidays in the usual way. That was likely to have been reinforced throughout the Supplier's sales presentations by the use of phrases such as "bricks and mortar" and notions that prospective members were building equity in something tangible that could make them some money at the end. And as the Fractional Club Training Manual suggests that much would have been made of the possibility of prospective members maximising their returns (e.g., by pointing out that one of the major benefits of a 19-year membership term was that it was an optimum period of time to see out peaks and troughs in the market), I think the language used during the Supplier's sales presentations was likely to have been consistent with the idea that Fractional Club membership was an investment.

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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

Overall, therefore, as the documentation I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members, they indicate that the Supplier's sales representative was likely to have led Mr B to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e., a profit) in the future. And with that being the case, I don't find him either implausible or hard to believe when he says that he and Mrs B were told "once the property was sold our money plus profit back-an investment". Indeed I think that's likely to be what Mr B was 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.

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 B 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 B 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 B, 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.

The reference made by Mr B to the possibility of a "profit" from the sale of the Allocated Property indicates his understanding was that there was an opportunity to make a profit by purchasing Fractional Club membership. So I have thought about how material that was to the purchasing decision he made and whether he would have made the same decision even if the Supplier's hadn't held out Fractional Club membership as an appealing investment opportunity.

On my reading of Mr B's testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when he decided to go ahead with his purchase. He clearly saw the Allocated Property as an opportunity to make a profit. That doesn't mean he was not interested in holidays. His own testimony demonstrates that he quite clearly was. And that is not surprising given the nature of the product at the centre of this complaint. However this holiday benefit was of lesser import to my mind. He paid £9,468 for this membership. It seems to me that this large upfront cost doesn't correspond to the limited increase in holiday rights. After all, as Mr B was already a member of the Vacation Club when he traded that in for this Fractional Club, I don't understand why he would have paid nearly £10,000 in return for 1,820 fractional points (only 319 of which were additional), for a modest increase in holiday rights, unless the Supplier had relied on other aspects of Fractional Membership to promote its sale that then motivated his purchase. So, although I acknowledge that there were a number of benefits to Fractional Club membership, based on everything I have seen so far, I think his purchase was motivated by his 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 his Vacation Club membership. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision he ultimately made.

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

I then set out what I thought fair compensation looked like in the context of Mr B's complaint.

Comments following my Provisional Decision

On behalf of Mr B the PR provided his comments which included "*It is incorrect that the client has suffered no loss as a result of the upgrade and loan consolidation*." The PR went on to highlight the difference between Mr B's original loan interest rate ("Loan 1" as I described it in my provisional decision's redress paragraph) and the interest rate charged on the credit in this purchase and explained that Mr B felt that this demonstrated loss on his part.

The Lender disagreed with my provisional position. It argued that my provisional position was based on an error in my approach to the prohibition in Reg.14(3) and my analysis of the evidence referred to in my provisional position. In particular, The Lender argued:

- The wording in my Provisional Decision is inconsistent with the premise that there is no prohibition to the sale of fractional timeshares, only a prohibition on the way they were sold, and the definition of 'investment' that I used. It argues that I took the position that

"*the mere existence of the "prospect of a financial return" constituted an "investment"*. In particular, the Provisional Decision falls into that error by conflating two different meanings of the word 'return': (a) a 'return on investment', which is normally understood to mean the measure of profit (the return) on the original investment; and (ii) a customer being told that some money will be 'returned' upon sale, which carries no connotation of investment or profit."

- I did not engage with the specific facts of Mr B's sale and erred by making generic assumptions about their particular Fractional Club membership and sale.
- None of the sales materials or documents from Mr B's sale described Fractional Club membership as an 'investment' and his evidence on the issue was generic in nature and failed to explain how it was sold to him as an 'investment'.
- Telling a customer that they would get a financial return from the sale of the Allocated Property would not breach Reg.14(3).
- Mr B was not shown the sales presentation documents I referred to in my Provisional Decision but, in any event, they did not demonstrate a breach of Reg.14(3).
- Mr B confirmed, at the Time of Sale, that he understood the relevant disclaimers that Fractional Club membership was not an investment.
- The parts of the training materials to which I referred were unobjectionable, in particular reference to 'bricks and mortar' was demonstrating that the return on the sale of the Allocated Property was secured on property and it was unsurprising that there was emphasis on the 19-year period as "*given that the proceeds of selling the Allocated Property will be returned to customers, it is natural that steps are taken to ensure that the return is as high as possible. Nobody would expect the intention to be that the amount returned at the end of the timeshare period would be as low as possible, or anything other than as much as possible. But the significant point is that there is no comparison between the expected level of the financial return as against the initial outlay in purchasing the product, the primary focus of which was to provide holidays*." Further, there was no promise on the amount to be returned and the suggestion was that there would be 'some' money back and no indication of a profit.
- I ought to follow the judgment a District Judge reached when considering a similar sale, where it was held there was no breach of Reg.14(3) (*Prankard v Shawbrook*, 8 October 2021, unreported).
- I ought to consider decisions reached by other Ombudsmen in relation to the sale of similar memberships where the complaints were not upheld.
- I erred in not applying the test I had highlighted in the judgment of *Carney*, rather I said 'I have not seen enough evidence to persuade me that they would have pressed ahead with their purchase regardless', which reverses the burden of proof.
- The Lender made a number of arguments about the reliability of Mr B's testimony on the matter including pointing to generic arguments and documentation used, that some of that evidence was "*purportedly*" signed in 2017 but not received by the Lender until 2024 and that I should "*at least give some weight to how Mr B's recollections of the sales event had been elicited by his representative*."
- The Lender also argues that the purchase meant that the "*annual management fees reduced from €1,507 to €1,378 for 2013 following the (sale)*" and thus suggests this was an important factor in the purchase here by Mr B.

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 considered everything again, I still uphold Mr B's complaint for the reasons set out above in the extract of my Provisional Decision. I will also deal with the matters the Lender and PR have raised in response. In doing so, I note again that 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 have read the Lender's response in full, I will confine my findings to what I find are the salient points.

The redress paragraphs in my provisional decision clearly remedied this loss, so it is unclear why Mr B felt it didn't. I'd have also expected the PR as a professional representative to have explained this to Mr B as I made it clear that the redress remedies the matter in what I thought was a fair and reasonable manner. As I said "*I think it would be fair and reasonable to put him back in the position he would have been in had he not purchased the Fractional Club membership*" and "*The Lender should refund the difference between Mr B's repayments to it under the Credit Agreement and what he would have paid towards Loan 1, including the difference between any sums paid to settle the debt owing under the Credit Agreement and what would have been needed to have been paid to settle Loan 1. The Lender should also reduce any outstanding balance under the Credit Agreement, if there is one, so that Mr B would only now owe what he would have owed as part of Loan 1 and change any future repayments so that he's making the same repayments that were towards Loan 1.*"

So I'm satisfied the redress methodology I described was fair and reasonable and that in actuality it did rectify the issue Mr B highlighted in relation to different interest rates whilst also considering the various other factors fairly.

I turn now to the Lender's comments. In my Provisional Decision, I noted that, to breach Reg.14(3), the Supplier had to market or sell Fractional Club membership as an investment and I used the following definition of 'investment' when considering whether that provision was breached: "*a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit*".

The Lender says my Provisional Decision was inconsistent with the notion that there was no prohibition on the sale of fractional timeshares per se, only a prohibition on the way they were sold. But this, in my view, takes too narrow a view of my Provisional Decision and overlooks that part of my decision that read:

> *"Mr B'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 he 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."*

However, for the avoidance of any doubt, I recognise that it was possible to market and sell Fractional Club membership without breaching the relevant prohibition in Reg.14(3). For instance, depending on the circumstances, there is every chance that simply telling a prospective customer very factually that Fractional Club membership included a share in an allocated property and that they could expect to receive a financial return or some money back on the sale of that property would not breach Reg.14(3).

But with that said, there seem to me to be many ways of marketing and selling a timeshare as an investment, without necessarily referring to (or even including) an allocated property. And if the Supplier said and/or did something in relation to an allocated property and/or Fractional Club membership more generally that at least implied to a prospective member

that membership offered them the prospect of a financial gain, that would, in my view, breach Reg.14(3).[4] With that in mind, therefore, I will first consider the sales and marketing materials more generally, before turning to the evidence Mr B has supplied in this case.

Sales and marketing materials

As I acknowledged in my Provisional Decision, the Supplier did try, in the sales documentation, to avoid describing Fractional Club membership as an 'investment' and giving any indication of the likely financial return. For example in the Member's Declaration, it was said:
"5. We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for the direct purpose of a trade in and that CLC makes no representation as to the future price or value of the Fraction."

As the Lender has pointed out, Mr B signed the Member's Declaration confirming that that he had read and understood its contents. I do not think however that he signed the document to say he understood that Fractional Club membership was not an investment, as that is not what the Members Declaration said at point 5.[5] So I have considered what other disclaimers there were in the paperwork. There is on file a 'Standard Information Form'[6] provided by the Lender. In that document it says:
"…*Fractional rights have been designed to be used and enjoyed and not bought with the expectation or necessity of future financial gain."* (page 2)
"…*The Vendor, Manager and the Trustee are unable to give any guarantees on the ultimate sales price as this depends on many factors including the state of the property market and the supply and demand at the time of sale.*" (page 3)

These disclaimers go some way to making the point that the purchase of Fractional Club membership should not be viewed as an investment. But they had to be read along with the other things in the Information Form, which included the following disclaimer:
"11. Investment advice
The Vendor, any sales or marketing agent and the Manager and their related businesses (a) are not licensed investment advisors authorized by the Financial Services Authority to provide investment or financial advice; (b) all information has been obtained solely from their own experiences as investors and is provided as general information only and as such is not intended for use as a source of investment advice and (c) all purchasers are advised to obtain competent advice from legal, accounting and investment advisors to determine their own specific investment needs; (d) no warranty is given as to any future values or returns in respect of an Allocated Property." (page 8)

This disclaimer is, in my view, an attempt to ensure that prospective members do not take and rely on what they were told by the Supplier as investment advice and a declaration that no assurance was given as to the future value of the Allocated Property. However the disclaimer does suggest that (1) the "Vendor's" and "Manager's" experience as investors had fed into the information provided during the sales presentations and (2) prospective members might be wise to consult an investment advisor.

4 See paragraphs 73 and 76 of the judgment in Shawbrook & BPF v FOS
5 Had the Supplier wished to clarify this, it could have simply said in the paperwork that Fractional Club membership was not, or was not to be treated as, an investment and the reasons for that. But it did not do that.
6 Under Reg.12 of the Timeshare Regulations, the Supplier was required to give Mr B "key information" in relation to the purchase, ensuring that such information met the requirements of that particular provision. 'Key information' was a defined term in the Timeshare Regulations and means the information required by parts 1, 2 and 3 of a "standard information form".

And, in my view, both of those suggestions, particularly the latter, ran the risk of giving a prospective Fractional Club member the impression that there was investment potential to what was being sold. Further, if during the course of the sale a prospective member was given the impression that Fractional Club membership was an investment, I do not think this disclaimer would have done much to disabuse him of that idea.

However, as I said before, deciding what happened in practice is often not as simple as looking at the contemporaneous paperwork. Especially when such paperwork was produced and signed after a potential customer, such as Mr B, had already been through a lengthy sales presentation. So that is why the training materials referred to in my Provisional Decision are important.

In response to my Provisional Decision, the Lender says that it does not accept that the training material I relied on was shown to Mr B. In light of that, I repeat my finding from my Provisional Decision that the material in question is (1) reasonably indicative of the training the Supplier's sales staff received around the Time of Sale and (2) how the sales staff were likely to have framed any presentation during the sale.

The Lender also says that the relevant training material did not expressly refer to Fractional Club membership as an investment. And I agree with that observation. But the Lender continues to take too narrow a view of the prohibition against marketing and selling timeshares as an investment in Reg.14(3). As I have suggested before, the Supplier did not have to refer to Fractional Club membership expressly as an investment to breach Reg.14(3).

Instead, it is important to consider both the explicit and implicit messaging at the Time of Sale to decide what I think was most likely to have happened. Further, I also want to make clear that it was not simply the training materials that led to the finding in my Provisional Decision that Reg.14(3) was breached by the Supplier at the Time of Sale, but rather it was a combination of all of evidence available, which included the documents from that time, Mr B' comments as well as the training material to which I have referred.

With respect to the training material, the Lender says that the parts I highlighted in my Provisional Decision were unobjectionable and that it was unsurprising that there was emphasis on the 19-year period as "*given that the proceeds of selling the Allocated Property will be returned to customers, it is natural that steps are taken to ensure that the return is as high as possible. Nobody would expect the intention to be that the amount returned at the end of the timeshare period would be as low as possible, or anything other than as much as possible. But the significant point is that there is no comparison between the expected level of the financial return as against the initial outlay in purchasing the product, the primary focus of which was to provide holidays.*"

However, as I explained in my Provisional Decision, I think it is too narrow an approach to take to only find that there was a breach of Reg.14(3) if the likely return from that sale of the Allocated Property was expressly quantified by the Supplier. The training material to which I referred in my Provisional Decision indicates that the Supplier was likely to have implied to a prospective purchaser that they were buying an interest in 'bricks and mortar', with an emphasis on there being a financial return based on the ownership of a tangible asset, the value of which was maximised thanks to the length of the nineteen-year membership term. When taken together with Mr B's memories of the sale, which are not undermined or contradicted by the contents of the training material, I think that there was at least the implication that Fractional Club membership was an investment that held out the hope of a profit – which is enough to find there was a breach of Reg.14(3) by the Supplier.

Mr B's testimony

The Lender has made a number of comments regarding what the PR has submitted on Mr B's behalf. In my Provisional Decision, I referred to the judgment in the case of *Smith v. Secretary of State for Transport* [2020] EWHC 1954 (QB). At paragraph 40 of the judgment, Mrs Justice Thornton helpfully summarised the case law on how a court should approach the assessment of oral evidence. Although in this case I have not heard direct oral evidence, I think this does set out a useful way to look at the evidence Mr B has provided. Paragraph 40 reads as follows:

"*At the start of the hearing, I raised with Counsel the issue of how the Court should assess his oral evidence in light of his communication difficulties. Overnight, Counsel agreed a helpful note setting out relevant case law, in particular the commercial case of Gestmin SPGS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) (Leggatt J as he then was at paragraphs 16-22) placed in context by the Court of Appeal in Kogan v Martin [2019] EWCA Civ 1645 (per Floyd LJ at paragraphs 88-89). In the context of language difficulties, Counsel pointed me to the observations of Stuart-Smith J in Arroyo v Equion Energia Ltd (formerly BP Exploration Co (Colombia) Ltd) [2016] EWHC 1699 (TCC) (paragraphs 250-251). Counsel were agreed that I should approach Mr Smith's evidence with the following in mind:*
a. In assessing oral evidence based on recollection of events which occurred many years ago, the Court must be alive to the unreliability of human memory. Research has shown that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts (Gestin and Kogan).
b. A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence (Kogan).
c. The task of the Court is always to go on looking for a kernel of truth even if a witness is in some respects unreliable (Arroyo).
d. Exaggeration or even fabrication of parts of a witness' testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony (Arroyo).
e. The mere fact that there are inconsistencies or unreliability in parts of a witness' evidence is normal in the Court's experience, which must be taken into account when assessing the evidence as a whole and whether some parts can be accepted as reliable (Arroyo).
f. Wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, may be neither reliable nor even truthful, the difficulty of discerning where the truth actually lies, what findings he can properly make, is often one of almost excruciating difficulty yet it is a task which judges are paid to perform to the best of their ability (Arroyo, citing Re A (a child) [2011] EWCA Civ 12 at para 20)."

From this, and from my own experience, I find that inconsistencies in evidence are a normal

part of someone trying to remember what happened in the past. It is also the case that in such evidence, particularly in long running disputes, there can be evidence which are not relevant to the matters at hand including where representatives are involved. I think the key consideration is whether there is a core of acceptable evidence from complainants that mean any inconsistencies or irrelevancies have little to no bearing on, or little chance of being fundamental enough to undermine or contradict, what they say about what the Supplier said and/or did to market and sell Fractional Club membership as an investment. I should add that it is for me to weigh up what is before me and allocate it weight in my decision making and give reasons for any such weighting.

I'll repeat what I said in my provisional position:

"I've seen Mr B's handwritten comments in his witness statement which is dated 21 August 2017 where he says "the new fractional points offer meant better value, more resorts, guaranteed booking, and once the property was sold our money plus profit back-an investment".

The importance of this handwritten evidence is clear to me for the following reasons. Firstly this service received the above document in 2017 and recorded it as such, and it is dated 2017 so I'm satisfied that is the year of its origin. The Lender has made a number of comments about the testimony being 'elicited' and asks me to consider the veracity of what has been submitted. However the document to which I refer has significant space set out within it for those such as Mr B to set out their recollections in 'free form' as it were. Mr B has done so here and made a number of such contributions to this document in what appears to be his own handwriting. As I'm satisfied this document originates from 2017 I can also be satisfied that h this document couldn't have been coloured by subsequent legal cases or indeed the judicial review which happened subsequent to 2017. And Mr B clearly describes the sale in terms of better value, more resorts, guaranteed book "*and once the property was sold our money plus profit back-an investment.*" To me this handwritten passage succinctly sets out the reasons for his purchase and shows that Mr B felt, in essence, that it had been sold to him as an investment that held out the hope of a profit – thus breaching regulation 14.3.

The Lender is correct in its observation that the PR has provided documents in this case which are to varying degrees formulaic. In the questionnaire which Mr B signs on 26 June 2017 Mr B indicates the following boxes as relevant to his case "*the timeshare he was selling was an investment*" and "*the future sale would make me money*". And the handwritten quote by Mr B regarding "*and once the property was sold our money plus profit back-an investment"* was dated 21 August 2017. However I also note that in the document entitled witness statement that having provided background to the matter the first argument about the sale of this purchase (point 11) makes clear that this purchase was sold as an investment; Mr B signs this document 21 November 2017. So it is clear to me that Mr B has been consistent in his arguments which he's signed for over a significant period of time. And the similar fact arguments made in the 'witness statement' dated 10 November 2017 are made in documentation some months after his questionnaire and handwritten comments. So I'm satisfied Mr B's recollections are persuasive as to how this purchase was sold to him.

The Lender points to Mr B not making similar comments (that is about 'profit' and 'investment') in other parts of his recollections. I'm not persuaded this makes a difference because I don't think it's persuasive to conclude that handwritten comments become more persuasive the more they are repeated or less persuasive if it is not repeated. I think it fair to consider them on their own merits.

The Lender makes the argument that the "*Client Questionnaire consists of a number of pre-populated tick box questions that require the complainant to 'tick all that apply,' therefore it is*

evident any allegation elicited using this questionnaire is neither in Mr B's own words nor language". I note the key testimony I've pointed to and relied on is in his own words and language as I'm satisfied it was handwritten and he has signed it. And I repeat my comments about his submissions being made separately months apart but which are consistent and persuasive to me.

The Lender has also pointed to the reduction in management fees of circa 135 Euros per year as being a possible reason for the purchase. Mr B's purchase here was over £9000. I don't think this is persuasive bearing in mind it would take a number of decades of these lesser fees (which were variable rather than fixed) to recoup the £9000 outlay here. And even if I consider the modest increase in holiday points that Mr B received through this transaction along with the small reduction in management fees I'm not persuaded that's sufficient to persuade me that the 'investment' for 'profit' that Mr B points to was not what motivated his purchase and that in reality he spent over £9000 (upfront borrowing plus consequent interest) for modest increase in holiday rights and a modest drop in management fees (which could easily increase at any time). Overall I'm not persuaded by the Lender's arguments here. I'm satisfied that Mr B's assertion that he was marketed and sold this purchase as an investment and purchased as such are persuasive.

Other matters

I have read and considered the judgment on Prankard v Shawbrook Bank Limited. However, that case was decided by the judge on its own facts and circumstances, and it does not change my own findings that, on balance, Mr B's sale did breach Reg.14(3). I have also read the other decisions of ombudsmen that the Lender has highlighted. But again, those cases were decided on their own facts and circumstances.

Lastly the Lender argues that I erred in not applying the test I had highlighted in the judgment of *Carney*, rather I said '*I have not seen enough evidence to persuade me that they would have pressed ahead with their purchase regardless,'* which reverses the burden of proof. What I actually said on the matter was:

> *So, although I acknowledge that there were a number of benefits to Fractional Club membership, based on everything I have seen so far, I think his purchase was motivated by his 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 his Vacation Club membership. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision he ultimately made.*
>
> *Mr B has not said or suggested, for example, that he would have pressed ahead with the purchase in question had the Supplier not led him and Mrs B to believe that Fractional Club membership was an appealing investment opportunity. And as he faced the prospect of borrowing and repaying a substantial sum of money while subjecting himself and Mrs B to a long-term financial commitment, had he not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I'm not persuaded that he would have pressed ahead with his purchase regardless."*

In short I'm satisfied I didn't reverse the burden of proof because I didn't frame my conclusion(s) on detriment in the way the Lender says I did.

Summary

In summary, for the reasons set out my provisional decision and this final decision, I still find that the Lender participated in and perpetuated an unfair credit relationship with Mr B under

the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint.

Putting things right

Having found that Mr B 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 him back in the position he would have been in had he not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided he and Mrs B agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

As I've already said, Mr and Mrs B were existing Vacation Club members and their membership was traded in against the purchase price of Fractional Club membership. Under their Vacation Club membership, they had 1,501 of Vacation Club points. And, like Fractional Club membership, they had to pay annual management charges as Vacation Club members. So, had they not purchased Fractional Club membership, they would have always been responsible to pay an annual management charge of some sort.

With that being the case, any refund of the annual management charges paid by Mr and Mrs B from the Time of Sale as part of their Fractional Club membership should amount only to the difference between those charges and the annual management charges they would have paid as ongoing Vacation Club members.

What's more, Mr and Mrs B paid for their existing Vacation Club membership using finance ('Loan 1'), £14,524.21 of which they refinanced using the Credit Agreement. So, part of what Mr B borrowed at the Time of Sale was used to repay the earlier borrowing under Loan 1 that always had to be repaid. I recognise that the credit agreement entered into as part of Loan 1 is a related agreement (under Section 140C(4)(a)) for the purposes of an assessment of unfairness under the Credit Agreement. But I can see that Mr B complained about an unfair credit relationship under Loan 1 and that the complaint was rejected by the Financial Ombudsman Service in 2022. As a result, I don't think it would be fair or reasonable to direct the Lender to refund everything repaid under the Credit Agreement, otherwise Mr B would be in a better position than he would have been if he hadn't purchased Fractional Club membership. And in light of that, I think this ought to be reflected in my redress when remedying the unfairness I have found.

So, here's what I think needs to be done to compensate Mr B with that being the case – whether or not a court would award such compensation:

(1) The Lender should refund the difference between Mr B's repayments to it under the Credit Agreement and what he would have paid towards Loan 1, including the difference between any sums paid to settle the debt owing under the Credit Agreement and what would have been needed to have been paid to settle Loan 1. The Lender should also reduce any outstanding balance under the Credit Agreement, if there is one, so that Mr B would only now owe what he would have owed as part of Loan 1 and change any future repayments so that he's making the same repayments that were towards Loan 1.

(2) In addition to (1), the Lender should also refund the difference between Mr and Mrs B's Fractional Club annual management charges paid after the Time of Sale and what

their Vacation Club annual management charges would have been had they not purchased Fractional Club membership.

(3) The Lender can deduct:

i. The value of any promotional giveaways that Mr and Mrs used or took advantage of; and
ii. The market value of the holidays* Mr and Mrs B 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 Vacation Club members. However, the deduction should be a proportion equal to the difference between those annual management charges. And if any of Mr and Mrs B's Vacation 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 if they could have taken those holidays as ongoing Vacation Club members in return for the relevant annual management charge.

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

(4) Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.

(5) The Lender should remove any adverse information recorded on Mr B's credit file in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr and Mrs B's Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.

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

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

My final decision

It is my decision that this complaint should be upheld and redressed as I've described. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 12 February 2025.

Rod Glyn-Thomas
Ombudsman