DRN-5232953

The complaint

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

What happened

I issued a provisional decision on Mr H's complaint on 28 November 2024, in which I set out the background to the case and my provisional findings on it. A copy of that provisional decision is appended to, and forms a part of, this final decision.

For that reason, it's not necessary for me to go into all the details of the complaint again. But in very short summary, Mr H purchased a membership of a timeshare I referred to as the 'Fractional Club' from a timeshare provider (the 'Supplier') on 14 October 2013, financed by a loan from the Lender of £8,923. Mr H had been an existing customer of the Supplier, and already had 'points' in the Supplier's 'Vacation Club'. He traded in these points during his October 2013 purchase.

Mr H later brought a claim against the Lender under Section 75 of the CCA in respect of alleged misrepresentations and breaches of contract by the Supplier. He also complained that certain of the Supplier's and Lender's actions had rendered the credit relationship between him and the Lender unfair under Section 140A of the CCA, and that the credit agreement had been arranged by an unregulated broker, making it unenforceable against him. The combined claim and complaint was brought by a professional representative ('PR') on Mr H's behalf.

In my provisional decision, I said I was minded to uphold Mr H's complaint. The full reasons can be found in the appended provisional decision, but I could summarise them as follows:

- Having considered Mr H's testimony about the context of the Time of Sale and what he'd been told by the Supplier, along with general information about how the Supplier trained its staff to sell membership to the Fractional Club, I thought it was more likely than not that the Supplier had marketed the Fractional Club membership as an investment at the Time of Sale, breaching Regulation 14(3) of the Timeshare Regulations 2010.

- While I considered there were multiple reasons which had driven Mr H's purchase of the Fractional Club membership, I considered the Supplier's breach had had a material impact on Mr H's decision to buy it, causing the credit relationship between Mr H and the Lender to be rendered unfair and entitling him to fair compensation.

I then went on to outline what I thought fair compensation should entail. Again, the details are set out in the appended provisional decision, but broadly speaking I thought fair compensation would involve putting Mr H back in the position he'd have been in, as far as practicable, had he not purchased Fractional Club membership. This included calculating a refund of payments made in respect of the membership and associated management

charges, and deducting the value of benefits received by Mr H as a result of him having made his purchase (such as promotional giveaways and holidays taken using his points). I considered compensatory interest should be added to any award, and adverse information should be removed from Mr H's credit file (if any had been recorded).

I invited the parties to the complaint to respond to the provisional decision. PR said Mr H was in agreement with the provisional decision, but there were concerns over how the Lender would calculate the value of holidays taken using the Fractional Club points. I directed that enquiries be made of the Lender regarding the methodology it would propose to use for this, and it responded to say that:

- For years in which Mr H used his points to take holidays, it would use the management charges for that year as a baseline value for the holidays.
- It would apply an uplift or supplementary amount in respect of any holidays taken in what it considered to be "peak" season – May to October.

The Lender said that it still did not agree that Mr H's complaint should be upheld in any event. It made the following arguments:

- I had taken an inappropriately expansive view of what constituted an "investment" in my provisional decision. In particular, I had extended it to encompass scenarios which didn't involve a profit, which was inconsistent with the definition I had given of an investment in the provisional decision.

- It thought I had attached too much weight to my general analysis of how the Supplier sold this version of membership to the Fractional Club, rather than to the specific evidence in Mr H's case. It disagreed, in any event, with my analysis of the Supplier's sales practices. It considered it was most likely the Supplier had simply described *how* the sale of the Allocated Property worked, rather than stating or implying that this would result in Mr H making a profit. It said its position was that a sales presentation I'd referred to would not have been seen by Mr H at the Time of Sale. It did not consider the Supplier's references to maximising returns through a combination of keeping the Allocated Property "in pristine condition" and holding the asset for the "optimum period of time to see out peaks and troughs in the market" was at all objectionable. It noted that the County Court had considered, in a case in 2021, the same sales practices, and concluded the Fractional Club membership had not been sold as an investment.

- It felt that certain disclaimers and declarations in documents Mr H had signed at the Time of Sale clearly demonstrated that the product was not an investment.

- It maintained that Mr H's witness testimony lacked credibility. It considered I had not given appropriate weight to this. It accepted that relatively minor inaccuracies should not discount the entirety of a person's evidence, but it noted Mr H worked in a profession where accuracy and detail were important. It considered PR had probably shaped his testimony, and that it was hardly surprising that contemporaneous documents such as handwritten notes appeared to support the testimony, because the narrative had been constructed around these notes to support an argument that the product has been sold as an investment. Without the particular emphasis placed on the contemporaneous documents by the testimony, they did not suggest the Supplier had sold the product as an investment.

- Particular and troubling inaccuracies in Mr H's testimony included:

- Stating that he'd made a previous purchase from the Supplier at a compulsory sales presentation at a specific resort in June 2010, when in fact he'd rung up the Supplier to trade in his existing 'Trial' membership.

- Suggesting that the October 2013 holiday during which he'd purchased Fractional Club membership, had been a holiday taken with his points, when it had in fact been a promotional holiday at which he had been well aware that he was expected to attend a sales presentation.

- It considered the potential for the product to be an investment was not a material reason for Mr H to have purchased it. Mr H had said himself that he had made the purchase because he was offered a Platinum membership for one year and an additional 1,000 points. None of the additional inducements which Mr H recalled being offered by the Supplier and which he had negotiated to have included in the deal, had anything to do with investment. Mr H had entered the agreement for holiday-related reasons.

- It considered I had reversed the burden of proof when concluding that the prospect of the product being an investment had been a material factor in Mr H's decision to proceed. I had focused on the prospect of a financial gain not being *insignificant* enough not to render the credit relationship unfair, rather than determining that it was material to Mr H's purchasing decision. This was the wrong test.

Mr H was asked to comment on the Lender's points, a summary of which was sent to him. He supplied a copy of an email dated 27 January 2019 in which he'd sent his comments on the Lender's response to his complaint, to PR. The email pointed out various of what Mr H considered to be errors in the Lender's response, and included the following paragraph:

"On the contrary, we were told that we [were] buying an interest in a specific parcel of property, namely 290 Marina Park…we were misled regarding our share of the potential proceeds. Again it was sold as an investment. If the representation were otherwise, I would not have decided to proceed."

Regarding the Lender's comments on the inaccuracies in his testimony, Mr H made the following points:

- He'd based his testimony on his memory and the limited documentation available. It was prepared to the best of his knowledge and belief.

- He insisted that in 2010 he'd been at a specific resort in Cornwall which he'd been visiting with his next door neighbours, and the Supplier had told him that he was required to attend a presentation. He'd sat through this while his neighbours went for a walk, and had declined the Supplier's proposal but agreed to stay in touch. He had subsequently made a purchase. If the Supplier had evidence that he or his wife had phoned up later to make this purchase then he was unable to rebut this.

- If the Supplier had records to show that he had not used any of his Vacation Club points for the holiday in Turkey in October 2013 then he was unable to rebut that either, but his recollection was that the sales presentation on that day had definitely been compulsory.

- He thought it was disingenous of the Lender to suggest the only reason he'd gone ahead with the October 2013 purchase was because of the additional "bolt-ons" offered by the Supplier. He said he'd relied on all of the representations made by the Supplier. He said the Supplier had offered two different packages, and he'd opted to

purchase the one with the higher unit share in the Allocated Property.

PR also made additional points on Mr H's behalf. It questioned how his motive for purchasing Fractional Club membership could have been holiday-related when he already had access to holidays using his existing membership with the Supplier, which he had been perfectly happy with. It noted that it was down to the Lender to show that the credit relationship had not been rendered unfair, and it didn't consider that it had done so.

Finally, PR said it disagreed with the methodology the Lender proposed to use to calculate any deductions to the fair compensation in respect of holidays taken by Mr H. It said the methodology appeared to be unsupported by any evidence, expert or otherwise, and it was concerned that it had come to light only after questions were raised following Mr H stating that he wouldn't accept deductions.

There was then considerable to-and-fro between myself, the Lender and PR, over the matter of deductions to be made from any redress (were the complaint to be upheld). This resulted in the parties agreeing in principle regarding what should be deducted in respect of holidays Mr H had taken in Florida, Costa Rica and Tenerife using the Fractional Club membership.

The case has now been 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 appended provisional decision, for essentially the same reasons. However, I will address the relevant points made by the Lender as well as considering the issues raised regarding what would constitute a fair deduction from the redress, in respect of any holidays taken by Mr H.

I don't agree with the Lender's contention regarding the approach I took to the definition of "investment" in the provisional decision. The definition I adopted, and which I do not think the Lender objects to, was:

"…a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit."

The Lender appears to be arguing that, in reality, I used a more expansive definition which included situations where there would be no profit or financial gain. However, I don't think that's a fair assessment of the content of the provisional decision. When deciding whether or not I thought it was likely the Supplier had sold or marketed the Fractional Club membership as an investment, I considered what Mr H had to say about what he'd been told by the Supplier's representatives at the Time of Sale. He said he was told that he'd:

"…get back at least what we paid for that unit and probably more with the way property values were going up."

For the reasons explained in the provisional decision, I thought Mr H's recollections were more likely to be accurate than not. So I think it's likely the Supplier said this, or something very similar to it, to Mr H at the Time of Sale. While it doesn't appear the Supplier guaranteed a profit or that Mr H would make a financial gain, it stated or implied that this was a probable outcome. I think that falls squarely within the definition of investment as set out above, and would have breached the prohibition in Regulation 14(3) of the Timeshare Regulations, on marketing timeshares as an investment.

I have considered the Lender's comments regarding my analysis of the Supplier's promotional and training materials relating to the version of the Fractional Club product which was sold to Mr H. This hasn't changed my overall analysis of that material, and it seems to me that the Lender is focusing on aspects of the material in isolation rather than the overall impression or implication that it is likely to have given, and how it would have encouraged sales staff to frame Fractional Club membership in a certain way.

I'd also say here that the individual circumstances of Mr H's case, and his recollections, were something that I attached significant weight to in my provisional decision when determining how the Supplier had marketed Fractional Club membership to him. While I'm aware that my analysis of the Supplier's materials was relatively lengthy, I did not place as much reliance on these materials as the Lender has suggested. I did, however, consider that they were not inconsistent with Mr H's allegations about how the Supplier sold the membership to him.

The Lender has reiterated that it thinks the disclaimers which appeared in the Supplier's paperwork dating to the Time of Sale were important, and pointed away from the product having been sold or marketed as an investment. As I said in my provisional decision, weighing up what happened is rarely as simple as looking at the contemporaneous paperwork, and I'd add that one of the disclaimers in fact (in my view) may have given the impression that the product could be viewed as a financial investment. I quoted from this disclaimer in my provisional decision – but in full it said:

> *"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 or any relevant 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."*

It seems to me that this disclaimer assumed that the Supplier's representatives would, or might, present Fractional Club membership to potential customers as an investment and provide an opinion or prediction as to the future value of the Allocated Property. Otherwise, I see no reason why the Supplier would have needed to clarify that any investment information provided by its representatives had *"been obtained solely from their own experience as investors*" and that no warranty was given *"as to any future values or returns".* Ultimately, I am not convinced that this disclaimer assists the Lender's case at all.

Regarding the credibility of Mr H's testimony, I remain of the view that the inaccuracies pointed out (if they are indeed inaccuracies – and I note Mr H has challenged this) are minor details, and that it wouldn't be reasonable to dismiss Mr H's witness statement as incredible as a result. While I note the Lender's other points about the testimony potentially being influenced by PR, or by the contemporaneous documents, I would say that I don't think the Lender has advanced any compelling evidence that the witness statement doesn't represent Mr H's genuine recollections of what happened at the Time of Sale.

The Lender also questioned the materiality of any breach by the Supplier of Regulation 14(3) to Mr H's decision to purchase the Fractional Club membership. It noted that Mr H appeared to have been keen on the holiday-related benefits and the extra giveaways the Supplier added to the deal during negotiations.

As I said in my appended provisional decision, I thought there were multiple reasons why Mr H decided to purchase the Fractional Club membership. I thought that the holiday-related benefits were likely to have been the top reason. But that doesn't mean however, that an investment-related motivation was *not* material to Mr H's purchasing decision. On the balance of probabilities, I thought it was a material reason for him deciding to go ahead. Some of the reasons for this were:

- Mr H's own testimony regarding his motivations.
- The fact that the investment aspect of the Fractional Club product was the main feature of the membership which set it apart from the membership Mr H had already.

The email from Mr H which has recently been supplied by PR, and which contains his reactions to the Lender's response to the complaint in 2019, I think tends to support a conclusion that the investment aspect of the product was important to his purchasing decision. In that email, he states that he wouldn't have gone ahead, had it not been for the Supplier's representations relating to the product being an investment.

Having considered all of the available evidence again, I'm still of the view that the potential for the Fractional Club membership to be an investment was material to Mr H's purchasing decision, and so the Supplier's breach of Regulation 14(3) rendered the credit relationship between Mr H and the Lender unfair under Section 140A of the CCA.

Finally, I acknowledge the Lender's point about reversing the burden of proof. I don't think that is what I did in the provisional decision. As outlined above, I focused on whether or not the investment aspect of the product had been material to Mr H's purchasing decision. I accept the wording of one of the paragraphs of the provisional decision could have given the impression that the "wrong test" had been used, when viewed in isolation. But when read alongside the rest of the provisional decision, I think it's apparent that this was not the case.

Fair Compensation

In general, my views regarding what would be fair compensation have not changed since the provisional decision. However, I'm mindful that I've received significant submissions from PR on Mr H's behalf, and the Lender, on what fair deductions would look like in respect of holidays Mr H took using his Fractional Club membership. I've thought about this point further.

I think it's fair that Mr H should account for any benefit he has received as a result of his purchase of the Fractional Club membership. The Lender has explained that it intends to make the following deductions:

£1,130.85 in respect of holidays taken in Florida and Costa Rica in 2014
£1,538.25 in respect of a holiday taken in Tenerife in 2018

It doesn't appear to have been denied that Mr H took these holidays, so I think it's right they are taken into account. The Lender has explained that the former figure is equal to the maintenance fees associated with the Fractional Club membership for 2014, while the latter figure is equal to the respective fees for 2018, with an uplift of £190 to reflect the fact that the holiday that year was taken in what it considered to be peak season.

I said in my provisional decision that, where the actual value of the holidays taken by Mr H cannot reasonably be determined, a proportionate and practical approach would be to deduct from the redress the management charges which correspond to any year in which holidays were taken. I note that the Lender does not appear to have taken steps to

determine the actual value of the holidays, and its methodology is not strictly in line with the approach I outlined, as it contains the peak season uplift I've referred to.

My own research suggests the Lender's methodology may have overvalued the Tenerife holiday and undervalued the other holidays, but I think it may well be the case that it all balances out overall. Certainly, I've not seen reason to believe the deductions proposed by the Lender would significantly overvalue the holidays taken by Mr H. So, looking at this point in the round, I think the deductions the Lender intends to make in respect of the holidays taken by Mr H are fair and reasonable.

It's not clear if the Lender intends to make further deductions – it hasn't mentioned any – but if it does, then any promotional or marketing holidays (at which the Supplier required attendance at a sales presentation or hoped to sell a product) should not be taken into account when calculating deductions. Any other deductions would need to be supported by robust evidence.

With the above in mind, here's what I think needs to be done to compensate Mr H – whether or not a court would award such compensation:

(1) The Lender should refund Mr H's repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.
(2) In addition to (1), the Lender should also refund the annual management charges Mr H paid as a result of Fractional Club membership.
(3) The Lender can deduct

   i. The value of any promotional giveaways that Mr H used or took advantage of, including any "cashback" type incentive; and
   ii. The market value of the holidays* Mr H took using his Fractional Points.

   (I'll refer to the output of Steps 1-3 hereafter as 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 H credit file(s) in connection with the Credit Agreement.
(6) If Mr H's Fractional Club membership is still in place at the time of this decision, as long as he agrees to hold the benefit of his interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify him against all ongoing liabilities as a result of his Fractional Club membership.

   *The actual deductions to be made in this case in respect of Mr H's holidays have been outlined, there appears to be agreement among the parties that these figures are reasonable, and I also consider them to be reasonable. Therefore, these are the figures that should be used.

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

My final decision

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

Compensation” section above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr H to accept or reject my decision before 5 March 2025.

Will Culley
Ombudsman

COPY OF PROVISIONAL DECISION

I've considered the relevant information about this complaint.

Having done so, I've reached the same conclusions as our Investigator, but I've provided more detailed reasons so I've decided to issue this provisional decision to allow the parties to the complaint an opportunity to provide further comment.

The deadline for both parties to provide any further comments or evidence for me to consider is 12 December 2024. Unless the information changes my mind, my final decision is likely to be along the following lines.

The complaint

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

Background to the Complaint

Mr H purchased a number of timeshare products from a timeshare provider (the 'Supplier') between 2008 and 2013. This complaint concerns only a purchase Mr H made in 2013, but I've set out his previous purchases for the purpose of context.

Mr H first purchased a 'Trial' membership from the Supplier in late 2008 for £3,295, because it "appeared to be very good value", offering a number of weeks of holiday with the Supplier over a defined period.

Then, in June 2010, Mr H traded in what was left of his Trial membership, for membership in what the Supplier called its 'Vacation Club'. This was a type of timeshare where Mr H was allocated a number of 'points' annually which could be exchanged for holiday accommodation within the Supplier's portfolio. Mr H purchased 900 points in the Vacation Club for £11,794, reduced either to £7,999 or £5,999 after trading in his Trial membership.

The purchase which is the subject of this complaint took place on 14 October 2013 (the 'Time of Sale'). On this date Mr H purchased membership of a different type of timeshare (the 'Fractional Club') from the Supplier. He entered into an agreement with the Supplier to buy 1,210 fractional points at a cost of £18,798 (the 'Purchase Agreement'). But after trading in his Vacation Club membership, he ended up paying £8,923 for membership of the Fractional Club. Mr H said various extras were thrown into the deal by the Supplier, including a premium membership of an exchange scheme, "bonus" points which could be used for a single year, a form of cashback, and a year's worth of annual management fees paid for by the Supplier.

Fractional Club membership was asset backed – which meant it gave Mr H 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 H paid for his Fractional Club membership by taking finance of £8,923 from the Lender in his own name (the 'Credit Agreement'). The terms of the agreement required Mr H to make 180 monthly payments of £141.03, however he ended up repaying the agreement early, around 10 months after taking it out.

Mr H – using a professional representative (the 'PR') – wrote to the Lender on 20 December 2018 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. A breach of contract by the Supplier giving him a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
3. 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.
4. The Credit Agreement being unenforceable because it was not arranged by a credit broker regulated by the relevant regulatory authority to carry out such an activity.

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

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

1. told him that he would own a fraction or a share in a specific piece of property when that was not true.
2. told him that Fractional Club membership would be a great investment which would make a profit due to its resale value, when that was not true because it was worthless and there is no market for it.
3. told him that the Supplier's holiday resorts were exclusive to its members when that was not true.

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

(2) Section 75 of the CCA: the Supplier's breach of contract

Mr H also says that although he was able to take holidays in Florida and Costa Rica in 2014, in general he found it difficult to book the holidays he wanted, when he wanted. There was normally no availability in places he wanted to go on holiday.

As a result of the above, Mr H says he has a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr H.

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

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

1. The contractual terms setting out (i) the duration of his Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of his membership, along with multiple other terms, were unfair contract terms under the relevant legislation governing unfair terms in consumer contracts.
2. He was pressured and intimidated into purchasing Fractional Club membership by the Supplier.
3. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mr H's concerns as a complaint and issued its final response letter on 14 January 2019, rejecting it on every ground.

Mr H 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 H at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of that breach on his purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr H was rendered unfair to him 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. I could summarise the reasons why the Lender disagreed with our investigator as follows:

- A witness statement made by Mr H was not credible, as it made a factual error when stating that Mr H was offered a premium membership in an exchange scheme, and 1,000 bonus points.

- Mr H had received numerous other benefits from his purchase of the Fractional Club membership, and by his own admission, he was interested in "freedom of holidays". This called into question whether his decision to purchase the membership was materially impacted by any breach by the Supplier of the Timeshare Regulations.

- In its view, the Supplier did not sell or market this version of the Fractional Club product as an investment.

The legal and regulatory context

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

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

- The CCA (including Section 75 and Sections 140A-140C).
- The law on misrepresentation.
- The Timeshare Regulations.
- The Unfair Terms in Consumer Contract Regulations 1999 ('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 H as an investment, which, in the circumstances of this complaint, rendered the credit relationship between him and the Lender unfair to him for the purposes of Section 140A of the CCA.[1]

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 H complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that:

- The Supplier made various misrepresentations to, or was in breach of contract with, Mr H, giving rise to a section 75 claim against the Lender.
- The Lender failed to carry out a proper creditworthiness assessment.
- The Supplier pressured and intimidated him into entering the Purchase Agreement and related Credit Agreement.
- Terms of the Purchase Agreement with the Supplier were unfair.

This is because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr H in the same or a better position than he would be if the redress was limited to what would be available if any of those aspects of the complaint were to be successful.

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

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

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

[1] I'm aware that Mr H's PR did not make a claim in such terms – it characterised the Supplier's marketing of the timeshare as an investment as a *misrepresentation*, rather than a breach of the Timeshare Regulations which led to an unfair credit relationship coming into existence. However, this does not prevent me from making a finding that this is what happened.

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

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

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

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

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

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

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

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

1. The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale; and
2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;
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 H and the Lender.

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

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

The Lender does not dispute, and I am satisfied, that Mr H 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 H says that this what the Supplier did at the Time of Sale. He says that while on holiday in Turkey using his Vacation Club points, the Supplier tried to persuade him to purchase an off-plan investment apartment and, after he said he wasn't interested as it was too expensive and he wanted the freedom to holiday elsewhere, pivoted to a sales pitch for the Fractional Club where he says the Supplier told him the following:

"[This] was set up to enable Club members to buy a fraction of a unit in Spain, rather than a whole unit.

…

They explained at some point in the future…the existing lease would come to an end and we could realise our investment in the fraction of the property and get back at least what we paid for that unit and probably more with the way property values were going up. [The Supplier] stressed that the fractional product was different from timeshare, in that we would be investing and acquiring an interest (namely a fraction) in real estate."

Mr H went on to say in his witness statement that the Supplier also explained that with 1,210 points he would have access to "2-bed units in low or mid-season" and "a unit share of 3.1%".

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

(1) There were two aspects to his Fractional Club membership: holiday rights and a profit on the sale of the Allocated Property.
(2) He was told by the Supplier that he would get his money back or more during the sale of Fractional Club membership.
(3) He was told by the Supplier that Fractional Club membership was the type of investment that would be likely to increase in value due to the way property prices were rising.

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 H's share in the Allocated Property clearly, in my view, constituted an investment as it offered him 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 H as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to him as an investment, i.e. told him or led him to believe that Fractional Club membership offered him 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 H, 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 *"primarily for the purpose of holidays"* and *"that [the Supplier] makes no representation as to the future price of value of the Fraction".* Elsewhere, in lengthier documents dating to the Time of Sale, the Supplier stated that the purchase was *not "specifically…an investment in real estate"*. It also stated that its representatives were *"not licensed investment advisors"* and *"all information has been obtained solely from their own experiences as investors and is provided as general information only…"*

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And there are a number of strands to Mr H allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that membership of the Fractional Club was expressly described as an "*investment*" and (2) that membership of the Fractional Club could make him 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 H or led him to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered him 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 a Electronic Sales Aid (the 'ESA'); and

3. a document called the “FPOC2 Fly Buy Induction Training Manual” (the ‘Fractional Club Training Manual’)

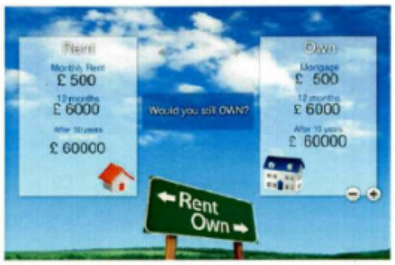
Neither the 2013/2014 Induction Training nor the ESA I’ve seen included notes of any kind. However, the Fractional Club Training Manual includes very similar slides to those used in the ESA. And according to the Supplier, the Fractional Club Training Manual (or something similar) was used by it to train its sales representatives at the Time of Sale. So, it seems to me that the Training Manual is reasonably indicative of:

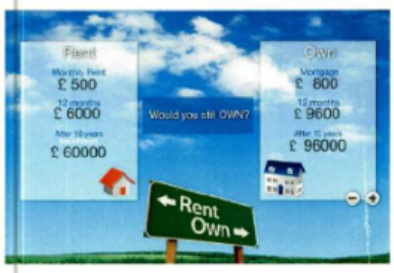
(1) the training the Supplier’s sales representatives would have got before selling Fractional Club membership; and

(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 H.

The “Game Plan” on page 23 of the Fractional Club Training Manual indicates that, of the first 12 to 25 minutes, 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:





- Re-visit the idea of renting a house and talk them through the example of renting a home for £500 highlighting the fact of no return
- Refer to their decision to purchase a property as it made more financial sense to own than rent because, not only are they are building equity in their property, they can also continue to enjoy living in their home once it is paid for
- Ask: “if it cost a little more to own rather than rent would they be happy to pay the extra to own?” *(increase amount of owning and continue to do this for a couple of times until they don’t agree.*

CLOSE: So what you are telling me is that, as long as it’s comfortably affordable, you would always choose to own rather than rent, is that correct?

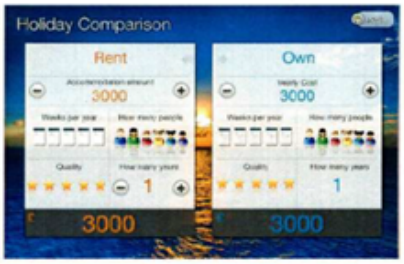
LINK: Now let me show you the relevance this has when it comes to your holidays because what you are currently doing is …

CLOSE:

Indeed, one of the advantages of ownership referred to in the slide above 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 the slides don'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:



- You are currently spending £xxxx on your holidays each year… (taken from survey)
- Confirm exactly what clients get for that money in terms of quality, people travelling and weeks
- Confirm the client will holiday for the next 10 years
- Explain total cost, with no inflation over a ten year period and ask what they own at the end of that period
- Compare spending the same money to own your holidays with better benefits, so that at the end of the ten years they would have received better value

CLOSE: So, looking at the two options which way makes more sense, to own or rent your holidays? *(Get the answer "Owning")* **This is why so many people choose to holiday with [redacted].**

LINK: Before I show you how the product works, I am just going to tell you how [redacted] started and where we are today.

CLOSE:

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 following 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 the slides above 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, the slides above 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 H) 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 H 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)).'"*[3] And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.

So, if a supplier *implied* to consumers that future financial returns (in the sense of possible profits) from a timeshare were a good reason to purchase it, I think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment.

Indeed, if I'm wrong about that, I find it difficult to explain why, in paragraphs 77 and 78 followed by 99 and 100 of S*hawbrook & BPF v FOS* when, Mrs Justice Collins Rice said the following:

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

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."*

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[3] 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

"[...] 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.

Overall, therefore, as the slides 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 H 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 Mr H either implausible or hard to believe when he says he was told membership of the Fractional Club was an investment and that, when it was sold, it would be likely to result in at least him getting his money back and probably a profit too. On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mr H 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 H and the Lender under the Credit Agreement and related Purchase Agreement.

As the Supreme Court's judgment in *Plevin* makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

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

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

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

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

"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court ***may*** *make an order* ***if*** *it determines that the relationship is unfair to the debtor. […]*

[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr H and the Lender that was unfair to him 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 H, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender) led him to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

I think Mr H's testimony has been clear, detailed and straightforward. There are some minor factual errors, such as in his description of how he came to upgrade his Trial membership to a Vacation Club membership.[4] The Lender has alleged there are other inaccuracies in his witness statement that damage its credibility as evidence but, having examined the paperwork dating to the Time of Sale, I don't think these are in fact inaccuracies. Handwritten notes on the sales paperwork support Mr H's account of events regarding the "extras" the Supplier put into the deal, and I note the Supplier hasn't denied (when responding to the Lender's queries) that these extras were offered. In any event, I don't think it would be reasonable to discount Mr H's entire testimony because he couldn't recall relatively minor details.

On my reading of Mr H's testimony, there were a number of aspects of Fractional Club membership that motivated his decision to make the purchase. I think the prospect of a financial gain from Fractional Club membership was an important one. That doesn't mean he was not interested in holidays. His own testimony demonstrates that he quite clearly was and, in fact, I think the holiday-related benefits associated with Fractional Club membership were the most attractive aspect of the product to him. None of this is surprising given the nature of the product at the centre of this complaint.

[4] Mr H says this happened while on holiday. The Supplier says it took place in the UK following a request from Mr H (or his then wife).

But as Mr H says (plausibly in my view) that Fractional Club membership was marketed and sold to him at the Time of Sale as something that offered him *more* than just holiday rights, on the balance of probabilities, 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 existing 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 H has not said or suggested, for example, that he would have pressed ahead with the purchase in question had the Supplier not led him 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 to long-term financial commitments in the form of ongoing management charges, had he 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 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 H under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint.

Fair Compensation

Having found that Mr H would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable to put 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 Mr H agrees to assign to the Lender his 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 H with that being the case – whether or not a court would award such compensation:

(7) The Lender should refund Mr H's repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.

(8) In addition to (1), the Lender should also refund the annual management charges Mr H paid as a result of Fractional Club membership.

(9) The Lender can deduct

iii. The value of any promotional giveaways that Mr H used or took advantage of, including any "cashback" type incentive; and

iv. The market value of the holidays* Mr H took using his Fractional Points.

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

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

(11) The Lender should remove any adverse information recorded on Mr H credit file(s) in connection with the Credit Agreement.
(12) If Mr H's Fractional Club membership is still in place at the time of this decision, as long as he agrees to hold the benefit of his interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify him against all ongoing liabilities as a result of his 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 H took using his 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 his usage.

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

My provisional decision

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

I now invite the parties to the complaint to let me have any further submissions they'd like me to consider, by 12 December 2024.

Will Culley
Ombudsman