DRN-5324114

The complaint

Mr B's complaint is 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 this complaint on 19 December 2024, a copy of which is appended to, and forms a part of, this final decision. I set out the background to Mr B's complaint, and my initial findings on it, in that provisional decision, so it's not necessary for me to go over the details again.

However, in brief summary, Mr B's complaint had the following background:

- Mr B had made a number of purchases from a timeshare supplier (the 'Supplier'), as far back as the year 2000. This included various purchases of 'points' in the Supplier's holiday club system. By September 2013, which was the point at which Mr B made the purchase which is the subject of the complaint, he had 21,500 points spread across two holiday clubs operated by the Supplier – the European Club and the US Club.

- In September 2013 Mr B signed an agreement (the 'Purchase Agreement') to convert 11,000 of his points in the Supplier's European Club, into the same number of points in the Supplier's 'Fractional Club'. After credit was given for his existing points, Mr B paid £7,480 to upgrade, financed by a loan (the 'Credit Agreement') arranged by the Supplier with the Lender. Mr B later converted more of his points in the Supplier's holiday clubs, but that purchase was not ultimately financed by the Lender and falls outside the scope of this complaint.

- Fractional Club membership was asset-backed, meaning that in addition to giving Mr B the same holiday rights he'd been entitled to previously, it also gave him a share in the net proceeds of the future sale of a property named on the purchase agreement (the 'Allocated Property'), after the membership was due to end in 2028.

- Mr B complained to the Supplier in December 2017 and to the Lender in January 2018 about, in essence, having been mis-sold the Fractional Club membership. He was initially represented by a firm of solicitors – 'PR1' – but has more recently been represented by a claims management company – 'PR2'.

- The complaint contained too many points to include in this brief summary, but broadly it centred on pre-contractual misrepresentations by the Supplier which Mr B claimed the Lender was liable for under Section 75 of the CCA; various wrongful acts or omissions by the Supplier which had rendered the credit relationship between him and the Lender unfair under section 140A of the CCA; and irresponsible lending.

In my appended provisional decision, I outlined the legal context to the complaint in detail

before going on to make several findings on the balance of probabilities. These findings are fully explained in the appended document, but briefly:

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

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

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

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

What I considered constituted fair compensation is also set out in the appended provisional decision but, broadly speaking, it involved the refund of all payments made under the Credit Agreement, plus management charges paid by Mr B as a result of him entering the Purchase Agreement. To the net refund, compensatory interest would need to be added. I also proposed that amendments be made to Mr B's credit file to remove any negative information associated with the Credit Agreement, and that the Lender provide an indemnity with respect to any ongoing liabilities associated with the Purchase Agreement.

I asked the parties to the complaint to provide any further submissions they wanted me to consider. Mr B said he accepted the provisional decision. The Lender disagreed with the provisional decision and sent in submissions running to many hundreds of pages. Its arguments however, I think could fairly be distilled into the following points:

- There was nothing inherent about the Fractional Club product, which was against the Timeshare Regulations, nor was it against the Timeshare Regulations simply to describe how the sale of the fractional asset worked to a prospective purchaser. Indeed, it was a feature of the Fractional Club product and so it was necessary to tell prospective purchasers about it in order to comply with *other* parts of the Timeshare Regulations.

- I had used an inappropriately expansive definition of the word "investment" in the provisional decision which was not in line with the definition used in the case of *Shawbrook & BPF v. FOS*. In particular, I had defined investment to include any money back at all, rather than an actual or potential profit. The Lender considered that a finding could only reasonably be made that the Supplier had sold the Fractional Club membership as an investment if it had represented that a financial gain or profit was a reason to buy the product, and that there was a corresponding financial or profit motivation on the part of the purchaser. Based on the evidence, it considered the only answer that could be reached to that question was "No".

- Rather than engaging meaningfully with the evidence, I had made inferences about how the Supplier had sold the product based on generic assumptions about the product. I had not attached appropriate weight to the contemporaneous paperwork, which contained many disclaimers and declarations which made it clear that the product should not be viewed as a financial investment.

- I had been wrong to say in the provisional decision that there wasn't much evidence either way as to how the Supplier's sales representatives are likely to have marketed the Fractional Club membership. Large quantities of training and related materials had been shared with the Financial Ombudsman Service which showed the Supplier trained its staff not to describe Fractional Club membership as an investment. A set of slides I had mentioned in my provisional decision were not used by the Supplier in a sales context and it was irrational to rely on them as evidence.

- The only evidence to support a conclusion that the Fractional Club membership was sold as an investment was Mr B's witness statement. It was irrational to conclude that his testimony was more reliable than the evidence which weighed against it. In fact, there were many problems with Mr B's testimony, including:

    - The fact it had emerged so late in the complaints process, calling into question its provenance.

    - Significant errors, such as claiming the later 2013 purchase was financed by another loan with the Lender, when it was in fact paid for by cheque.

    - That it appeared to have been influenced by PR2, as it contained certain stock phrases and content which appeared frequently in witness statements produced by PR2.

- I hadn't given enough weight to other reasons why Mr B would have wanted to buy the Fractional Club membership. He had mentioned other things, such as wanting a shorter membership term, and there were other features of the product, such as the "wish to rent" scheme, which I'd discounted.

- I had applied the wrong test to determine that the credit relationship was unfair. Specifically, I had appeared to reverse the burden of proof by assuming it was up to the Lender to demonstrate the prospect of the Fractional Club membership being an investment was *not* material to Mr B's decision to buy it. The test I should have adopted was to assess whether there was sufficient evidence of a material impact of the Supplier's breach (which it denied had occurred in any event).

The case has now been returned to me to review again.

What I've decided – and why

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

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

I think the Lender is wrong to suggest that I adopted a definition of "investment" that was too broad. I was clear in the provisional decision about the definition of investment that I intended to use, and I note that this appears to be the definition the Lender agrees is the correct one. I appreciate the Lender considers I went on to deviate from that definition in practice, but I don't think that's a fair characterisation of the content of my provisional decision. Mr B's allegations in the witness statement (more on which below) included that the Supplier had told him *"…that when the property sold, we would be able to get our money back, plus profit."* And in the letter of claim to the Supplier written by PR1 back in December

2017, Mr B is also quoted as having alleged the Supplier to have told him that *"…property over a 15 year period would increase in value".*

If it is the case that the Supplier did market the Fractional Club membership to Mr B in this way, then I think that falls within the definition of investment I set out in the provisional decision, and would constitute a breach of the prohibition on selling or marketing timeshares as investments.

The Lender has advanced its reasons for why it disagrees that the Supplier would have marketed the product in this way. I've carefully considered the arguments put forward by the Lender and various other materials it has submitted to this service, including a commentary by the Supplier and copies of statements made in various proceedings, both in the courts and through this service.

In my provisional decision, I acknowledged the various disclaimers the Lender has referred to in the sales paperwork, and explained that I did not necessarily think they told the full story. As I said in the provisional decision, I think weighing up what happened at the Time of Sale is rarely as simple as looking at the contemporaneous paperwork. I remain of that view.

I have read and considered the Lender's concerns about Mr B's testimony. Most of these concerns were already expressed prior to the provisional decision and I consider I have already addressed then. The Lender has focused on a specific error in the PR2 witness statement. It considers the fact that Mr B mistakenly identified the further conversion of points which took place three months after the purchase complained about, as also having been financed by a loan, as something which calls into question the reliability of the statement. While this is certainly an error, I am not as convinced as the Lender that this significantly undermines the reliability of the witness statement. That purchase *was* going to be financed by the Lender and the relevant loan paperwork was signed by Mr B, however the financing later fell through (apparently due to administrative issues), and alternative funding needed to be arranged. I think it's an understandable error to have made some years later, considering the contemporaneous paperwork appeared to show that the purchase had been financed by a loan from the Lender. Indeed, I note that even the Supplier made this error when writing to the Lender in March 2018 with details of Mr B's various purchases.

I understand the Lender's concerns about the similarities between some of the witness statements produced by PR2, especially in their phrasing. In this case however, I consider there are consistent threads between the details which emerge about the sale in PR1's letter of claim to the Supplier, and the later statement produced by PR2. I thought the consistent elements across these documents produced at different times lent some credence to the overall narrative put forward to support Mr B's complaint. I note the Lender has not really addressed PR1's letter in its submissions. Overall, I remain of the view that the witness statement, and quotes from PR1's letter, are likely to be representative of Mr B's recollections of what he was told by the Supplier's personnel at the Time of Sale.

The Lender's broader concerns about PR2's business practices which come across in its response to my provisional decision, are matters which fall outside the scope of this individual complaint. While I acknowledge the Lender has these concerns, it doesn't follow that Mr B's complaint is invalid. The Lender can report its concerns to PR2's regulator, if it hasn't already done so.

Moving to the question of the evidence, or absence of evidence, of the Supplier's sales practices, I outlined the materials I had seen in my provisional decision and noted that it appeared the Supplier was concerned to avoid marketing or selling Fractional Club membership as an investment. I also said:

"On the other hand, it's apparent from the materials I've considered that the Supplier was aware that the sale of the fractional asset at the end of the term was a benefit to a potential purchaser, and it appears still to have held this view at the time Mr B first complained. I've also seen presentation slides dating to September 2012 which, in my view, implied that the Supplier's brand and other positive attributes would contribute to enhancing the value of the fractional asset at the end of the membership term. I understand the Supplier denies that these slides were used to promote the product to potential customers."

The Lender has restated the Supplier's denial that the September 2012 slides were used to promote the Fractional Club product. I do not think this is necessarily as straightforward as the Lender or the Supplier has stated, and I think it's something worth expanding on.

A director of the Supplier, "SC", originally provided the September 2012 slides to the Financial Ombudsman Service, explaining:

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

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

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

SC explained in a later witness statement that, having enquired further with a sales manager, or sales managers, who had been in the role at the relevant time, she now understood the slides were *"never used during the sales presentation of the fractional product."* The Supplier also provided a witness statement from a sales manager in Tenerife – "GH" – who said he'd never seen the September 2012 slides before.

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

I've also seen other sales aides which it's been alleged the Supplier used[1], and which appear to describe or position the Fractional Club product as an investment. I understand the Supplier's position is that these were unauthorised documents which may have been produced by sales representatives locally, but I think this all serves to illustrate the point that different materials may have been used in different ways, at different times, in different places. And that while the Supplier's centralised training documents and policies may have emphasised compliance with Regulation 14(3), it's important to consider what happened in each individual case. For the avoidance of doubt, I make no finding that the Supplier showed Mr B the September 2012 slides. I don't think it's necessary because I don't think the outcome of the complaint turns on it.

In my provisional decision I highlighted how the nature of the purchase contributed to my findings about how the Supplier had likely marketed the product to Mr B, and also his motivations for going ahead with it. I said:

[1] For clarity, it's not been alleged they were used in Mr B's case.

"…it's difficult to see how the Supplier could have marketed the Fractional Club membership to [Mr B] on the basis of holiday use. He already had a number of points in the Supplier's holiday clubs, which he could exchange for holiday accommodation. And as far as I can see, Fractional Club ownership offered him nothing more, in terms of holidays, than he already had access to. He was simply making a "like for like" exchange of his points and paying £7,480. Given this set of facts, I think it's more likely the Supplier would have focused on other benefits of Mr B converting to Fractional Club membership."

Later, I went on to say:

"This leaves the two selling points Mr B mentioned in his testimony: the shorter term of the membership as compared to his existing holiday club membership(s), and the prospect of a financial gain when the Allocated Property was sold. Having considered the circumstances carefully, I think it's likely that both of these reasons were equally important to Mr B and he would have been unlikely to proceed with the purchase had either of them not been promoted to him as reasons to buy at the Time of Sale.

It comes across very clearly in Mr B's testimony and PR1's submissions, that Mr B was looking to leave his existing membership(s) with the Supplier, and that it was probably this desire which triggered conversations with the Supplier, which then led to Mr B entering the Purchase Agreement.

Mr B's existing membership was due to end in 2052. I am aware that the Supplier had a policy of allowing members to surrender their memberships at the age of 75 (although I do not know if it advised Mr B of this). For Mr B, that would be in 2032. Mr B's Fractional Club membership was due to end in 2028, so he would have obtained a reduction of four years.

I have not seen the precise management fee details for Mr B's holiday club points and his Fractional Club points. But based on an example given in the Supplier's training materials for staff, it appears fees across both clubs were broadly equivalent and were charged on a "per point" basis. The example given by the Supplier is of 20,000 points in either club attracting an annual fee of £1,600. Based on this, the 11,000 points Mr B exchanged would have attracted a fee of about £880 per year (with probable increases over time).

Mr B paid £7,480 to convert 11,000 holiday club points, to points in the Fractional Club. In 2028, the Fractional Club scheme would end and he'd have no further management fee liabilities.

If Mr B had left his points in the Supplier's holiday club, he would have needed to wait until 2032 to surrender them, and would have paid approximately £3,520 in management fees between 2029 and 2032.

While I appreciate these are approximate figures, it doesn't appear from them that it would have made much financial sense for Mr B to purchase Fractional Club membership solely to obtain a shorter membership term and the associated smaller liability for fees. It would have made more sense to surrender his points in 2032, if this had been his only goal."

In other words, if we accept (as it appears the Lender does) that Mr B's aim going into his discussions with the Supplier was to get out of his membership sooner, then his options would have been:

- To purchase Fractional Club membership for an up-front cost of £7,480 (plus finance interest), which would allow him to exit in 2028. He would also have had access to the Wish to Rent scheme the Lender has mentioned, which I discounted as being a significant factor in Mr B's purchasing decision for reasons referred to in the

appended provisional decision.

- To continue with his existing holiday club points until 2032, at which point he would be eligible to leave the membership at no charge. This would involve paying approximately £3,520 more in management fees due to the extra years he would hold the points, although he would also be able to continue holidaying in that time.

This assumes, of course, that the Supplier would have informed Mr B that he could leave his membership at age 75, meaning he would have been aware of the second of these two options. One of the Supplier's sales policies the Lender has referred to, and which was apparently implemented in June 2013, instructed staff to provide this information to members, so it seems probable that Mr B would have been made aware of it.

It still appears to me that it would make little financial sense for someone to choose the first option, assuming their goal was to exit their membership, unless they perceived some other significant benefit to having the Fractional Club product. The main thing which set this product apart from the holiday club memberships Mr B already owned, was the share in the net sale proceeds of the Allocated Property. And Mr B's case is that the Supplier told him that property prices would rise over a 15 year period and that he'd be able to get his money back, plus a profit, from the proceeds. If the Fractional Club membership had been sold in the way Mr B describes, it would become a more attractive proposition from a financial perspective than waiting until 2032 to leave the holiday club, and the decision to purchase it would make more financial sense.

While I acknowledge what the Lender has said, I remain of the view that the factual matrix in this case points towards the Supplier having stated or implied to Mr B that the Fractional Club membership was an investment that would, or was likely to, generate a profit, thus breaching Regulation 14(3). And it appears to me that even if Mr B had gone into the pre-purchase discussions with the aim of exiting his existing membership, he would not have proceeded with the purchase had it not been for the Supplier's breach. It follows that I consider the breach was material to his purchasing decision and that it rendered unfair the credit relationship between Mr B and the Lender under section 140A of the CCA.

Finally, I disagree with the Lender's suggestion that I have applied the wrong test or reversed the burden of proof when determining if the credit relationship was unfair. The Lender has observed that the correct way to proceed is to assess if there was sufficient evidence that the Supplier's breach had a material impact on Mr B's purchasing decision. But that is what I did in the appended provisional decision, and have set out again above.

Ultimately, while I thank the Lender for its response to my provisional decision, I have seen no good reason to depart from the findings and conclusions I reached in it. It follows that I consider the Lender ought to pay Mr B compensation.

Fair Compensation

My views regarding what would constitute fair compensation have not changed, so the following paragraphs are identical to those in my provisional decision.

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 Mr B agrees to assign to the Lender his Fractional Points or hold them on trust for the Lender if that can be achieved.

I'm aware Mr B later purchased 5,500 more points in the Fractional Club, under a separate Purchase Agreement that was intended to be, but ultimately was not, financed by the Lender. For the avoidance of doubt, the 5,500 points purchase is not included in the compensation.

Mr B was an existing holiday club member and 11,000 points he held in the holiday club was traded in against the purchase price of Fractional Club membership. Under his holiday club membership, like Fractional Club membership, he had to pay annual management charges relating to his points. So, had Mr B not purchased Fractional Club membership, he 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 B from the Time of Sale as part of his Fractional Club membership should amount only to the difference between those charges and the annual management charges he would have paid had he left his 11,000 points in the Supplier's holiday club.

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 Mr B'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 difference between Mr B's Fractional Club annual management charges paid after the Time of Sale and what his holiday club annual management charges would have been had he not purchased Fractional Club membership, insofar as these charges relate to the 11,000 points purchased at the Time of Sale.

3. The Lender can deduct:

    i. The value of any promotional giveaways that Mr B used or took advantage of; and
    ii. The market value of the holidays* Mr B took using his Fractional Points if his annual management charge for the year in which the holidays were taken was more than the annual management charge he would have paid had he left his 11,000 points in the Supplier's holiday club. However, the deduction should be a proportion equal to the difference between those annual management charges. And if any of Mr B's holiday club annual management charges would have been higher than his equivalent Fractional Club annual management charge, there shouldn't be a deduction for the market value of any holidays taken using

Fractional Points in the years in question as he could have taken those holidays as with his 11,000 points, had they been left in the holiday club, 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 B'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 B 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 the consumer a certificate showing how much tax it's taken off, if requested.

My final decision

For the reasons explained above, and in the appended provisional decision, I uphold Mr B'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 B to accept or reject my decision before 14 March 2025.

Will Culley
Ombudsman

COPY OF PROVISIONAL DECISION

I've considered the relevant information about this complaint.

Having done so, I've arrived at broadly the same conclusions as our investigator, but I've explained my reasons in more detail. So, in the interests of fairness, I am issuing this provisional decision to allow the parties an opportunity to provide further submissions.

The deadline for both parties to provide any further comments or evidence for me to consider is 16 January 2025. Unless the information changes my mind, my final decision is likely to be along the following lines.

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 him under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying claims under Section 75 of the CCA.

Background to the Complaint

Mr B made a number of purchases from a particular timeshare provider (the 'Supplier') over the course of many years, going at least as far back as the year 2000. This complaint concerns a purchase he made in September 2013, but I will outline below his purchase history for the purpose of putting things in their proper context.

Mr B appears to have made his first purchase from the Supplier (or one of its predecessors) in March 2000. This was a purchase of 'points' in a holiday club type system. It's not known specifically how the club worked at that time, but normally with such products the purchaser is granted an allowance of points each year, and these can be exchanged for holiday accommodation. Mr B purchased 3,500 points[2] at this time, and paid £6,600 by cheque.

A couple of months later, in May 2000, Mr B purchased a further 3,500 points in the Supplier's club, for £4,939, again paying by cheque.

Five years after topping up his points, Mr B made a purchase in a different holiday club operated by the Supplier in the USA. He purchased 3,000 points in this club for 7,320 USD, and I understand a US Dollar loan was used to finance this amount.

In February 2006 Mr B purchased a further 10,000 points in the original club he'd purchased points in, for £10,875. He paid by cheque. It appears these points were transferred later to Mr B's ex-wife as part of a financial settlement.

In August 2009, Mr B purchased another 5,000 points in the same club. This cost £6,920 and was financed by a loan from a different lender.

It was in September 2013 that Mr B made his purchase which is the subject of this complaint. This purchase involved the conversion of 11,000 of the points he'd purchased previously from the Supplier, into the same number of points in a new club being promoted

[2] It's likely this was 35 points at the time, but the Supplier changed the way its system worked at a later date, and this number of points is equivalent to 3,500 under the Supplier's current system. I've used the values under the current system throughout my decision to avoid confusion.

by the Supplier. This was a club I'll call the 'Fractional Club'. It appears Mr B was granted a trade-in value of £11,000 for his existing points, and had £7,480 to pay on top of that, meaning the total purchase price was £18,480.

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 was due to end in 2028.

Mr B paid for his Fractional Club membership by taking finance of £7,480 from the Lender (the 'Credit Agreement'). Under the Credit Agreement Mr B was expected to make monthly payments of £119.31 per month for 120 months, except for the first month, in which he was expected to make a payment of £184.31. I understand Mr B settled the loan early, in 2014.

Mr B converted a further 1,000 of his holiday club points, along with the 3,000 points he'd purchased in the Supplier's club in the USA, to 5,500 Fractional Club points, in December 2013. This cost £4,500, and it was initially planned to finance the transaction with another loan from the Lender. However, the loan never went ahead and Mr B ended up paying by cheque.

Mr B initially complained to the Supplier – using a professional representative ('PR1') – by letter in December 2017. PR1 followed this up with a letter to the Lender on 29 January 2018 (the 'Letter of Complaint'). The Letter of Complaint referred the Lender to the complaint made to the Supplier, and outlined the following concerns on Mr B's behalf:

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. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.
3. The decision to lend being irresponsible because (1) the Lender did not carry out the right creditworthiness assessment and

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

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

1. told him that Fractional Club membership was the only way to exit his current holiday club contract, when in fact there were other avenues available if exceptional circumstances applied.
2. told him that his family would inherit any contractual liabilities from him relating to the timeshare, which he knew not to be true.
3. told him that Fractional Club membership had a guaranteed end date in 15 years, after which he'd receive an amount of money which was more than he'd put in. This wasn't true because the sale of the Allocated Property would take place at the same time as many others within the Fractional Club, which would lead to oversupply and depressed prices. Furthermore, the sale date was not guaranteed.
4. told him that he'd be able to sell his Fractional points any time, to anyone, so long as he gave the Supplier first refusal, because they were in demand. This wasn't true because there was no second-hand market in Fractional points, and the Supplier did not operate a resale programme.
5. told him there would be no problems with the availability of accommodation, where and when he wanted it. But this was false and the Supplier knew it was a major issue. Mr B rarely got his first choice and needed to book a year in advance.
6. told him that the Supplier's holiday resorts were exclusive to its members when that was

not true.
7. told him that he'd be able to earn enough in rental income from the Fractional points to cover his annual management fees. No rental income was received and the Supplier would have been aware it was unlikely that any such income would be received from rentals.
8. told him that the management fees would rise at a rate below inflation, but in reality the average rise has been 6% per year.

Mr B 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 him.

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

The Letter of Complaint (and the letter to the Supplier which was referenced in it) set out several reasons why Mr B 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. Fractional Club membership was marketed and sold to him as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. The contractual terms including those 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 were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
3. He was pressured into purchasing Fractional Club membership by the Supplier.
4. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.
5. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mr B's concerns as a complaint and issued its final response letter on 28 September 2018, rejecting it on every ground. The complaint was subsequently referred to the Financial Ombudsman Service in February 2019. PR1 then ceased trading and, after a time, another professional representative (PR2) took over the complaint. It doesn't appear that PR2 added any new points to the complaint or sought to reformulate it, but it took a witness statement from Mr B in early 2020, which it provided a copy of to the Financial Ombudsman Service in December 2023. This provided some more detail from Mr B, first hand, of his recollections of his interactions with the Supplier.

After the complaint had been referred to this 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 B 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 B 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. The Lender's arguments against our Investigator's assessment could be summarised as follows:

- There were inconsistencies between the letter PR1 sent to the Supplier, and the Letter of the Complaint it sent to the Lender. The letters did not make the same allegations.

- Notes made by the Supplier at the Time of Sale suggested the reason Mr B had converted his holiday club points to Fractional Club points, was because he wanted a shorter membership term.

- Mr B had benefited from the shorter term of the Fractional Club membership, as compared to the holiday club membership he exchanged from. He could also have benefited from the Supplier's rental scheme, which was exclusive to the Fractional Club, albeit it seemed he'd never tried to use it.

- It felt there was a lack of detail in Mr B's witness statement, along with various inaccuracies.

The legal and regulatory context

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

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

- The CCA (including Section 75 and Sections 140A-140C).
- The law on misrepresentation.
- The Timeshare Regulations.
- The UTCCR.
- The CPUT Regulations.
- Case law on Section 140A of the CCA – including, in particular:

    - The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') (which remains the leading case in this area).
    - *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
    - *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*').
    - The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*').
    - *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
    - *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
    - *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').

Good industry practice – the RDO Code

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

What I've provisionally decided – and why

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr B 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.

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's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the Supplier misrepresented the Fractional Club membership; that the loan was made irresponsibly due to a failure to carry out a proper creditworthiness assessment; and that the credit relationship between Mr B and the Lender was rendered unfair for various other reasons set out above.

And that's because, even if those aspects 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 what would have been fair and appropriate if the complaint were to have been upheld for any other reason.

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."[3]

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

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

The Lender does not dispute, and I am satisfied, that Mr B 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 B says that the Supplier did exactly that at the Time of Sale. He said in the witness statement prepared by PR2 that he recalled the following about his September 2013 interactions with the Supplier:

"In September 2013 we were on holiday. While we were at the resort, we were invited to come along and have a catch up with the reps on site. At this meeting, the rep began telling us about an amazing offer he had on that day, and this was for us to purchase fractional property. I had told the rep that I no longer wanted the points, and I just wanted to end our contract. We were told that the best thing we could do, was convert our points over to fractions. We were told this would an investment, and that this would also ensure our contract ended sooner. We were told that after so many years our contract would end, and the property would be sold. We were told that when the property sold, we would be able to get our money back, plus profit. There was no mention of what would happen if it didn't sell, it was guaranteed to sell. We did feel under pressure to make this purchase. The rep told us that this was an amazing deal that we were getting, and if we walked away, we wouldn't be able to get the same deal twice. We also seen this as a way for us to get out of our contract."

A similar story emerges in PR1's letter to the Supplier. While no witness statement was produced by PR1, it seems to have based aspects of its letter to the Supplier on details provided by Mr B. These included that he'd approached a representative of the Supplier called "Gary" about the Supplier buying back his points, and had been advised the only way he could end his agreement earlier than 2054 was to convert his holdings into the Fractional Club. Mr B had been looking for the "most cost effective" exit from his existing commitments, and PR1 alleged he'd been told he would get more out, after 15 years, than he'd put in.

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

(1) He was told by the Supplier that he would get the money he had paid back, or more during the sale of Fractional Club membership.

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

Mr B'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 as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr 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 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 B, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr B as an investment.

These disclaimers included one on the reverse of the front page of the Purchase Agreement signed by Mr B, which stated the product should not be purchased as an investment in real estate, and that the price Mr B was "primarily" so Mr B could go on holidays. I note Mr B signed other paperwork during the sales process which said, among other things, that the purchase was an investment in future holidays and shouldn't be regarded as a property or financial investment, and that the sale price of the Allocated Property would depend on market conditions at the relevant time.

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And there are a number of strands to Mr B 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*" (2) that membership of the Fractional Club could make him a financial gain in the sense he'd get more money back than he'd paid.

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 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

I've seen a variety of internal materials produced by the Supplier and dating to around the time it began selling Fractional Club membership. I think, in general, these materials indicate that the Supplier was concerned to avoid breaching Regulation 14(3). I've seen a copy of a Sales Policy, for example, which warned staff that promoting the Fractional Club product as an investment, or discussing resale values with potential purchasers, was considered unacceptable. I've also seen evidence that the Supplier did not consider it a part of its strategy for the sale of the product to promote the residual value of the share in the Allocated Property as a reason to purchase it. Rather, it considered that its strategy should be to

market the product as something which could be used to go on holiday, but it also acknowledged that for existing holiday club members, the shorter term associated with Fractional Club membership was a selling point.

On the other hand, it's apparent from the materials I've considered that the Supplier was aware that the sale of the fractional asset at the end of the term was a benefit to a potential purchaser, and it appears still to have held this view at the time Mr B first complained.[4] I've also seen presentation slides dating to September 2012 which, in my view, implied that the Supplier's brand and other positive attributes would contribute to enhancing the value of the fractional asset at the end of the membership term. I understand the Supplier denies that these slides were used to promote the product to potential customers.

It seems to me that there's not much in the way of conclusive evidence, either way, as to how the Supplier's sales representatives are likely to have marketed the product. But I don't think the Supplier would have needed to have deviated very far from a simple description of how the Fractional Club product worked in terms of the sale of the fractional asset at the end of the term, to have fallen foul of 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)).''*[5] 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*, 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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[4] In its response to the complaint made on Mr B's behalf by PR1, the Supplier appeared optimistic about the local property market, stating: *"[Mr B] will definitively receive some sort of return when the Fractional Property is sold and…it is not unforeseeable that he will receive a positive return on the amount paid by him for his Fractional Ownership."*

[5] 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."*

In Mr B's case, it's difficult to see how the Supplier could have marketed the Fractional Club membership to him on the basis of holiday use. He already had a number of points in the Supplier's holiday clubs, which he could exchange for holiday accommodation. And as far as I can see, Fractional Club ownership offered him nothing more, in terms of holidays, than he already had access to.[6] He was simply making a "like for like" exchange of his points and paying £7,480. Given this set of facts, I think it's more likely the Supplier would have focused on other benefits of Mr B converting to Fractional Club membership.

And indeed, Mr B describes there having been two main selling points on the day:

- He was told it was a way for him to exit his contract with the Supplier sooner; and
- He was told that, at the end of this shorter term, he would get back the money paid with the potential for a profit.

I am aware that the Lender has concerns about the evidence put forward either by Mr B or on his behalf. It has highlighted potential inconsistencies or inaccuracies in the information submitted. I've considered these below.

I don't think the Lender's concerns about PR1's Letter of Complaint differing from the letter of claim/complaint it had submitted to the Supplier, are valid. It was apparent from the Letter of Complaint that PR1 considered the letter of claim/complaint to the Supplier should be read *alongside* the Letter of Complaint to the Lender, so I don't find it surprising that PR1 did not replicate all of the details between the two letters. The Lender has also suggested the only allegation that the product was sold as an investment appeared in PR1's letter(s). However, this isn't correct, as the same allegation appears in Mr B's 2020 witness statement.

I am also not convinced that certain inconsistencies or apparent errors in Mr B's 2020 witness statement should be taken to invalidate the entirety of his testimony. It may well be the case that someone gets minor details wrong with the passage of time, but it doesn't necessarily follow that everything else is wrong or cannot be relied on. And I do not think that some things the Lender has highlighted as problematic are in fact a problem in any event. For example, in relation to a purchase he made in February 2006 by cheque, Mr B says he didn't recall any affordability checks being carried out to see if he could afford such a large purchase. The Lender has pointed to this as evidence of inaccuracy in his testimony, but it's not clear what is inaccurate or wrong about this statement. Given there was no application for a loan, Mr B's recollection of there being no affordability checks would appear to be accurate. And he would not necessarily be aware of under what circumstances the Supplier would have a duty to check whether the purchase was affordable.

[6] I appreciate there was the "Wish to Rent" scheme which was mentioned by PR1. However, I understand Mr B never enquired further about this scheme and he's not mentioned it in his witness statement.

Finally, I disagree with the Lender's contention that the 2020 witness statement lacks sufficient detail. While it may not contain details such as the names of people Mr B spoke to, I don't think there is a lack of detail in how Mr B describes how the product was sold. And I note there is some further detail in PR1's letter to the Supplier which is not inconsistent with Mr B's witness statement, such as an allegation that Mr B was told "property over a 15 year period would increase in value".

Overall, considering the factual matrix, Mr B's testimony, and the limited information about the Supplier's sales and marketing practices at the relevant time, I think the Supplier more likely than not strayed from describing how the sale of the Allocated Property worked, into a discussion of future values, and either stated or implied that Mr B would make a profit when the Allocated Property was sold. In doing so, it 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 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 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) led him to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

I've already outlined above that Mr B is unlikely to have seen the holiday-related benefits of Fractional Club membership to have been a reason to buy it, given he was not getting any additional rights in this regard in exchange for his £7,480, compared to what he already had under the Supplier's holiday clubs.

This leaves the two selling points Mr B mentioned in his testimony: the shorter term of the membership as compared to his existing holiday club membership(s), and the prospect of a financial gain when the Allocated Property was sold. Having considered the circumstances carefully, I think it's likely that both of these reasons were equally important to Mr B and he would have been unlikely to proceed with the purchase had either of them not been promoted to him as reasons to buy at the Time of Sale.

It comes across very clearly in Mr B's testimony and PR1's submissions, that Mr B was looking to leave his existing membership(s) with the Supplier, and that it was probably this desire which triggered conversations with the Supplier, which then led to Mr B entering the Purchase Agreement.

Mr B's existing membership was due to end in 2052. I am aware that the Supplier had a policy of allowing members to surrender their memberships at the age of 75 (although I do not know if it advised Mr B of this). For Mr B, that would be in 2032. Mr B's Fractional Club membership was due to end in 2028, so he would have obtained a reduction of four years.

I have not seen the precise management fee details for Mr B's holiday club points and his Fractional Club points. But based on an example given in the Supplier's training materials for staff, it appears fees across both clubs were broadly equivalent and were charged on a "per point" basis. The example given by the Supplier is of 20,000 points in either club attracting an annual fee of £1,600. Based on this, the 11,000 points Mr B exchanged would have attracted a fee of about £880 per year (with probable increases over time).

Mr B paid £7,480 to convert 11,000 holiday club points, to points in the Fractional Club. In 2028, the Fractional Club scheme would end and he'd have no further management fee liabilities.

If Mr B had *left* his points in the Supplier's holiday club, he would have needed to wait until 2032 to surrender them, and would have paid approximately £3,520 in management fees between 2029 and 2032.

While I appreciate these are approximate figures, it doesn't appear from them that it would have made much financial sense for Mr B to purchase Fractional Club membership solely to obtain a shorter membership term and the associated smaller liability for fees. It would have made more sense to surrender his points in 2032, if this had been his only goal.

This, along with Mr B's testimony, leads me to conclude that the prospect of a financial gain from the investment aspect of the Fractional Club product was likely just as important to Mr B, if not more so, than the shorter membership term. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision he ultimately made.

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.

Fair Compensation

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 Mr B agrees to assign to the Lender his Fractional Points or hold them on trust for the Lender if that can be achieved.

I'm aware Mr B later purchased 5,500 more points in the Fractional Club, under a separate Purchase Agreement that was intended to be, but ultimately was not, financed by the Lender. For the avoidance of doubt, the 5,500 points purchase is not included in the compensation.

Mr B was an existing holiday club member and 11,000 points he held in the holiday club was traded in against the purchase price of Fractional Club membership. Under his holiday club membership, like Fractional Club membership, he had to pay annual management charges relating to his points. So, had Mr B not purchased Fractional Club membership, he 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 B from the Time of Sale as part of his Fractional Club membership should amount only to the difference between those charges and the annual management charges he would have paid had he left his 11,000 points in the Supplier's holiday club.

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 Mr B'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 difference between Mr B's Fractional Club annual management charges paid after the Time of Sale and what his holiday club annual management charges would have been had he not purchased Fractional Club membership, insofar as these charges relate to the 11,00 points purchased at the Time of Sale.

3. The Lender can deduct:

    iii. The value of any promotional giveaways that Mr B used or took advantage of; and
    iv. The market value of the holidays* Mr B took using his Fractional Points if his annual management charge for the year in which the holidays were taken was more than the annual management charge he would have paid had he left his 11,000 points in the Supplier's holiday club. However, the deduction should be a proportion equal to the difference between those annual management charges. And if any of Mr B's holiday club annual management charges would have been

higher than his equivalent Fractional Club annual management charge, there shouldn't be a deduction for the market value of any holidays taken using Fractional Points in the years in question as he could have taken those holidays as with his 11,000 points, had they been left in the holiday club, 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 B'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 B 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 the consumer a certificate showing how much tax it's taken off, if requested.

My provisional decision

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

I now invite the parties to the complaint to let me have any further submissions they'd like me to consider, by 16 January 2025.

Will Culley
Ombudsman