DRN-5331329

The complaint

Mr J's complaint is, in essence, that Honeycomb Finance 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.

I recognise that Mr J purchased the timeshare that is the subject of this complaint in joint names with his partner at the time, Miss S. However, he is the only eligible complainant here as the associated credit agreement is in his name only. I'll refer to both Mr J and Miss S throughout, where relevant.

What happened

Mr J and Miss S purchased a fractional timeshare membership from a timeshare provider (the 'Supplier') in July 2018. They entered into an agreement with the Supplier to buy 1,040 fractional points at a cost of £14,430. That purchase was funded by a different lender and as such is being dealt with in a separate decision.

Mr J and Miss S then traded in this membership when they made a further purchase of a fractional membership (this purchase here on in referred to as the 'Fractional Club') from the Supplier on 14 October 2018 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,370 fractional points at a cost of £20,237 (the 'Purchase Agreement'). However, after trading in their existing membership, they ended up paying £5,807 for this purchase.

Mr J and Miss S made a further purchase of fractional membership with the Supplier in June 2019 where they again traded in all their fractional points. However, again, that purchase is also being dealt with in a separate decision as the debt was subsequently transferred to another lender.

Fractional Club membership was asset backed – which meant it gave Mr J and Miss S more than just holiday rights. It also included a share in the net sale proceeds of a property named on their Purchase Agreement (the 'Allocated Property') after their membership term ends.

Mr J and Miss S paid for their Fractional Club membership by taking finance of £20,606 from the Lender in Mr J's name only (the 'Credit Agreement'). This also consolidated their previous lending.

Mr J – using a professional representative (the 'PR') – wrote to the Lender on 13 August 2020 (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. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.
3. The decision to lend being irresponsible because (1) the Lender did not carry out the

right creditworthiness assessment and (2) the money lent to him under the Credit Agreement was unaffordable for him.

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

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

1. told them that Fractional Club membership had a guaranteed end date when that was not true.
2. told them that Fractional Club membership was an "investment" when that was not true.
3. told them that the Supplier's holiday resorts were exclusive to its members when that was not true.
4. told them that if they changed their mind regarding the membership, they could cancel at any time and would not have to make any further repayments, including towards the loan, when that was not true.

Mr J 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 J.

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

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

1. Misrepresentations made by the Supplier, as outlined above.
2. The contractual documentation was not provided to Mr J and Miss S until after they had already committed to the purchase, and it was not clear or easy to understand.
3. They were subjected to a lengthy and confusing sales presentation.
4. Fractional Club membership was marketed and sold to them as an investment, but they were provided no detail about the risks involved or the potential downsides.
5. There were various unfair contract terms, including the contractual term which allowed the Supplier to cancel the membership and retain any money paid towards it if Mr J and Miss S failed to make a payment under the agreement.

Mr J then referred the complaint to the Financial Ombudsman Service as he had not received any response to the complaint within the eight-week period required by the regulator.

The Lender subsequently dealt with Mr J's concerns as a complaint and issued its final response letter on 21 November 2020, rejecting it on every ground.

The complaint was then 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 J (and Miss S) 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 J 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 considered the matter and issued a provisional decision (the 'PD') on 30 January 2025. In that decision, I said:

"***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 Consumer Rights Act 2015.*
- *The Consumer Protection from Unfair Regulations 2008.*
- *Case law on Section 140A of the CCA – including, in particular:*

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

Good industry practice – the RDO Code

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

My provisional findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr J 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 J's complaint, it isn't necessary to make formal findings on all of them. This includes the allegation that the Supplier misrepresented the Fractional Club membership and the Lender ought to have accepted and paid that claim under Section 75 of the CCA.

This is because even if that aspect of the complaint ought to succeed, the redress I'm currently proposing puts Mr J in the same or a better position than he would be if the redress was limited to misrepresentation.

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

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

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between Mr J 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 J's (and Miss S's) membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

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

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

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

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

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

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

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

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 J 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 J and the Lender.

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

The Lender does not dispute, and I am satisfied, that Mr J and Miss S's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling Fractional Club membership as an investment. This is what the provision said at the Time of Sale:

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

But Mr J says that the Supplier did exactly that at the Time of Sale – Mr J saying the following in a witness statement drafted when the complaint was first made:

> *"The purchase of further fractional points could also be viewed as a further*

investment as we would own a further fractional week. This would be of greater desirability to future buyers and would make the membership easier to sell.

[…]

We were interested in being able to increase our investment and thought that there was no risk involved as we had been told that we could cancel at any time and not pay any further sums towards the purchase. We therefore agreed to the upgrade. The representative produced a pricing sheet to show us the calculation of the cost of the purchase.

[…]

It can also be seen from the pricing sheet that we would own a unit share of 3.53%, an increase on our previous ownership. We felt that this increase was substantial for the additional price paid, it seemed like a good deal. In addition to being able to take holidays with more flexibility, with an increase in percentage ownership, we were increasing the return that we would receive on the sale of the property."

I acknowledge that there is no explicit suggestion by Mr J and Miss S in their statement that the sales representative specifically led them to believe at the Time of Sale that they could expect a financial gain or profit from the sale of the Allocated Property. And, the Lender may argue, in response to this provisional decision, that the wording used in the statement is simply a factual description of how the membership worked. But, Mr J and Miss S have said that the sales representative told them they were making a further investment and increasing what they 'owned'.

And, they have gone on to say that as a result of what they were told at the Time of Sale, they thought they were "increasing the return that we would receive on the sale of the property" and they've referred to their increased share.

And, I can't see what that could reasonably and realistically have meant apart from an expectation of financial gain (i.e. a profit) in the context of the sale of an asset backed timeshare given everything else I know about the sale (which I'll expand on further below) and Mr J and Miss S's reasons for making the purchase.

So, given the overall content of their witness statement and what is said in the Letter of Complaint, Mr J alleges, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because:

(1) *There were two aspects to their Fractional Club membership: holiday rights and a profit on the sale of the Allocated Property.*

(2) *They were led to believe by the Supplier that they would get their money back or more during the sale of Fractional Club membership.*

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

Mr J and Miss S's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract

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

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr J and Miss S as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr J and Miss S, 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 J and Miss S as an investment.

For example, in their signed Member's Declaration, it said:

> *"We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that [the Supplier] makes no representation as to the future price or value of the Fractional Rights which are personal rights and not interests in real estate."*

This disclaimer goes some way to making the point that the purchase of Fractional Rights shouldn't be viewed as an investment. But I note that this was also to be read in conjunction with the following disclaimer in the Information Statement provided at the Time of Sale:

> *"11. Investment Advice*
>
> *The Vendor, any sales or marketing agent and the Manager and their related businesses (a) are not licensed investment advisers authorised by the Financial Conduct Authority to provide investment or financial advice; (b) all information has been obtained solely from their own experiences as investors and is provided as general information only and as such it is not intended for use as a source of investment advice and (c) all purchasers are advised to obtain competent advice from legal, accounting and investment advisers 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."*

This disclaimer seems to have been aimed at distancing the Supplier from any investment advice that was given by its sales agents, telling customers to take their own investment advice, and repeating the point that the returns from membership from the sale of the Allocated Property weren't guaranteed.

Yet I think it would be fair to say, that while a prospective member who read the disclaimer in question might well have thought that they would be wise to seek professional investment advice in relation to membership of the Fractional Club, rather than rely on anything they might have been told by the Supplier, it wouldn't have done much to dissuade them from regarding membership as an investment. In fact, I think it would have achieved rather the opposite.

It's also difficult to explain why it was necessary to include such a disclaimer if there wasn't a very real risk of the Supplier marketing and selling membership of the Fractional Club as an investment given the difficulty of articulating the benefit of fractional ownership in a way that distinguishes it from other timeshares from the viewpoint of prospective members.

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 J's allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that membership of the Fractional Club was expressly described as an "investment" in several different contexts and (2) that membership of the Fractional Club could make them a financial gain and/or would retain or increase in value.

So, I have considered:

(1) *whether it is more likely than not that the Supplier, at the Time of Sale, sold or marketed membership of the Fractional Club as an investment, i.e., told Mr J and Miss S or led them to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered them the prospect of a financial gain (i.e., a profit); and, in turn*

(2) *whether the Supplier's actions constitute a breach of Regulation 14(3).*

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

How the Supplier marketed and sold the Fractional Club membership

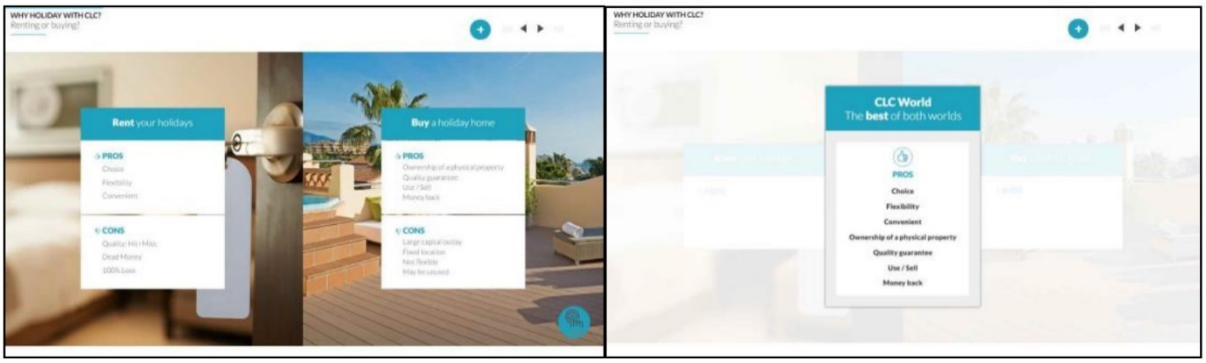
During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier provided information on how it sold membership of timeshares like Mr J and Miss S's – which includes a document called the "Fractional Property Owners Club Fly Buy Manual 2017" (the '2017 Fractional Training Manual').

As I understand it, the 2017 Fractional Training Manual was used from November 2016 onwards during the sale of the Supplier's second version of the Fractional Property Owners Club (which I will continue to refer to as simply the Fractional Club) – which was the version Mr J and Miss S appear to have purchased. It is not entirely clear whether Mr J and Miss S would have been shown the slides included in the Manual. But it seems to me to be reasonably indicative of:

(1) *the training the Supplier's sales representatives would have got before selling Mr J and Miss S Fractional Club membership; and*

(2) *how the sales representatives would have framed the sale of Fractional Club membership to Mr J and Miss S.*

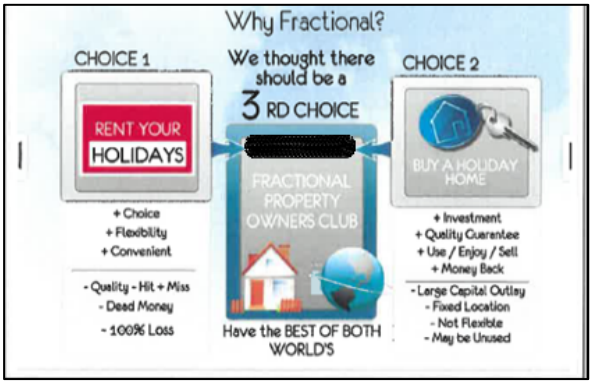
Having looked through the Manual, my attention is drawn first to page 19 (of 74) – which includes two slides called "Why holiday with [the Supplier]? Renting or buying?".



They were the first slides in the Manual that seem to me to set out any information about Fractional Club membership, albeit without expressly referring to the Fractional Club, because they suggest that sales representatives were likely to have made the point to Mr J and Miss S that holidaying with the Supplier combined the best of (1) and (2), including, amongst other things, ownership of a physical property and money back – which were benefits that were only front and centre of Fractional Club membership.

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

Indeed, the slides above presented a very similar prospect to that presented in a slide used in one of the Supplier's earlier training manuals that was used to help it sell the first version of Fractional Property Owners Club:



All three indicate that sales representatives would have taken prospective members through three holidaying options along with their positives and negatives:

(1) *"Rent Your Holidays"*

(2) *"Buy a Holiday Home"*

(3) *The "Best of Both Worlds"*

I acknowledge that the slides incorporated into the 2017 Fractional Training Manual don't include express reference to the 'investment' benefit of Fractional Club membership. But they allude to much the same concept, namely that Fractional Club membership combined the best aspects of taking 'normal' holidays and purchasing a holiday home. Further, for the reasons I will come onto, although the word 'investment' did not appear in the 2017 Fractional Training Manual, I think the idea that Fractional Club membership offered the same benefits as a purchasing an investment property did form part of the sales process.

One of those advantages referred to in the slides on page 19 of the 2017 Fractional Training Manual is the "ownership of a physical property". And as an owner's equity in their property is built over time as the value of the asset increases relative to the size of any mortgage secured against it, this particular advantage of Fractional Club membership was portrayed in terms that played on the opportunity ownership gave prospective members of the Fractional Club to accumulate wealth in a similar way, especially when combined with the phrase "money back".

When the Manual moved on to describe how membership of the Fractional Club worked between pages 26 and 36, one of the major benefits of Fractional Club membership was described on page 35 as:

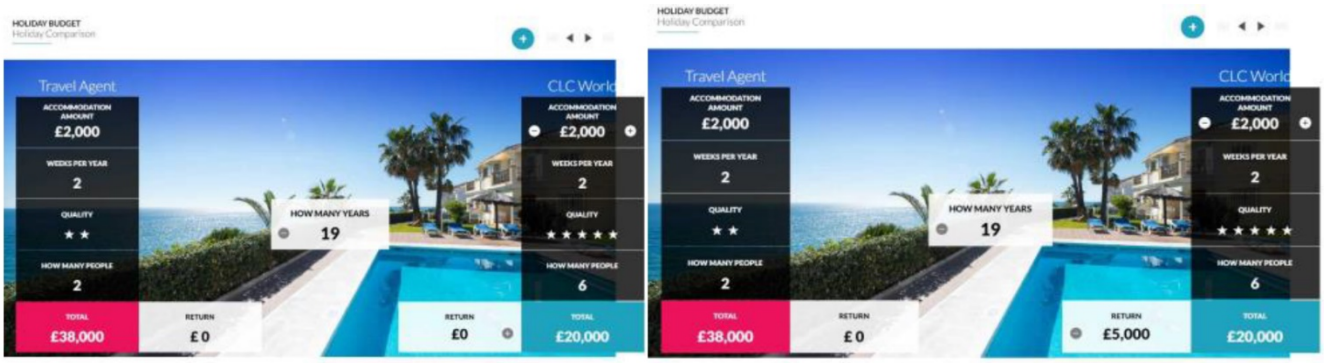
"A major benefit is that after 19 years of fantastic holidays, the property in which you own a fraction is sold and you will receive your share of the sale proceeds according to the number of fractions owned."

And on page 36 there were notes that encouraged sales representatives to summarise this benefit in the following way:

"So really 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?".

After discussing some of the other aspects of membership, such as the different resorts available to members, page 53 of the Manual indicates that sales representatives would have moved onto a cost comparison between "renting" holidays and "owning" them. Sales representatives were encouraged to tell prospective members how much they would spend over 19 years (i.e., the length of Fractional Club membership) on holidays with "no return" in contrast to spending the same amount of money as Fractional Club members – thus demonstrating the financial advantages of membership.

Page 53 included the following slides and accompanying notes:



"We aren't only talking about 10 years, we are talking about 19 years. So in actual fact, with the travel agent over 19 years you would have spent over £… with no return.

However, with [the Supplier] you would still have spent the same £… because once your fraction is paid for, the remaining years of holiday accommodation is taken care of.

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 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 2017 Fractional 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 J and Miss S) 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.

What's more, I think the Supplier's sales representatives were encouraged to make prospective Fractional Club members (like Mr J and Miss S) consider the advantages of owning something and view membership as a way of generating a return, rather than simply paying for holidays in the usual way. That was likely to have been reinforced throughout the Supplier's sales presentations by describing membership as a form of property ownership referring to the prospect of a "return". And with that being the case, 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.

I acknowledge that there may not have been a comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mr J and Miss S the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

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

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

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

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

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

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

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

Given what I've already said about the Supplier's training material and the way in which I think it was likely to have framed the sale of Fractional Club membership to prospective members (including Mr J and Miss S), I think it is more likely than not that the Supplier did, at the very least, imply that future financial returns (in the sense of possible profits) from a Fractional Club membership were a good reason to purchase it

So, overall, I think the Supplier's sales representative was likely to have led Mr J and Miss S to believe that Fractional Club membership 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 them either implausible or hard to believe when they say they were told they were 'buying a further investment' and were therefore 'increasing the return they would receive on the sale of the property'. On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mr J and Miss S were led by the Supplier to believe at the relevant time. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

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 J 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 J 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 J and Miss S, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender) lead them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On my reading of Mr J and Miss S's testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. That doesn't mean they were not interested in holidays. Their own testimony demonstrates that they quite clearly were.

In response to the Investigator's view, the Lender provided notes made by the Supplier from the day of purchase.

In relation to this Time of Sale, the Supplier noted "the clients upgraded to multi FPOC to have more points & more benefits". The Lender said they felt this clearly showed that Mr J and Miss S made the purchase for extra points and the benefits of a 'multi-fraction' such as 'two for ones and more free upgrades'. Again, I acknowledge Mr J and Miss S were likely interested in holidays at the Time of Sale. But the reference to 'more benefits' is vague and could quite plausibly be a reference to the investment 'benefit' of the product. The other benefits the Lender has mentioned such as free upgrades isn't something Mr J and Miss S have ever referred to.

So again, I acknowledge that Mr J and Miss S were likely interested in holidays. And that is not surprising given the nature of the product at the centre of this complaint.

But as Mr J and Miss S say (plausibly in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I think their purchases were motivated by their share in the Allocated Property and the possibility of an increased profit as that share was one of the defining features of membership that marked it apart from the more 'standard' type of timeshare available to them. And, that marked it apart from their current membership as their share or 'ownership' was to be increased, as Mr J and Miss S have highlighted in their testimony where they've said they were led to believe that this membership purchase was a way of both taking holidays and increasing the return they'd receive. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

Mr J has not said or suggested, for example, that they would have pressed ahead with the purchase in question had the Supplier not led them to believe that Fractional Club membership was an appealing investment opportunity. And as he faced the prospect of borrowing and repaying a substantial sum of money while subjecting himself (and Miss S) to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I have not seen enough to persuade me that they would have pressed ahead with their purchase regardless.

Conclusion

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

Did the unfairness caused by the purchase of Fractional Club end when it was traded in for a further purchase?

On 23 June 2019, Mr J and Miss S traded in their second membership ('Fractional Club 2'), paying an additional sum and adding a further 250 fractional points to their existing 1,370 by entering into a different purchase agreement for a further fractional membership ('Fractional Club 3'), thereby again 'upgrading' and replacing Fractional Club 2. The credit relationship Mr J and Miss S had with the Lender ended when that loan was consolidated when making their third purchase in June 2019.

As a result of their purchase of Fractional Club 3, it is necessary to consider whether the unfairness caused to Mr J from the purchase of the original Fractional Club at the Time of Sale continued, and if it did continue, what were the ongoing consequences.

While the Supplier gave Mr J and Miss S £19,180 credit for their Fractional Club membership, this credit wasn't the equivalent of cash. It was a deduction from a starting price set by the Supplier itself for Mr J and Miss S's upgrade to Fractional Club 3. And as there is no information to indicate what the market value was of the Allocated Property connected to their subsequent purchase, there is no evidence that the starting price of that 'upgrade' represented the objective value of the benefits under the new purchase agreement, as opposed to a commercial opening position from which the Supplier would and could profitably offer deductions or discounts. And as £19,180 was a little less than the purchase price originally attached to their Fractional Club purchase, it cannot be said that the upgrade to Fractional Club 3 on 23 June 2019 improved Mr J and Miss S's position financially.

However, I have thought about the extent to which responsibility for the situation after their purchase of Fractional Club 3 must be attributed to the Supplier and the Lender. As the credit agreement associated with the purchase of Fractional Club 3 is now the responsibility of a different lender, I cannot see it would be fair and reasonable to hold the Lender in this case responsible for any aspect of the Time of Sale 3 (nor would a court likely do so). So, I do not think that the Lender should have to answer for the financial consequences specifically associated with the 250 additional fractional points Mr J and Miss S purchased in June 2019.

Formally, the agreement Mr J and Miss S entered into in June 2019 was a new contract that superseded the old one. But I think the purpose of this upgrade was to continue and supplement their existing Fractional Club membership.

With all of that being the case, I therefore think that the upgrade was really just a top-up of Mr J and Miss S's fractional points by rolling over those that they had and providing them, as members of the Fractional Club 3, with enough points to enable them to take holidays in better and more luxurious accommodation, albeit while also holding an interest in the net sales proceeds of a different Allocated Property.

And as the function of the Supplier's £19,180 credit was to roll over Mr J and Miss S's existing fractional points into their upgrade, I'm not persuaded that the purchase of Fractional Club 3 ended the unfairness to M J in his credit relationship with the Lender. I think their original purchase of Fractional Club, and the associated Credit Agreement with the Lender had ongoing financial consequences for them, which continued the unfair relationship with the Lender. And for that reason, it is my view that the Lender is still answerable for them.

Mr J was an existing Fractional Club member ('FC Membership 1') alongside Miss S and their membership was traded in against the purchase price of Fractional Club membership in question ('FC Membership 2'). Under FC Membership 1, they had 1,040 Fractional Points. And, like FC Membership 2, they had to pay annual management charges as part of FC Membership 1. So, had Mr J and Miss S not purchased FC Membership 2, they would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr J and Miss S from the Time of Sale as part of FC Membership 2 should amount only to the difference between those charges and the annual management charges they would have paid as part of FC Membership 1.

Further, Mr J and Miss S paid for FC Membership 1 using finance ('Loan 1') that they refinanced using the Credit Agreement. So, part of what Mr J borrowed at the Time of Sale was used to repay the borrowing under Loan 1 that always had to be repaid. I recognise that the credit agreement entered into as part of Loan 1 is a related agreement (under Section 140C(4)(a)) for the purposes of an assessment of unfairness under the Credit Agreement. But Mr J and Miss S have complained about Loan 1 separately and I have issued a separate decision upholding that complaint. My proposed redress also deals with any unfairness that there might be in the Credit Agreement arising out of the sale of FC Membership 1. So, I do not think it would be fair for the Lender to refund everything that was paid and, if relevant, due to be repaid under the Credit Agreement, otherwise Mr J will receive compensation twice rising out of the same sale. Given that, I think this ought to be reflected in my redress when remedying the unfairness I have found.

Fair Compensation

Having found that Mr J and Miss S 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 Mr J was unfair under section 140A of the CCA, I think it would be fair and reasonable to put Mr J (and Miss S) back in the position they would have been in had they not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore Mr J not entered into the Credit Agreement. This is on the proviso that Mr J and Miss S agree to assign to the Lender the additional 330 Fractional Points they bought at the Time of Sale 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 J with that being the case – whether or not a court would award such compensation:

(1) The Lender should refund the difference between Mr J and Miss S's repayments to it under the Credit Agreement and what they would have paid under Loan 1, including the difference between any sums paid to settle the debt owing under the Credit Agreement and what would have needed to have been paid to settle Loan 1.

(2)

(3) The Lender should also refund 25%[3] of the annual management charges Mr J and Miss S actually paid from the Time of Sale 2 up to the Time of Sale 3.*

(4) The Lender can deduct

i. *The value of any promotional giveaways that Mr J and Miss S used or took advantage of from the Time of Sale 2 up to the Time of Sale 3; and*

ii. *25% of the market value of the holidays** Mr J and Miss S took using their Fractional Club 2 points from the Time of Sale 2 up to the Time of Sale 3 (if any).*

(the 'Net Repayments')

** Mr J and Miss S, having purchased their first Fractional Club membership in July 2018, and then after they made their Purchase of Fractional Club 2 in October 2018, they bought a subsequent membership in June 2019. But the Lender is only responsible for the unfairness arising out of Credit Agreement 2 in relation to the management charges caused by the fractional points acquired through Fractional Club 2. I think the simplest way to work this out is to refund a proportion of the charges levied between Time of Sale 2 and the Time of Sale 3 and from the Time of Sale 3 onwards, expressed as the number of fractional points acquired through Fractional Clubs 2 and 3 divided by the total number of fractional points held at the time the management charge was levied ('the Proportional Management Charges').*

***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 J and Miss S took using their Fractional Points, deducting the relevant management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.*

(5) Simple interest[4] 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.

(6) The Lender should remove any adverse information recorded on Mr J and Miss S's

[3] All percentages rounded to the nearest whole number.

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

credit files in connection with the Credit Agreement reported within six years of this decision.

However, as I don't think the effects of the unfairness in question ended when Mr J and Miss S upgraded their Fractional Club membership in June 2019, and as I think their original 330 additional fractional points purchased at the Time of Sale 2 were essentially rolled over into their upgrade and had ongoing financial consequences for them, the compensation needs to reflect that.

So, in my view, the Lender also needs to refund to Mr J and Miss S the proportion of the management charges that they actually paid after 23 June 2019 that relate to those additional 330 points. These equate to 20% of the 1,620 points Mr J and Miss S actually ended up with. So, in addition to the Net Repayments above:

(1) *The Lender should refund 20% of the annual management charge(s) paid by Mr J and Miss S from 23 June 2019 onwards less a proportional deduction for any holiday[5] they took using the fractional points relating to Fractional Club 3.*

(2) *Simple interest at 8% per annum should be added to this amount from the date each charge was paid until the date of settlement.*

It is possible that the Supplier might pursue Mr J and Miss S for other costs in addition to the annual management charges arising from the Fractional Club 3 membership, so there is the possibility of continuing detriment that I think needs addressing. So, in keeping with what I've said above, the Lender should indemnify Mr J and Miss S against 25% of any other liabilities accruing from 14 October 2018 to 23 June 2019 and 20% from 23 June 2019 onwards that result from Mr J and Miss S's ownership of Fractional Rights.

I do wish to make the Lender aware that I'm taking the redress awarded to Mr J and Miss S in this complaint into account when making my decisions on their other complaints about their other, previous and subsequent purchases.

This, together with what I've said in the paragraphs above will achieve, as closely as I can, the same financial position for Mr J and Miss S as if they had never joined the Fractional Club in the first place.

I would like the Lender to provide a calculation of how it would work all of this out in response to my provisional decision."

The responses to my PD

The PR, on behalf of Mr J, agreed with my PD and didn't add anything further.

The Lender disagreed. In particular, they said:

- The PD didn't deal with the facts of the case and has ignored the points the Lender and Supplier previously made.
- The PD suggests everything the complainants have said (via the PR) is correct and that none of the documentation or evidence actually produced is relevant, which they don't think is fair.
- The issues raised by the PR are virtually identical to others they have submitted previously regardless of how the original complaint to the Supplier arose.
- The PD ignored Mr J's request to cancel the membership and the Lender questioned

[5] See Section (2) and (3) (ii) above

why, if the product was sold to him and Miss S as an investment, this was not mentioned until the involvement of the PR.

- The slides I referred to in the PD was not a presentation used by the Supplier at this time. They said I should refer to the relevant sales presentation (called 'ESA5') sent to our Service by another Lender in 2024, which was used from 14 October 2016. They said this doesn't contain many of the slides that I referred to in my PD, which the Supplier has said weren't in use after October 2016. The Lender said they assume the slides I referred to in my PD were therefore provided to our Service by the PR.

What I've decided – and why

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

Having considered everything afresh, I still uphold Mr J's complaint for broadly the same reasons I gave in my PD as set out above. I will also address the matters the Lender raised in response.

In their response, the Lender has suggested they don't feel I've sufficiently considered the points they had previously made and the documentation and evidence they had produced. But they haven't explained which points or evidence they're referring to here.

Again, my role as an Ombudsman is not to address every single point that has been made in response. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I've read and considered the Lender's further submissions in full as well as all of the information and evidence provided by both parties throughout the course of this complaint (as I did when reaching my provisional conclusions), I will confine my findings to what I find are the key points.

The Lender has suggested they are questioning the reliability of Mr J and Miss S's witness testimony given the involvement of the PR and the similarity of what the PR has said to what they've said in other, similar complaints.

I have read and considered the Lender's concerns about Mr J and Miss S's testimony and having done so, these appear to be similar to the concerns it expressed prior to my PD which I've already addressed. I don't think the Lender has said much new regarding Mr J and Miss S's testimony following my PD, mainly some more general concerns they have about the involvement of professional representatives which go beyond the scope of this particular complaint.

I think the Lender is restating its view that either the testimony, or the original Letter of Complaint which followed it, or both, are not representative of Mr J (and Miss S's) concerns about how the Supplier sold Fractional Club membership to them. For example, they've said what the PR has said in this complaint is similar to what they've said in other, similar complaints. While it may be relevant to a discussion of the PR's business practices or whether it gave a proper voice to Mr J and Miss S's concerns, I don't think the point the Lender has made is particularly relevant to whether or not Mr J and Miss S's testimony can be relied on.

The Lender also said I hadn't taken into account that on 16 October 2019, Mr J wrote to the Supplier by email to cancel their membership. And, they highlighted that the email didn't list any allegation that the membership had been sold as an investment. So, the Lender suggests this challenges the authenticity of their witness statement, particularly since they engaged their PR shortly afterwards. But, the purpose of the email in question wasn't to explain their full recollections of what happened at the Time of Sale or what motivated their

purchase at that particular time. Indeed, the email doesn't differentiate between the different purchases they made. From the email, it also appears that it was sent following a conversation with the Citizen's Advice Bureau and suggests that they had potentially given Mr J and Miss S some advice on what to include in their email.

I think the email likely only reflects their unhappiness which led to the complaint shortly afterwards and I don't think is particularly relevant to whether their testimony can be relied on.

So, I remain of the view, on balance, that their testimony is likely to be a genuine reflection of their recollections from the Time of Sale.

Lastly, I've considered the additional comments the Lender provided in relation to the Supplier's sales process and materials.

In my PD, I explained that during the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier provided information on how it sold membership of timeshares like Mr J and Miss S's, including a document called the "Fractional Property Owners Club Fly Buy Manual 2017" (the '2017 Fractional Training Manual'). This wasn't therefore provided to our Service by the PR, as the Lender has suggested in their response.

I explained that as I understood it, this was used from November 2016 onwards during the time when the Supplier was selling its second version of the Fractional Club – which is the version Mr J and Miss S appear to have purchased.

The Lender and Supplier, in their response to my PD, said that Mr J and Miss S did not actually receive or view this particular document or the slides and information within it (outlined in my PD).

The Lender and Supplier said I should review and consider the relevant sales presentation sent to our Service by another lender in 2024 labelled 'ESA5'. I can confirm I'm aware of this and have reviewed it, and did so prior to issuing my PD.

And, I acknowledge that this didn't contain the same slides I referred to in my PD, and didn't have the same references to 'renting or buying', for example. Although, I do note that the slides in the presentation the Lender has referred to do still continue the concept of 'ownership'. And the presentation also has slides which are very similar to those I referred to in my PD, which were on Page 53 of the 2017 Training Manual, presenting a similar 'holiday comparison' between holidaying in the traditional sense (such as via a travel agent) in contrast to spending the same amount of money as Fractional Club members – therefore still demonstrating the financial advantages of membership.

The Lender hasn't provided any other comments regarding the 2017 Training Manual, apart from saying Mr J and Miss S wouldn't have seen it. For the avoidance of doubt, I accepted in my PD that it wasn't entirely clear whether Mr J and Miss S would have been shown the slides included in the aforementioned Manual. But, I explained that this document seemed to me to be reasonably indicative of:

(1) The training the Supplier's sales representatives would have got before selling Mr J and Miss S Fractional Club membership; and

(2) How the sales representatives would have framed the sale of Fractional Club membership to Mr J and Miss S

I haven't seen anything in the Lender or Supplier's response to my PD which changes my view on that or my view on the contents of the Manual itself (outlined in my PD). And, for the same reasons, I think this is still important evidence to consider in combination with the 'ESA5' presentation the Lender has referred to.

So, overall, given the facts and circumstances of this complaint, for all of the above reasons, including those in my PD, I still think the Lender participated in and perpetuated an unfair credit relationship with Mr J under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. It follows therefore that I remain of the view that it is fair and reasonable that I uphold this complaint.

Neither party made any further comments in relation to the proposed method of redress in my PD. So, it follows that I still think that is a fair and reasonable way to compensate Mr J. For the avoidance of doubt, I've outlined this again below.

Did the unfairness caused by the purchase of Fractional Club end when it was traded in for a further purchase?

On 23 June 2019, Mr J and Miss S traded in their second membership ('Fractional Club 2'), paying an additional sum and adding a further 250 fractional points to their existing 1,370 by entering into a different purchase agreement for a further fractional membership ('Fractional Club 3'), thereby again 'upgrading' and replacing Fractional Club 2. The credit relationship Mr J and Miss S had with the Lender ended when that loan was consolidated when making their third purchase in June 2019.

As a result of their purchase of Fractional Club 3, it is necessary to consider whether the unfairness caused to Mr J from the purchase of the original Fractional Club at the Time of Sale continued, and if it did continue, what were the ongoing consequences.

While the Supplier gave Mr J and Miss S £19,180 credit for their Fractional Club membership, this credit wasn't the equivalent of cash. It was a deduction from a starting price set by the Supplier itself for Mr J and Miss S's upgrade to Fractional Club 3. And as there is no information to indicate what the market value was of the Allocated Property connected to their subsequent purchase, there is no evidence that the starting price of that 'upgrade' represented the objective value of the benefits under the new purchase agreement, as opposed to a commercial opening position from which the Supplier would and could profitably offer deductions or discounts. And as £19,180 was a little less than the purchase price originally attached to their Fractional Club purchase, it cannot be said that the upgrade to Fractional Club 3 on 23 June 2019 improved Mr J and Miss S's position financially.

However, I have thought about the extent to which responsibility for the situation after their purchase of Fractional Club 3 must be attributed to the Supplier and the Lender. As the credit agreement associated with the purchase of Fractional Club 3 is now the responsibility of a different lender, I cannot see it would be fair and reasonable to hold the Lender in this case responsible for any aspect of the Time of Sale 3 (nor would a court likely do so). So, I do not think that the Lender should have to answer for the financial consequences specifically associated with the 250 additional fractional points Mr J and Miss S purchased in June 2019.

Formally, the agreement Mr J and Miss S entered into in June 2019 was a new contract that superseded the old one. But I think the purpose of this upgrade was to continue and supplement their existing Fractional Club membership.

With all of that being the case, I therefore think that the upgrade was really just a top-up of Mr J and Miss S's fractional points by rolling over those that they had and providing them, as members of the Fractional Club 3, with enough points to enable them to take holidays in better and more luxurious accommodation, albeit while also holding an interest in the net sale proceeds of a different Allocated Property.

And as the function of the Supplier's £19,180 credit was to roll over Mr J and Miss S's existing fractional points into their upgrade, I'm not persuaded that the purchase of Fractional Club 3 ended the unfairness to Mr J in his credit relationship with the Lender. I think their original purchase of Fractional Club, and the associated Credit Agreement with the Lender had ongoing financial consequences for them, which continued the unfair relationship with the Lender. And for that reason, it is my view that the Lender is still answerable for them.

Mr J was an existing Fractional Club member ('FC Membership 1') alongside Miss S and their membership was traded in against the purchase price of the Fractional Club membership in question ('FC Membership 2'). Under FC Membership 1, they had 1,040 Fractional Points. And, like FC Membership 2, they had to pay annual management charges as part of FC Membership 1. So, had Mr J and Miss S not purchased FC Membership 2, they would have always been responsible for paying an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr J and Miss S from the Time of Sale as part of FC Membership 2 should amount only to the difference between those charges and the annual management charges they would have paid as part of FC Membership 1.

Further, Mr J and Miss S paid for FC Membership 1 using finance ('Loan 1') that they refinanced using the Credit Agreement. So, part of what Mr J borrowed at the Time of Sale was used to repay the borrowing under Loan 1 that always had to be repaid. But Mr J and Miss S have complained about Loan 1 separately and I have issued a separate decision upholding that complaint. My proposed redress also deals with any unfairness that there might be in the Credit Agreement arising out of the sale of FC Membership 1. So, I do not think it would be fair for the Lender to refund everything that was paid and, if relevant, due to be repaid under the Credit Agreement, otherwise Mr J will receive compensation twice rising out of the same sale. Given that, I still think this ought to be reflected in my redress when remedying the unfairness I have found.

Fair Compensation

Having found that Mr J and Miss S 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 Mr J was unfair under section 140A of the CCA, I still think it would be fair and reasonable to put Mr J (and Miss S) back in the position they would have been in had they not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore Mr J not entered into the Credit Agreement. This is on the proviso that Mr J and Miss S agree to assign to the Lender the additional 330 Fractional Points they bought at the Time of Sale or hold them on trust for the Lender if that can be achieved.

Here's what the Lender needs to do to compensate Mr J with that being the case – whether or not a court would award such compensation:

(1) The Lender should refund the difference between Mr J and Miss S's repayments to it under the Credit Agreement and what they would have paid under Loan 1, including the difference between any sums paid to settle the debt owing under the Credit

Agreement and what would have needed to have been paid to settle Loan 1.

(2) The Lender should also refund 25%[6] of the annual management charges Mr J and Miss S actually paid from the Time of Sale 2 up to the Time of Sale 3*.

(3) The Lender can deduct

i. The value of any promotional giveaways that Mr J and Miss S used or took advantage of from the Time of Sale 2 up to the Time of Sale 3; and

ii. 25% of the market value of the holidays** Mr J and Miss S took using their Fractional Club 2 points from the Time of Sale 2 up to the Time of Sale 3 (if any).

(the 'Net Repayments')

* Mr J and Miss S, having purchased their first Fractional Club membership in July 2018, and then after they made their Purchase of Fractional Club 2 in October 2018, they bought a subsequent membership in June 2019. But the Lender is only responsible for the unfairness arising out of Credit Agreement 2 in relation to the management charges caused by the fractional points acquired through Fractional Club 2. I think the simplest way to work this out is to refund a proportion of the charges levied between Time of Sale 2 and the Time of Sale 3 and from the Time of Sale 3 onwards, expressed as the number of fractional points acquired through Fractional Clubs 2 and 3 divided by the total number of fractional points held at the time the management charge was levied ('the Proportional Management Charges').

**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 J and Miss S took using their Fractional Points, deducting the relevant management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

(4) Simple interest[7] 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 J and Miss S's credit files in connection with the Credit Agreement reported within six years of this decision.

However, as I don't think the effects of the unfairness in question ended when Mr J and Miss S upgraded their Fractional Club membership in June 2019, and as I think their original 330 additional fractional points purchased at the Time of Sale 2 were essentially rolled over into their upgrade and had ongoing financial consequences for them, the compensation needs to reflect that.

So, in my view, the Lender also needs to refund to Mr J and Miss S the proportion of the management charges that they actually paid after 23 June 2019 that relate to those additional 330 points. These equate to 20% of the 1,620 points Mr J and Miss S actually ended up with. So, in addition to the Net Repayments above:

(1) The Lender should refund 20% of the annual management charge(s) paid by Mr J and

[6] All percentages rounded to the nearest whole number.

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

Miss S from 23 June 2019 onwards less a proportional deduction for any holiday[8] they took using the fractional points relating to Fractional Club 3.

(2) Simple interest at 8% per annum should be added to this amount from the date each charge was paid until the date of settlement.

It is possible that the Supplier might pursue Mr J and Miss S for other costs in addition to the annual management charges arising from the Fractional Club 3 membership, so there is the possibility of continuing detriment that I think needs addressing. So, in keeping with what I've said above, the Lender should indemnify Mr J and Miss S against 25% of any other liabilities accruing from 14 October 2018 to 23 June 2019 and 20% from 23 June 2019 onwards that result from Mr J and Miss S's ownership of Fractional Rights.

My final decision

I uphold Mr J's complaint against Honeycomb Finance Limited and direct it to work out and pay fair compensation as outlined above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 4 April 2025.

Fiona Mallinson
Ombudsman

[8] See Section (2) and (3) (ii) above