DRN-5336396

The complaint

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

What happened

I issued a provisional decision on Mr and Mrs A's complaint on 27 November 2024, a copy of which is appended to, and forms a part of, this final decision.

I set out the background to the complaint in my provisional decision, so it's not necessary to go over it again in detail here, but in brief summary:

- Mr and Mrs A had a history of purchasing timeshare products from a timeshare company (the 'Supplier'), between 2007 and 2015. This complaint relates to their final purchase, on 17 March 2015 (the 'Time of Sale').

- During the purchase in question, Mr and Mrs A made a purchase of 2,850 'points' in the Supplier's 'Fractional Club', which was a type of timeshare. The points could be exchanged annually for holiday accommodation, but the product was also asset-backed in the sense that it entitled Mr and Mrs A to a percentage of the net sale proceeds of a property named on their contract (the 'Allocated Property') when their membership was due to come to an end.

- The purchase cost £5,650 after Mr and Mrs A's previous membership with the Supplier was traded in. This was financed by a loan arranged by the Supplier with the Lender, under which Mr and Mrs A were expected to make 180 monthly payments of £88.56.

- Mr and Mrs A complained to the Lender in May 2018, via a professional representative ('PR'), that the Lender had been a party to an unfair credit relationship with them under Section 140A of the CCA for a number of reasons. The Lender rejected the complaint.

In my provisional decision I said I was minded to uphold Mr and Mrs A's complaint for the following reasons (which are all set out in the detail in the appended document):

- The Lender had been a party to an unfair credit relationship with Mr and Mrs A under Section 140A of the CCA, because:

    - The Supplier had, in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'), marketed the Fractional Club membership to them as an investment; and

    - The breach had had a material impact on Mr and Mrs A's decision to go ahead with the purchase of the Fractional Club membership and their entry

into the loan agreement to pay for it.

I set out in the appended provisional decision what actions I thought the Lender should take to compensate Mr and Mrs A. Broadly, these were to refund the repayments or settlement payments made by them under the loan agreement and the annual management charges they'd paid associated with the points they purchased, minus the value of any benefit derived from the points. I also thought compensatory interest should be payable on the net refund, that any relevant adverse credit file information should be removed from Mr and Mrs A's credit files, and that the Lender should provide an indemnity relating to ongoing liabilities associated with their Fractional Club membership.

I asked the parties to the complaint to provide any further submissions they wanted me to consider. Mr and Mrs A said they accepted the provisional decision but also said they didn't want their membership to be reinstated.

The Lender said it disagreed with the provisional decision. I think I could fairly summarise its arguments against it as follows:

- I had taken a definition of "investment" in the provisional decision that was too expansive. In particular, I had extended it to cover scenarios which didn't involve a profit, which was inconsistent with the definition I had given of investment earlier in the provisional decision.

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

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

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

- It had several concerns about Mr and Mrs A's testimony and how I had approached it – specifically:

    - It considered I had inappropriately taken into account the circumstances of a previous purchase, made in 2012, when considering Mr and Mrs A's testimony relating to the 2015 sale.

    - Mr and Mrs A's prior actions were consistent with them having made all their purchases from the Supplier for holiday-related reasons, not because they

thought they were making a financial investment. Notes made by the Supplier from a sale in 2011 (of a different points-based product) appeared to confirm this. Mrs A had also been involved in an email exchange with the Supplier in 2017, before she'd made her complaint, where she'd expressed a variety of concerns about her membership and a particular holiday, but not mentioned anything about the product being an investment or of being dissatisfied with that aspect of the membership.

- Mr and Mrs A's supplementary witness statement from May 2018 also focused on the holiday-related aspects of their purchases, and made no mention of their purchases having had an investment purpose.

- Errors in Mr and Mrs A's recollection which I had dismissed as being minor, were in fact significant. It maintained that their misidentification of the place they had made their purchase as having been Spain (rather than the UK) was troubling. And while acknowledging that I'd concluded Mr and Mrs A's mention of Australia (as opposed to Austria) was probably a clerical error when preparing their witness statement, it expressed doubts that Mr and Mrs A would have made such an error when their holiday in Austria would have been fresh in their mind (it having taken place a year before).

- It considered Mr and Mrs A's representatives had probably shaped their testimony, and the inconsistencies and errors were symptomatic of this.

The Lender added that it had not had sight of a witness statement dating to March 2018 which I'd mentioned in my provisional decision, and asked to see a copy of this so it could comment.

The case has now been returned to me to review once more.

What I've decided – and why

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

Having done so, I've arrived at the same conclusions I did in my appended provisional decision, for essentially the same reasons. However, I thank the Lender for its submissions, and I think it's important to address the relevant points it has made. First of all though, I should clarify that there is no March 2018 witness statement. That was a typographical error in the provisional decision – I was referring to the January 2018 witness statement the Lender has already seen.

Moving on to the Lender's arguments, I don't agree with what the Lender has said about the approach I took to the definition of "investment" in the provisional decision. I adopted the following definition:

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

I do not think the Lender objects to this definition, but it considers that I went on to deviate from it in practice, and in fact ended up using a more expansive definition that encompassed scenarios where there would be no profit or financial gain. However, I don't think that's a fair assessment of the content of the provisional decision. When deciding whether or not I thought it was likely the Supplier had sold or marketed the Fractional Club membership as an investment, I considered what Mr and Mrs A had to say about what they'd been told by

the Supplier's representatives at the Time of Sale. Mr A, in the January 2018 statement, said the Supplier had told him:

"Once again, the representatives advised that this was an investment in a property. The sale date would be in 2033 and we would have to sell the property and would get the market value plus a profit from the sale."

If this is indeed what the Supplier said at the Time of Sale, then this would fall squarely within the definition of investment set out above, and marketing the product in this way would have breached the prohibition in Regulation 14(3) of the Timeshare Regulations, on marketing timeshare as an investment.

I acknowledge the Lender has concerns about the accuracy of the testimony – I will cover that shortly. But I will cover first the Lender's comments about my analysis of how the product was sold in general, and the effectiveness of the disclaimers and declarations dating to the Time of Sale.

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

I can understand why the Lender may have formed the impression that I attached a large amount of weight to the Supplier's sales practices – as my analysis of these was fairly lengthy. But I did not place as much reliance on the Supplier's training and promotional materials as perhaps that would suggest. I also attached significant weight to Mr and Mrs A's recollections, when determining how the Supplier marketed and sold the Fractional Club membership to them. And I considered that the Supplier's materials were not inconsistent with how Mr and Mrs A say the membership was sold to them.

The Lender has also reiterated that it thinks the disclaimers and declarations which appeared in the Supplier's paperwork dating to the Time of Sale were important, and pointed away from the product having been sold or marketed as an investment. As I said in my provisional decision, weighing up what happened is rarely as simple as looking at the contemporaneous paperwork. And I note there was one disclaimer in the Supplier's paperwork that may even have contributed to an impression that the product could be viewed as a financial investment. This was the following passage from the Supplier's "Information Statement":

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

It seems to me that this disclaimer assumed that the Supplier's representatives would, or might, present the Fractional Club membership as an investment and provide an opinion or

prediction as to the future value of the Allocated Property. Otherwise, I see no reason why the Supplier would have needed to clarify that any investment information provided by its representatives had *"been obtained solely from their own experience as investors"* and that no warranty was given *"as to any future values or returns".* While I acknowledge the paperwork contains various disclaimers, I do not think they are as straightforwardly contradictory to the idea that the Supplier could have marketed or sold the Fractional Club membership as an investment, as the Lender has indicated they are.

Moving on to Mr and Mrs A's testimony and actions, I do of course acknowledge the Lender's points. I still don't agree with the Lender however, that their failure to recollect where they signed up for the Fractional Club membership, or the fact Australia was apparently confused with Austria, significantly damages the credibility of what they've said overall, for the same reasons I gave in my provisional decision.

Likewise, I don't necessarily see any contradiction between the January 2018 and May 2018 witness statements. First of all, it appears the earlier witness statement was prepared based on a conversation with Mr A only. In that statement, Mr A says the following about the impact of the Supplier's breach of Regulation 14(3): *"As we thought this would be an investment for the future, we bought 2,850 points…"*

The May 2018 statement (which doesn't mention investment at all) appears to have been prepared based on a conversation with Mrs A only. I don't think it's implausible that, where there are joint purchasers, each person may recall different things about a sales process or have found different aspects of a product appealing. Secondly, and more importantly, I think it's apparent that Mrs A's witness statement is referring to an *earlier* purchase of a Vacation Club membership, which was not an asset-backed product and had no investment element. Therefore, it wouldn't be surprising that a witness statement recalling the sale of that product, wouldn't refer to it having been an investment.

I would make the same comments regarding the Lender's analysis of the Supplier's sales notes. Those notes appear to relate to the same non-Fractional product Mrs A's witness statement refers to, so it's again hardly surprising that the notes are focused on the purchase having been made for holidays.

Finally, I'm not convinced that Mrs A's emails with the Supplier in April 2017 are fatal to her and her husband's complaint, though I accept they do suggest that Mrs A at least was significantly motivated by the prospect of cheaper holidays. It appears these emails form part of a longer chain, which hasn't been shared with the Financial Ombudsman Service, so some of the context may be missing. In the emails we do have, Mrs A complains about problems booking in Austria and describes how this had made her feel about the membership. Specifically, Mrs A appears to have been unhappy with the Supplier's pricing compared to booking with the resort directly. She also refers to problems with availability of certain resorts and says that the whole idea was to make their holidays enjoyable and cheaper.

As I said in my provisional decision, Mr and Mrs A clearly were interested in holidays, and given holiday-related benefits were a feature of the Fractional Club product, that is something you would expect. I think it's worth repeating in full the paragraph from my provisional decision which dealt with this:

"That doesn't mean [Mr and Mrs A] were not interested in the holiday-related benefits of the Fractional Club membership, or previous products held with the Supplier. Their own testimony about their disappointment with a lack of availability of holiday accommodation, and the fact they took numerous holidays with the Supplier between 2007 and 2018, demonstrates that they quite clearly were. And that is not surprising given the nature of the

product at the centre of this complaint. But as Mr and Mrs A say (plausibly in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit as that share was one of the defining features of membership that had marked it apart from their previous Vacation Club membership. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made."

Ultimately, and on balance, I think these findings remain correct having considered all of the available evidence again. I think the Supplier's breach of Regulation 14(3) was material to Mr and Mrs A's purchasing decision, rendering the credit relationship between them and the Lender unfair.

This brings me to the Lender's point that I appeared to have reversed the burden of proof and used the wrong test when arriving at the conclusions in my provisional decision. I don't think that's correct. I focused on whether or not the investment aspect of the Fractional Club product had been material to Mr and Mrs A's purchasing decision. I accept the wording of one of the paragraphs of the provisional decision could have given the impression that the "wrong test" was used, when read in isolation. But when read alongside the rest of the provisional decision I think it's clear that wasn't the case.

In light of the above, it follows that my overall findings and conclusions remain unchanged from my provisional decision and that I consider the Lender now needs to provide appropriate compensation to Mr and Mrs A to reflect the unfairness of the credit relationship.

Fair compensation

I note Mr and Mrs A's concern about their membership being reinstated, and that this is something they do not want. Ultimately the situation with their membership will be a matter for the Supplier. That is why I provided for an indemnity in the compensation directions I outlined in my provisional decision. The indemnity only covers liabilities associated with the Fractional Club membership (and not any earlier membership).

My position on what would constitute fair compensation hasn't changed, so I've reproduced the corresponding text from my appended provisional decision below:

Having found that Mr and Mrs A would not have agreed to upgrade their Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable to put them back in the position they would have been in had they not upgraded the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr and Mrs A agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Here's what I think needs to be done to compensate Mr and Mrs A with that being the case – whether or not a court would award such compensation:

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

   i. The value of any promotional giveaways that Mr and Mrs A used or took advantage of and which were offered as part of the deal entered into at the Time of Sale ; and
   ii. The market value of the holidays* Mr and Mrs A took using the Fractional Points associated with the March 2015 purchase (i.e. deductions cannot be made for holidays taken using points associated with previous memberships).

   (the 'Net Repayments')

   *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 and Mrs A took using the Fractional Points associated with the March 2015 purchase, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

(4) Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.
(5) The Lender should remove any adverse information recorded on Mr and Mrs A credit files in connection with the Credit Agreement.
(6) If Mr and Mrs A's Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.

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

My final decision

For the reasons explained above, and in the appended provisional decision, I uphold Mr and Mrs A'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 A and Mrs A to accept or reject my decision before 19 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 the same conclusions as our Investigator, but I've significantly expanded on her reasons, and have decided to issue this provisional decision to allow the parties to the complaint time to make further comments.

The deadline for both parties to provide any further comments or evidence for me to consider is 11 December 2024. Unless the information changes my mind, my final decision is likely to be along the following lines.

The Complaint

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

Background to the Complaint

Mr and Mrs A had a history of purchasing timeshares and other similar holiday products from a particular timeshare provider (the 'Supplier'), from 2007 until 2015. The present complaint concerns only their final purchase in 2015, but I've outlined their other purchases below for the purpose of putting things in context.

Mr and Mrs A's first purchase I'm aware of from the Supplier was a 'Trial' membership they agreed to buy in February 2007. It's not known how much they paid for this, but it's my understanding it would have entitled Mr and Mrs A to several weeks of holidays with the Supplier. Mr and Mrs A subsequently purchased, in May 2007, a full 'Vacation Club' membership from the Supplier, for a price of £22,345. The Trial membership was traded in for £5,595, leaving £16,750 to pay, which I understand was financed by a different lender. The Vacation Club was a timeshare under which Mr and Mrs A would have been allocated a certain number of 'points' each year, which could be exchanged for holiday accommodation in the Supplier's portfolio.

The next purchase Mr and Mrs A made from the Supplier was in September 2011. There's not much information in evidence about this purchase, but it appears they bought additional points in the Vacation Club for a further £10,519. This was also financed by a different lender.

It was on 2 October 2012 that Mr and Mrs A first purchased a different type of membership from the Supplier, which I'll call the 'Fractional Club'. They entered into an agreement with the Supplier to buy 2,766 fractional points at a cost of £7,414. It appears this price accounted for the trade-in of their existing Vacation Club membership, but the value Mr and Mrs A were given for this is not on file. This purchase was financed by the same lender which had lent money to Mr and Mrs A for their 2011 purchase.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs A 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 was due to end.

Mr and Mrs A upgraded their Fractional Club membership on 17 March 2015 (the 'Time of

Sale'), and it is this upgrade which is the subject of their complaint about the Lender. On this date, Mr and Mrs A entered a new purchase agreement with the Supplier for 2,850 points in the Fractional Club. It appears the previous membership was traded in (the value given is once again not in evidence), leaving an amount to pay of £5,650.

Mr and Mrs A paid for this Fractional Club membership by taking finance of £5,650 from the Lender joint names (the 'Credit Agreement'). Under the terms of the agreement they were expected to make 180 monthly payments of £88.56. However, I understand they repaid the loan in full a few months after taking it out.

Mr and Mrs A – using a professional representative (the 'PR') – wrote to the Lender in May 2018 (the 'Letter of Complaint') to complain about:

1. 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.

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

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

1. Fractional Club membership was marketed and sold to them as an investment, but this wasn't true.
2. Fractional Club membership had been marketed as a means of exiting their existing product with the Supplier, with a guaranteed exit date, but this wasn't true either.
3. They were pressured into purchasing Fractional Club membership by the Supplier.
4. The decision to lend was irresponsible because the Lender, or Supplier as its agent, didn't carry out the right creditworthiness assessment.
5. The Lender had failed to properly disclose a commission it had paid to the Supplier.

The Lender dealt with Mr and Mrs A's concerns as a complaint, but it was unable to provide a final response to the complaint within the time prescribed under the relevant complaint handling rules, so Mr and Mrs A referred the complaint to the Financial Ombudsman Service in September 2018. The Lender then responded to the complaint, rejecting it on every ground.

More recently, the complaint was assessed by an Investigator who, having considered the information on file, upheld the complaint on its merits.

The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr and Mrs A at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of that breach on their purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr and Mrs A was rendered unfair to them for the purposes of section 140A of the CCA.

The Lender disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. The Lender said it had specific concerns about our Investigator's reliance on a witness statement made by Mr A, pointing out factual errors which it considered called into question how credible the statement was.

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 Sections 140A-140C).
- The law on misrepresentation.
- The Timeshare Regulations.
- The Unfair Terms in Consumer Contract Regulations 1999 ('UTCCRs')
- 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've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr and Mrs A as an investment, which, in the circumstances of this complaint, rendered the credit relationship between them and the Lender unfair to them for the purposes of Section 140A of the CCA.

However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I recognise that there are a number of aspects to Mr and Mrs A's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that:

- They were put under excessive pressure to purchase the Fractional Club membership.
- A proper creditworthiness assessment was not carried out by the Lender or the Supplier.
- A commission paid by the Lender to the Supplier was not properly disclosed.

- Claims made by the Supplier about the product having a guaranteed exit date were untrue.

This is because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs A in the same or a better position than they would be if the redress was limited to what would have been available had their complaint succeeded for any of those other reasons.

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

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

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

Under Section 140A of the CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as *"a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]"*. And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to *"finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."*

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr and Mrs A's membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

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

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

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

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

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

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

So, the Supplier is deemed to be Lender's statutory agent for the purpose of the pre-contractual negotiations.

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in *Patel* (which was recently approved by the Supreme Court in the case of *Smith),* that determining whether or not the relationship complained of was unfair had to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"* – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in *Plevin* (at paragraph 17):

"Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with […] whether the creditor's relationship with the debtor was unfair."

Instead, it was said by the Supreme Court in *Plevin* that the protection afforded to debtors by Section 140A is the consequence of all of the relevant facts.

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

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

1. The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale; and
2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;
3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;
4. The inherent probabilities of the sale given its circumstances.

I have then considered the impact of these on the fairness of the credit relationship between Mr and Mrs A and the Lender.

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

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

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

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

But Mr and Mrs A say that the Supplier did exactly that at the Time of Sale, having already marketed their existing Fractional Club membership to them as an investment back in 2012. In particular, in a witness statement dating from March 2018, Mr A described what had happened at the March 2015 sale as follows:

"The representatives advised they could give us a very good deal on more fractional points. This was for 3 weeks in the [name] resort and the representatives advised that they could give us these points for a special purchase price of £5,650 that was only available that day. Once again, the representatives advised that this was an investment in a property. The sale date would be in 2033 and we would have to sell the property and would get the market value plus a profit from the sale. As we thought this would be an investment for the future, we purchased 2,850 points for £5,650…"

Mr and Mrs A allege, 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 in the form of fractional points, and an investment in a property.
(2) They were told by the Supplier that they would make a profit when the Allocated Property was sold.

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

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

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

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

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs A, 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 for the primary purpose of holidays and that the Supplier made no representation as to the future value of a given fraction. There was a further statement in another document dating to the time of sale, which said *"Fractional Rights…[are] neither specifically for direct purposes of a trade in nor as an investment in real estate".*

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. So, I have considered:

(1) whether it is more likely than not that the Supplier, at the Time of Sale, sold or marketed membership of the Fractional Club as an investment, i.e. told Mr and Mrs A or led them to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered them the prospect of a financial gain (i.e., a profit); and, in turn
(2) whether the Supplier's actions constitute a breach of Regulation 14(3).

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

How the Supplier marketed and sold the Fractional Club membership

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

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

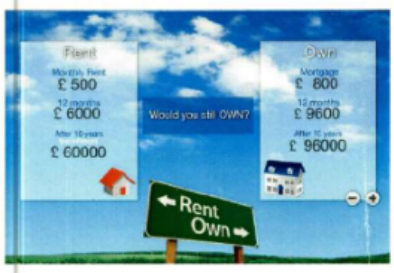
Neither the 2013/2014 Induction Training nor the ESA I've seen included notes of any kind. However, the Fractional Club Training Manual includes very similar slides to those used in the ESA. And according to the Supplier, the Fractional Club Training Manual (or something similar) was used by it to train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

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

(2) how the sales representatives would have framed the Supplier's multimedia presentation (i.e., the ESA) during the sale of Fractional Club membership to prospective or upgrading members – including Mr and Mrs A.

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

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



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

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

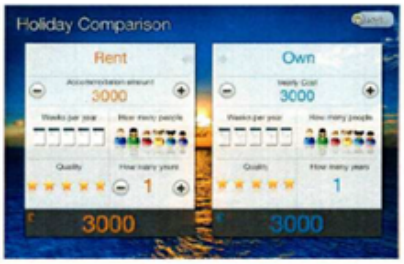
LINK: Now let me show you the relevance this has when it comes to your holidays because what you are currently doing is ...

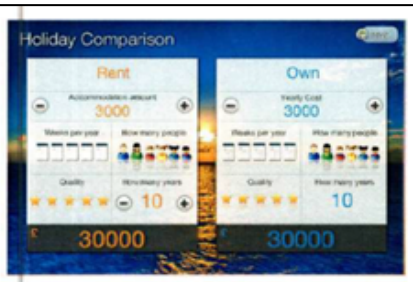
CLOSE:

Indeed, one of the advantages of ownership referred to in the slide above is that it makes more financial sense than renting because owners *"are building equity in their property"*. And as an owner's equity in their property is built over time as the value of the asset increases relative to the size of the mortgage secured against it, one of the advantages of ownership over renting was portrayed in terms that played on the opportunity ownership gave prospective members of the Fractional Club to accumulate wealth over time.

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

Page 33 of the Fractional Club Training Manual then moved the Supplier's sales representatives onto a cost comparison between "renting" holidays and "owning" them. Sales representatives were told to ask prospective members to tell them what they'd own if they just paid for holidays every year in contrast to spending the same amount of money to "own" their holidays – thus laying the groundwork necessary for demonstrating the advantages of Fractional Club membership:





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

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

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

CLOSE:

With the groundwork laid, sales representatives were then taken to the part of the ESA that explained how Fractional Club membership worked. And, on pages 41 and 42 of the Fractional Club Training Manual, this is what sales representatives were told to say to prospective members when explaining what a 'fraction' was:

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

[…]

Major benefit is the property is sold in nineteen years ***(optimum period to cover peaks and troughs in the market)*** *when sold you will get your share of the proceeds of the sale*

SUMMARISE LAST SLIDE:

FPOC equals a passport to fantastic holidays for 19 years ***with a return at the end of that period.*** *When was the last time you went on holiday and* ***got some money back? How would you feel if there was an opportunity of doing that?***

[…]

LINK: Many people join us every day and one of the main questions they have is ***"how can we be sure our interests are taken care of for the full 19 years?*** *As it is very important you understand how we ensure that, I am going to ask Paul to come over and explain this in more details for you.*

[…]

*"Handover: (Manager's name) John and Mary love FPOC and have told me the best for them is……...****Would you mind explaining to them how their interest will be protected over the next 19 year[s]****?"*

(My emphasis added)

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

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

[…]

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

(My emphasis added)

By page 68 of the Fractional Training Manual, sales representatives were moved on to the holiday budget of prospective members. Included in the ESA were a number of holiday comparisons. It isn't entirely clear to me what the relevant parts of the ESA were designed to show prospective members. But it seems that prospective members would have been shown that there was the prospect of a "return".

For example, on page 69 of the Fractional Club Induction Training Manual, it included the following screenshots of the ESA along with the context the Supplier's sales representatives were told to give to them:

[…]

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

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

(1) The right to receive holiday rights for 19 years whose market value significantly exceeds the costs to a Fractional Club member; plus

(2) A significant financial return at the end of the membership term.

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

I also acknowledge that there was no comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mr and Mrs A 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 S*hawbrook & BPF v FOS* when, Mrs Justice Collins Rice said the following:

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

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

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[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

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

I think the Supplier's sales representatives were encouraged to make prospective Fractional Club members consider the advantages of owning something and view membership as an opportunity to build equity in an allocated property rather than simply paying for holidays in the usual way. That was likely to have been reinforced throughout the Supplier's sales presentations by the use of phrases such as "bricks and mortar" and notions that prospective members were building equity in something tangible that could make them some money at the end. And as the Fractional Club Training Manual suggests that much would have been made of the possibility of prospective members maximising their returns (e.g., by pointing out that one of the major benefits of a 19-year membership term was that it was an optimum period of time to see out peaks and troughs in the market), I think the language used during the Supplier's sales presentations was likely to have been consistent with the idea that Fractional Club membership was an investment.

Overall, therefore, as the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members, they indicate that the Supplier's sales representative was likely to have led Mr and Mrs A to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e. a profit) in the future. And with that being the case, I don't find them either implausible or hard to believe when they say they were told by the Supplier that their purchase was an investment in property which, when sold in 2033, would realise a profit.

On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mr and Mrs A 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.

I think at this point it's worth addressing the Lender's concerns about Mr and Mrs A's witness statement. The Lender argued, in response to our Investigator's assessment, that the witness statement lacked credibility and, essentially, couldn't be relied on.

To support its position, the Lender highlighted what it said were factual errors or inconsistencies in the witness statement. These included Mr and Mrs A misidentifying the country in which they had purchased Fractional Club membership in 2012 and 2015, and stating they'd been interested in taking holidays in Australia in 2017, when they had actually enquired about booking in Austria.

I agree that there are some apparent errors in the witness statement. For example, Mr and Mrs A recalled being in Spain when they signed up for, and upgraded, their Fractional Club membership. However, it appears that both of these purchases took place in the UK. The Supplier has told the Lender that the purchases took place in Cornwall and Scotland respectively. Having considered the purchase paperwork myself, it seems more likely the

locations were London and Scotland, but either way it appears Mr and Mrs A did not recall correctly where they were when they made these purchases.

However, I would say that it doesn't seem reasonable, when looking at the witness statement *overall*, to discount the rest of Mr and Mrs A's recollections as lacking credibility because they were unable to recall specific details. According to the Supplier[3] Mr and Mrs A went on around 20 holidays with their various memberships, and I think it's plausible that the specific locale in which a sale took place could have occupied a less prominent place in their memory than the things which motivated them to make their purchases, especially given the amounts of money changing hands.

Similarly, if it's the case that Mr and Mrs A's witness statement incorrectly identifies Australia (instead of Austria) as somewhere they were thinking of going on holiday in 2017, I think this is hardly fatal to the credibility of the rest of their evidence. Given the similarity between the two words I think it's not improbable in any case, that this was simply a clerical error made when preparing the witness statement.

Furthermore, I've not seen anything else to suggest Mr and Mrs A's witness statement is either unreliable or likely not be a faithful account of their recollections of their experiences with the Supplier.

Was the credit relationship between the Lender and the Consumer rendered unfair?

Having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr and Mrs A 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. […]*

[3] In evidence provided on a linked case which the Lender has referred to in its submissions.

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

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs A and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) (which, having taken place during its antecedent negotiations with Mr and Mrs A, is covered by Section 56 of the CCA, and 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 them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On my reading of Mr and Mrs A's testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead and purchase Fractional Club membership for the first time in October 2012, and then to upgrade this membership in March 2015. That doesn't mean they were not interested in the holiday-related benefits of the Fractional Club membership, or previous products held with the Supplier. Their own testimony about their disappointment with a lack of availability of holiday accommodation, and the fact they took numerous holidays with the Supplier between 2007 and 2018, demonstrates that they quite clearly were. And that is not surprising given the nature of the product at the centre of this complaint. But as Mr and Mrs A say (plausibly in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit as that share was one of the defining features of membership that had marked it apart from their previous Vacation Club membership. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

Mr and Mrs A have not said or suggested, for example, that they would have gone ahead with the purchase in question had the Supplier not reinforced their belief that Fractional Club membership was an appealing investment opportunity. And as they faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments in the form of management charges, had they not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I have not seen enough to persuade me that they would have pressed ahead with their purchase regardless.

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs A 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 and Mrs A would not have agreed to upgrade their Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable to put them back in the position they would have been in had they not upgraded the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr and Mrs A agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Here's what I think needs to be done to compensate Mr and Mrs A with that being the case – whether or not a court would award such compensation:

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

(2) In addition to (1), the Lender should also refund the annual management charges Mr and Mrs A paid as a result of purchasing the Fractional Club membership they upgraded to at the Time of Sale.

(3) The Lender can deduct

iii. The value of any promotional giveaways that Mr and Mrs A used or took advantage of and which were offered as part of the deal entered into at the Time of Sale ; and

iv. The market value of the holidays* Mr and Mrs A took using the Fractional Points associated with the March 2015 purchase (i.e. deductions cannot be made for holidays taken using points associated with previous memberships).

(the 'Net Repayments')

*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 and Mrs A took using the Fractional Points associated with the March 2015 purchase, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

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

(5) The Lender should remove any adverse information recorded on Mr and Mrs A credit files in connection with the Credit Agreement.

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

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

My provisional decision

For the reasons explained above, I am currently minded to uphold Mr and Mrs A's complaint, and direct Shawbrook Bank Limited to take the actions set out in the "Fair Compensation"

section above. I now invite the parties to provide any further comments they would like me to consider, by 11 December 2024. I will then review the case again.

Will Culley
Ombudsman