DRN-5340158

The complaint

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

What happened

In August 2011, Miss O and Mr A purchased a trial membership of a timeshare from a timeshare provider (the 'Supplier'). That purchase was funded by a loan from another lender in Mr A's name only, but that purchase isn't the subject of this complaint.

Then, on 7 June 2012, they traded in their trial membership towards a full timeshare membership (the 'Fractional Club'). They entered into an agreement to purchase 747 points at a cost of £13,599 (the 'Purchase Agreement'). But, after trading in their existing trial membership, they ended up paying £9,599 for membership of the Fractional Club.

Fractional Club membership was asset backed – which meant it gave Miss O and Mr 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 ends.

Miss O and Mr A paid for their Fractional Club membership by taking finance of £12,525 from the Lender in both of their names (the 'Credit Agreement'). This loan consolidated their previous lending.

In September 2014 they then traded in their previous membership, thereby 'upgrading' their Fractional Club membership. This purchase was funded by a loan from another lender and as such is being considered in a separate decision. That loan also consolidated their prior lending.

Miss O and Mr A – using a professional representative (the 'PR') – wrote to the Lender on 8 January 2019 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. A breach of contract by the Supplier giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

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

Miss O and Mr A say 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 the Supplier's holiday resorts were exclusive to its members when that was not true.
3. Told them they would receive a high standard of accommodation, when that was not true.
4. Told them the annual management fees would only go up by a certain amount, but that was not true because they increased by significantly more than that year after year.

Miss O and Mr A say that they have 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, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Miss O and Mr A.

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

Miss O and Mr A also raised some more general concerns with membership which, although not expressed in these exact terms, suggest they feel the Supplier breached the purchase agreement. Namely, because they say they found it difficult to book the holidays they wanted, when they wanted.

As a result of the above, Miss O and Mr A suggest that they have a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Miss O and Mr A.

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

The Letter of Complaint set out several reasons why Miss O and Mr A say 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. The contractual terms setting out (i) the duration of their Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of their membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
2. They were pressured into purchasing Fractional Club membership by the Supplier.
3. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.
4. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
5. The Supplier didn't give an adequate or transparent explanation as to the features of the agreement which may have made the credit unsuitable for them or have a significant adverse effect which they would be unlikely to foresee, especially given the length of the term, their age and high interest and total charge for the credit provided.

The Lender did not respond to Miss O and Mr A's complaint within the eight weeks required by the Regulator. So, the PR referred the complaint on Miss O and Mr A's behalf to the Financial Ombudsman Service.

The Lender subsequently dealt with Miss O and Mr A's concerns as a complaint and issued

its final response letter on 29 July 2019, 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 Miss O and Mr 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 Miss O and Mr 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.

I considered the matter and issued a provisional decision dated 29 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 UTCCR.*
- *The CPUT Regulations.*
- *Case law on Section 140A of the CCA – including, in particular:*

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

Good industry practice – the RDO Code

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

My provisional findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Miss O and Mr A as an investment, which, in the circumstances of this complaint, rendered the credit relationship between Miss O and Mr A 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 Miss O and Mr A's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the Supplier misrepresented the Fractional Club membership and breached the Purchase Agreement and the Lender ought to have accepted and paid those claims under Section 75 of the CCA, and the other reasons why she says the credit relationship was unfair to them.

I say this because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Miss O and Mr A in the same or a better position than they would be if the redress was limited to misrepresentation or a breach of contract.

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 Miss O and Mr 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 Miss O and Mr 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.

I have considered the entirety of the credit relationship between Miss O and Mr 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 Miss O and Mr A and the Lender.

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

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

The Lender does not dispute, and I am satisfied, that Miss O and Mr A'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 Miss O and Mr A that the Supplier did exactly that at the Time of Sale – saying the following in a witness statement signed and dated 6 July 2017:

"They then told us about Fractional Ownership. We were told that the Trial membership was of no value to us. We were just renting and getting nothing back. We were told with the full Membership we would get access to [Supplier] resorts all over the world. We could also rent out our weeks and make money or share with friends.

We were told that we were buying property and that we could sell it, or that they could sell if [sic] for us. If we did not want to, our children could take it on and enjoy the holidays as well.

We were told it was an investment and we would make money when we sold it.

They told us about maintenance fees, which they would pay for us in the first year. We could rent out our weeks and if we got one family to rent our week this would pay our fees for the year.

[…]

We made the decision to go ahead as we could rent the property, so we would not have to pay maintenance fees. They were also effectively going to pay our finance for the first 9 months. We would own property, ours to use or sell."

Mr O and Miss A allege, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because: there were two aspects to their Fractional Club membership: holiday rights and a profit on the sale of the Allocated Property.

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

Miss O and Mr 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 Miss O and Mr 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 Miss O and Mr 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 not sold to Miss O and Mr A as an investment.

For example, in the Member's Declaration signed by Miss O and Mr A it said:

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

And, in the Information Statement signed by Miss O and Mr A it said:

> *"The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for the direct purposes of a trade in nor as an investment in real estate. [The Supplier] makes no representation as to the future price or value of the Allocated Property or any Fractional Rights."*

And:

> *"11. Investment advice*
>
> *The Vendor, or any sales or marketing agent and the Manager and their related businesses (a) are not licenced investment advisers authorised 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 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 Fractional Club 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 Miss O and Mr A'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 Miss O and Mr 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

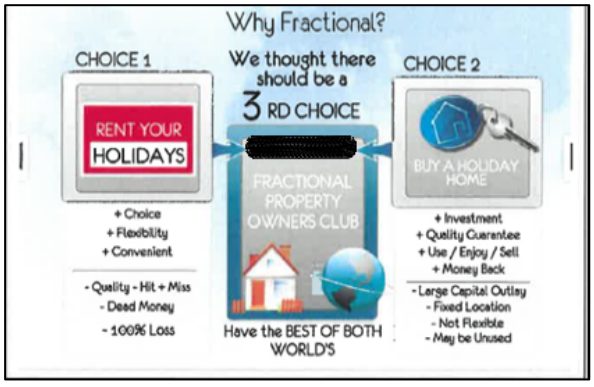
During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives – including a document called "2011 Spain PTM FPOC 1 Practice Slides Manual" (the '2011 Fractional Training Manual').

As I understand it, the 2011 Fractional Training Manual was used throughout the sale of the Supplier's first version of a product called the Fractional Property Owners Club – which I've referred to and will continue to refer to as the Fractional Club. It isn't entirely clear whether Miss O and Mr A 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 Miss O and Mr A Fractional Club membership; and*

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

Having looked through the manual, my attention is drawn to page 6 (of 41) – which includes the following slide on it:



This slide titled "Why Fractional?" indicates that sales representatives would have taken Miss O and Mr A through three holidaying options along with their positives and negatives:

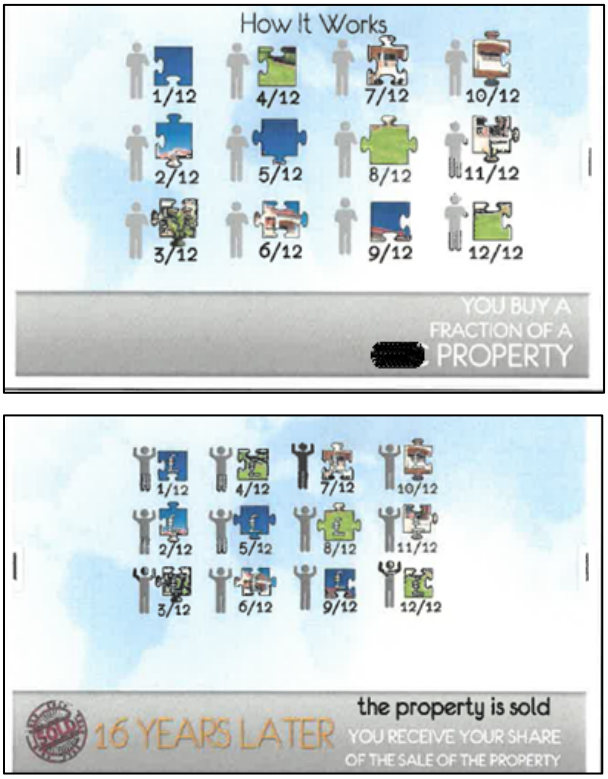
(1) *"Rent Your Holidays"*

(2) *"Buy a Holiday Home"*

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

It was the first slide in the 2011 Fractional Training Manual to set out any information about Fractional Club membership and I think it suggests that sales representatives were likely to have made the point to Miss O and Mr A that membership combined the best of (1) and (2) – which included choice, flexibility, convenience and, significantly, an investment they could use, enjoy and sell before getting money back.

The manual then moved on to two slides (on pages 7 and 8) concerned with how Fractional Club membership worked:



I'm aware that the Supplier says that 90-95% of its time during its sales presentations was focused on holidays rather than the sale of an allocated property. Having looked through the 2011 Fractional Training Manual, it seems to me that there were 10 slides on how Fractional Club membership worked before the slides moved onto to sections titled "Peace of Mind",

"Resort Management" and "Which Fractional". And as 5 of the 10 slides look like they focused on holidays, there seems to me to have been a fairly even split during the Supplier's sales presentations between marketing membership of the Fractional Club as a way of buying an interest in property and as a way of taking holidays.

However, even if more time was spent on marketing membership of Fractional Club membership as a way of taking holidays rather than buying an interest in property, as the slides above suggest, in my view, that the Supplier's sales representatives would have probably led prospective members to believe that a share in an allocated property was an investment (after all, that's what the slide titled "Why Fractional" expressly described it as) , I can't see why the Supplier wouldn't have been in breach of Regulation 14(3) in those circumstances.

I 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 Miss O and Mr 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.*

[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

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.

Miss O and Mr A, in their own words, that the Supplier positioned membership of the Fractional Club as an investment to them. And as I've said before, 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 – including Miss O and Mr A. And as the slides clearly indicate that the Supplier's sales representative was likely to have led them 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, I don't find them either implausible or hard to believe when they say they were told by the Supplier that they were 'buying property' that they would 'own' and that membership was 'an investment' and they would 'make money' when the Allocated Property was sold. On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Miss O and Mr 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.

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 Miss O and Mr 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. […]*

[…] 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 Miss O and Mr 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 Miss O and Mr A, 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 Miss O and Mr 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 with their purchase. What they've had to say, in my view, shows that they were interested in making money, by either renting out the property or selling in due course (the money back highlighted in the above slides). I note for example they've said in their testimony "we made the decision to go ahead as we could rent the property, so we would not have to pay maintenance fees… We would own property, ours to use or sell". This suggests to me that they bought the membership because they thought from what the Supplier told them at the Time of Sale that they owned a property they could make money from. They've highlighted the prospect of a financial gain from the membership throughout their testimony and I therefore think it's clear this was a key consideration in their purchase.

That doesn't mean they were not interested in holidays. Their own testimony 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 Miss O and Mr A (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 marked it apart from the more 'standard' type of timeshare available to them. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

Miss O and Mr A 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 they faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves 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 Miss O and Mr 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.

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

On 1 September 2014, Miss O and Mr A traded in their first membership ('Fractional Club 1') membership, paying an additional sum and adding a further 553 fractional points to their existing 747 by entering into a different purchase agreement for 'Fractional Club 2', thereby 'upgrading' and replacing Fractional Club 1. The credit relationship Miss O and Mr A had with the Lender ended when that loan was consolidated when making their second purchase in September 2014.

As a result of their purchase of Fractional Club 2, it is necessary to consider whether the unfairness caused to Miss O and Mr A 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 Miss O and Mr A £13,594 credit for their original Fractional Club 1 membership, this credit wasn't the equivalent of cash. It was a deduction from a starting price set by the Supplier itself for Miss O and Mr A's upgrade to Fractional Club 2. 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 £13,594 was almost the same as the purchase price originally attached to their Fractional Club 1 purchase, it cannot be said that the upgrade to Fractional Club 2 on 1 September 2014 improved Miss O and Mr A's position financially.

However, I have thought about the extent to which responsibility for the situation after their purchase of Fractional Club 2 must be attributed to the Supplier and the Lender. As the credit agreement associated with the purchase of Fractional Club 2 was from 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 2 (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 553 additional fractional points Miss O and Mr A purchased in September 2014.

Formally, the agreement Miss O and Mr A entered into in September 2014 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 upgrades were really just a top-up of Miss O and Mr A's fractional points by rolling over those that they had and providing them, as members of the Fractional Club 2, 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 £13,594 credit was to roll over Miss O and Mr A's existing fractional points into their upgrade, I'm not persuaded that the purchase of Fractional Club 2 ended the unfairness to them in their credit relationship with the Lender. I think their original purchase of Fractional Club 1, and the associated Credit Agreement 1 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.

Fair Compensation

Having found that Miss O and Mr A 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 Miss O and Mr A was unfair under Section 140A of the CCA, I think it would be fair and reasonable to put Miss O and Mr A 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 Miss O and Mr A not entered into the Credit Agreement. This is on the proviso that Miss O and Mr A agree to assign to the Lender 747 of their Fractional Points or hold them on trust for the Lender if that can be achieved.

Miss O and Mr A were trial members before purchasing Fractional Club membership. As I understand it, trial membership involved the purchase of a fixed number of week-long holidays that could be taken with the Supplier over a set period in return for a fixed price. The purpose of trial membership was to give prospective members of the Supplier's longer-term products a short-term experience of what it would be like to be a member of, for example, the Fractional Club. According to an extract from the Supplier's business plan, roughly half of trial members went on to become timeshare members.

If, after purchasing trial membership, a consumer went on to purchase membership of one of the Supplier's longer-term products, their trial membership was usually cancelled and traded in against the purchase price of their timeshare – which was what happened at the Time of Sale. Miss O and Mr A's trial membership was, therefore, a precursor to their Fractional Club membership. And, as they paid for their trial membership using finance that they refinanced using the Credit Agreement, in the absence of any realistic prospect of the trial membership being reinstated to the satisfaction of both parties to it, the trade-in value acted, in essence, as a deposit on this occasion. Given that, I think this ought to be reflected in my redress when remedying the unfairness I have found.

So, given all of the above, here's what I think needs to be done to compensate Miss O and Mr A with that being the case – whether or not a court would award such compensation:

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

(2) The Lender should also refund 100% of the annual management charges Miss O and Mr A actually paid from the Time of Sale 1 up to the Time of Sale 2.

(3) The Lender can deduct

i. *The value of any promotional giveaways that Miss O and Mr A used or took advantage of from the Time of Sale 1 up to the Time of Sale 2; and*

ii. *The market value of the holidays* Miss O and Mr A took using their Fractional Club 1 points from the Time of Sale 1 up to the Time of Sale 2 (if any).*

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

(4) Simple interest[3] at 8% per annum should be added to each of the Net Repayments

[3] 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.

from the date each one was made until the date the Lender settles this complaint.

However, as I don't think the effects of the unfairness in question ended when Miss O and Mr A upgraded their Fractional Club membership in September 2014, and as I think their original 747 fractional points 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 Miss O and Mr A the proportion of the management charges that they actually paid after 1 September 2014 that relate to those 747 points. These equate to 58%[4] of the 1,300 points Miss O and Mr A actually ended up with at the Time of Sale 2. So, in addition to the Net Repayments above:

(1) *The Lender should refund 58% of the annual management charge(s) paid by Miss O and Mr A from 1 September 2014 onwards, less a proportional deduction for any holiday[5] they took using the fractional points relating to Fractional Club 2.*

(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 Miss O and Mr A for other costs in addition to the annual management charges arising from the Fractional Club 2 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 Miss O and Mr A against 58% of any other liabilities accruing from 1 September 2014 onwards that result from Miss O and Mr A's ownership of Fractional Rights.

I do wish to make the Lender aware that I'm taking the redress awarded to Miss O and Mr A in this complaint into account when making my decision on their other complaint about their other, subsequent purchase.

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

Miss O and Mr A accepted my provisional decision. The Lender also responded and said while they didn't agree with some of the findings made in my provisional decision, they accepted what I had said overall regarding the merits of the complaint. However, they did raise two further points in relation to my proposed redress.

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.

Following the responses from both parties, I've considered all the evidence and arguments afresh.

As neither party has provided any new evidence or arguments in relation to whether the complaint should be upheld, and having reconsidered everything, I don't believe there is any reason for me to reach a different conclusion from that which I reached in my provisional decision (outlined above).

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[4] All percentages have been rounded to the nearest whole number.
[5] See Section (3) (ii) above

I also remain satisfied that the method of redress I proposed in my provisional decision is fair and reasonable in the circumstances of this complaint. I'll explain why and respond to the specific points the Lender has raised in that regard.

The Lender said firstly that they didn't think the trial membership should be reflected in the compensation because ultimately, if the purchase at the Time of Sale hadn't occurred, the trial membership would still have 'been present'. And, to include it in the redress would mean that Miss O and Mr A are provided with a 'windfall' because they would receive redress for a product that can be reinstated and from which they can 'get the value'.

I acknowledged in my PD that Miss O and Mr A were trial members before purchasing Fractional Club membership. Trial membership involved the purchase of a fixed number of week-long holidays that could be taken with the Supplier over a set period in return for a fixed price. And, as the Lender has said, the purpose of trial membership was to give prospective members of the Supplier's longer-term products a short-term experience of what it would be like to be a member of, for example, the Fractional Club.

If, after purchasing trial membership, a consumer went on to purchase membership of one of the Supplier's longer-term products, their trial membership was usually cancelled and traded in against the purchase price of their timeshare – which was what happened at the Time of Sale here. So again, Miss O and Mr A's trial membership was, therefore, a precursor to their Fractional Club membership.

Importantly, they paid for their trial membership using finance that they refinanced using the Credit Agreement, and as I explained in my provisional decision, I don't think there is any *realistic* prospect of the trial membership being reinstated to the satisfaction of both parties to it. So, the trade-in value acted, in essence, as a deposit on this occasion. For these reasons, I still think it's fair and reasonable for this to be reflected in my redress when remedying the unfairness I have found.

Secondly, the Lender said they didn't think they should be liable for any management charges relating to the second fractional membership Miss O and Mr A bought following the Time of Sale, which was financed by another lender and which superseded this one. They said there's no evidence that they would not have upgraded in 2014 or purchased the same number of points at that time. So, they say this also gives Miss O and Mr A a 'windfall'. They also said that in combination with the redress on Miss O and Mr A's other complaint, they may be potentially compensated twice in relation to the management charges.

As the Lender correctly highlights, on 1 September 2014, Miss O and Mr A traded in their first membership ('Fractional Club 1') membership, paying an additional sum and adding a further 553 fractional points to their existing 747 by entering into a different purchase agreement for 'Fractional Club 2', thereby 'upgrading' and replacing Fractional Club 1. The credit relationship Miss O and Mr A had with the Lender ended when that loan was consolidated when making their second purchase in September 2014. The purchase of Fractional Club 2 has been considered in a separate decision (as it was financed by another lender) and as the Lender has said, that complaint has also been upheld by myself based on the evidence provided in that case.

As I explained in my provisional decision, as a result of their purchase of Fractional Club 2, it's been necessary for me to consider whether the unfairness caused to Miss O and Mr A from the purchase of the original Fractional Club 1 at the Time of Sale continued, and if it did continue, what were the ongoing consequences.

I acknowledge, as I did in my PD, that the Supplier gave Miss O and Mr A £13,594 credit for their original Fractional Club 1 membership. But, this credit wasn't the equivalent of cash. It

was a deduction from a starting price set by the Supplier itself for Miss O and Mr A's upgrade to Fractional Club 2. 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 £13,594 was almost the same as the purchase price originally attached to their Fractional Club 1 purchase, it cannot be said that the upgrade to Fractional Club 2 on 1 September 2014 improved Miss O and Mr A's position financially.

However, as I already explained in my provisional decision, I have thought about the extent to which responsibility for the situation after their purchase of Fractional Club 2 must be attributed to the Supplier and the Lender. As the credit agreement associated with the purchase of Fractional Club 2 was from 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 2 (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 553 additional fractional points Miss O and Mr A purchased in September 2014 which is where their aforementioned concerns, at least in part, seem to stem from.

Formally, the agreement Miss O and Mr A entered into in September 2014 was a new contract that superseded the old one. But I still 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 Miss O and Mr A's fractional points by rolling over those that they had and providing them, as members of the Fractional Club 2, 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 £13,594 credit was to roll over Miss O and Mr A's existing fractional points into their upgrade, I'm still not persuaded that the purchase of Fractional Club 2 ended the unfairness to them in their credit relationship with the Lender. I think their original purchase of Fractional Club 1, and the associated Credit Agreement 1 with the Lender had ongoing financial consequences for them, which continued the unfair relationship with the Lender. And it's for that reason that I think the Lender is still answerable for them.

It's worth highlighting at this point that I'm only asking the Lender to cover 100% of the management fees that Miss O and Mr A actually paid for the period from the Time of Sale 1 up to the Time of Sale 2. And, 58% of the fees they paid (and any other liabilities resulting from their membership) from 1 September 2014 onwards. And as I explained in my provisional decision on this case, my decision on Miss O and Mr A's other complaint has reflected this appropriately in its redress. So, I'm satisfied this does not provide them with any undue windfall or compensate them twice.

So, overall, I remain satisfied that the method of redress I proposed in my provisional decision is the fair and reasonable way to resolve this complaint. So, for the avoidance of doubt, upon receipt of notification from this Service of Miss O and Mr A's acceptance of my final decision, and on the proviso that Miss O and Mr A agree to assign to the Lender 747 of their Fractional Points or hold them on trust for the Lender if that can be achieved, the Lender should:

(1) Refund Miss O and Mr A the repayments that were made to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding

balance if there is one.

(2) The Lender should also refund 100% of the annual management charges Miss O and Mr A actually paid from the Time of Sale 1 up to the Time of Sale 2.

(3) The Lender can deduct:

i. The value of any promotional giveaways that Miss O and Mr A used or took advantage of from the Time of Sale 1 up to the Time of Sale 2; and

ii. The market value of the holidays* Miss O and Mr A took using their Fractional Club 1 points from the Time of Sale 1 up to the Time of Sale 2 (if any).

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

(4) Simple interest[6] 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.

However, as I don't think the effects of the unfairness in question ended when Miss O and Mr A upgraded their Fractional Club membership in September 2014, and as I think their original 747 fractional points 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 Miss O and Mr A the proportion of the management charges that they actually paid after 1 September 2014 that relate to those 747 points. These equate to 58%[7] of the 1,300 points Miss O and Mr A actually ended up with at the Time of Sale 2. So, in addition to the Net Repayments above:

(1) The Lender should refund 58% of the annual management charge(s) paid by Miss O and Mr A from 1 September 2014 onwards, less a proportional deduction for any holiday[8] they took using the fractional points relating to Fractional Club 2.

(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 Miss O and Mr A for other costs in addition to the annual management charges arising from the Fractional Club 2 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 Miss O and Mr A against 58% of any other liabilities accruing from 1 September 2014 onwards that result from Miss O and Mr A's ownership of Fractional Rights.

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[6] 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.

[7] All percentages have been rounded to the nearest whole number.

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

My final decision

I uphold Miss O and Mr A's complaint and direct Shawbrook Bank Limited to compensate Miss O and Mr A in line with what I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A and Miss O to accept or reject my decision before 24 March 2025.

Fiona Mallinson
Ombudsman