DRN-5448310

The complaint

Mr and Mrs N complain 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

I issued a provisional decision on Mr and Mrs N's complaint on 28 February 2025, which outlined the background to the matter and my provisional findings on it. A copy of the provisional decision is appended to, and forms a part of, this final decision, so it's not necessary for me to go over all the details again. However, to summarise briefly:

- Mr and Mrs N were long-time customers of a timeshare company (the "Supplier") and, by the time of the purchase which is the subject of this complaint, they had amassed 30,000 "points" in the Supplier's holiday club. These points could be exchanged annually for accommodation in the Supplier's portfolio.

- On 16 February 2014 Mr and Mrs N converted 12,000 of their holiday club points to points in a different product being promoted by the Supplier – the "Fractional Club". These points cost £19,344 but Mr and Mrs N were given £12,000 consideration for their holiday club points, leaving £7,344 to pay. Finance was arranged by the Supplier with the Lender for £5,876 (the "Credit Agreement"), with the remainder being paid by card.

- Mr and Mrs N could exchange their Fractional Club points for accommodation in the same way as they could exchange their holiday club points, but there were some differences between the two products:

    - Fractional Club membership was for a shorter period – ending in 2028 instead of 2054.

    - Fractional Club membership included access to a "Wish to Rent" scheme, where points could be deposited and the equivalent accommodation rented out to someone else for a fixed fee, plus a commission if the person in question purchased a product from the Supplier.

    - Fractional Club membership was asset-backed, and entitled Mr and Mrs N to a specified share of the net proceeds of the sale of a named property (the "Allocated Property"), when their membership term came to an end.

- Mr and Mrs N later complained about what they said was, in essence, mis-selling of the Fractional Club membership. One of their key points of complaint was that the Supplier had described and sold the product to them as an investment, when it had been illegal to sell the product in that way. Mr and Mrs N brought their complaint against the Lender on two main bases – that the Lender ought to honour a claim under Section 75 of the CCA as a result of its joint liability for the Supplier's

misrepresentations; and that the Lender had participated in an unfair credit relationship with them under Section 140A of the CCA, as a result of the Supplier's wrongdoing.

The Lender rejected the complaint. In my provisional decision I said I was minded to uphold the complaint. The full reasoning for this can be found in the appended provisional decision, but again, summarising briefly:

- I noted that to market or sell a timeshare, such as the Fractional Club membership, as an investment, was prohibited under the *Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010* ("Timeshare Regulations"). An investment was properly defined as a "*transaction in which money or other property is laid out in the expectation or hope of financial gain or profit".*

- There was in fact an investment element to the Fractional Club membership – the share of the proceeds of the sale of the Allocated Property could potentially end up being more than Mr and Mrs N had put in. It wasn't prohibited for an investment element to exist in a timeshare contract, but if the Supplier had improperly marketed or sold the product to Mr and Mrs N in a way which stated or implied that the investment element was a reason to buy it, and this had had a material impact on their decision to purchase the membership and enter the associated credit agreement, I thought this was likely to render the credit relationship between them and the Lender, unfair.

- I concluded, on the balance of probabilities, that the Supplier had stated or implied to Mr and Mrs N that the Fractional Club membership was an investment. The main reasons for this were:

    - I acknowledged the existence of disclaimers in the sales paperwork which indicated the product was not an investment, and an apparently rigorous training programme the Supplier gave to its representatives which impressed upon them the importance of not selling the product in that way. But I noted the existence of other materials produced by the Supplier which *did* imply or state the product was an investment. I accepted these materials had not been shown to Mr and Mrs N, but I considered they illustrated the point that there was the *potential* for the product to be sold in a way which didn't accord with the Supplier's stated policies.

    - It was difficult to see how the Supplier could have marketed the product to Mr and Mrs N on the basis of its holiday-related benefits, given they were not gaining any holiday rights over and above what they already had. I thought it more likely, in light of this, that the Supplier would have focused on other reasons to buy the product.

    - Mr and Mrs N's recollection was that the Supplier had expressly referred to the product as a good investment. While the Lender had argued their testimony was inconsistent and unreliable, I didn't agree with that assessment.

- Having concluded the Supplier had breached the Timeshare Regulations, I went on to consider whether or not this had had a material impact on Mr and Mrs N's purchasing decision, thus rendering the credit relationship between them and the Lender unfair. I considered that it had, because:

    - There were no holiday-related benefits to the product for them (as stated

above).

- The benefit of having a shorter membership term was unlikely to have been enough, on its own, for Mr and Mrs N to make the purchase. This was because they had been advised by the Supplier at the time of sale that they could exit their holiday club membership at no charge when one of them reached the age of 75, in 2022. This would have given them an even shorter term than the Fractional Club membership (2028), and been cheaper.

- By the process of elimination, this left the investment aspect of the product as the most important reason for Mr and Mrs N to have made their purchase. I said:

  "I think the most plausible reason, given the circumstances, the fact that the share in the Allocated Property was a key feature of the fractional product, and what Mr and Mrs N have said, is that they were motivated to convert their points to the Fractional Club because they hoped or expected they would make a financial return, due to the Supplier having marketed the product in a way which stated or implied this was a good reason to buy it. While I think Mr and Mrs N had some interest in the Wish to Rent scheme, as evidenced by them using it in one year, I don't think such an interest was incompatible with them making their purchase with investment in mind. Indeed, given the fact a member had to choose not to use their points for holidays in any given year they wanted to use the scheme, in exchange for a speculative return, I would say interest in the scheme is consistent with someone having made the purchase for investment-related reasons."

I went on to outline compensation proposals which, broadly speaking, involved Mr and Mrs N receiving refunds of their loan repayments and any ongoing fees relating to the Fractional Club membership, with appropriate deductions allowed where they had used their Fractional Club points to go on holiday. Also included in the proposals was compensatory interest, an amendment to Mr and Mrs N's credit file, and an indemnity from the Lender in respect of any ongoing liabilities associated with the membership.

I asked the parties to the complaint to comment on the provisional decision. Mr and Mrs N accepted the provisional decision. The Lender did not, sending extensive submissions which included a commentary from the Supplier. Rather than repeat these submissions verbatim, I think the following constitutes a fair summary of the points made:

- I had used a more expansive definition of the word "investment" in my decision than the one I had stated I would use. In particular, I had wrongly equated the existence of a prospect of a financial return as being the same thing as a "return on investment". It was mandatory for the Supplier to tell Mr and Mrs N about all the features of the product, and all the Supplier had done was to inform Mr and Mrs N that an amount of money would be returned at the end of their membership. That was not selling the product as an investment.

  - It was also notable that Mr and Mrs N had not referred to any expectation of making a financial gain or profit when the Allocated Property was sold. They had only referred to getting their money back. There appeared to be no hope or expectation of a financial gain or profit.

- I had made generic assumptions about how the product was sold rather than engaging with the specific facts and evidence of the case.

- I had attached too little weight to the disclaimers Mr and Mrs N had signed at the time of sale, which had included that the membership should not be purchased "as an investment in real estate", that it "should not be viewed by you as a financial investment"; and "the Fractional Points should not be regarded as a property or financial investment". I had also attached too little weight to the Supplier's extensive training to staff and its policies which prohibited the selling of the Fractional Club product as an investment. It was reasonable to conclude that salespeople would not have disregarded their training. Copies of the salespeople's signed agreement to the Supplier's sales policies had been enclosed.

- On the other hand, I'd attached too much weight to Mr and Mrs N's testimony. The Lender still had concerns about this testimony – in particular it said it was unclear why two witness statements had been produced in May 2017 and February 2019 respectively, or why these were not supplied with the June 2019 complaint letter, or why subsequently one statement was given to the Financial Ombudsman Service and the other was given to the Lender. It was in any event irrational to favour Mr and Mrs N's testimony about what had happened, over the general evidence provided by the Supplier's witnesses, who had detailed knowledge of the product design, features, and training materials.

- Not enough consideration had been given to the other reasons why Mr and Mrs N made their purchase of the Fractional Club membership. For example, they had specifically expressed interest in the Wish to Rent scheme, and having a shorter term. It was the *overall* package of rights conferred by the membership, which included the shorter term, Wish to Rent scheme, and the return of money at the end, which had had a material impact on their purchasing decision.

- Mr and Mrs N had sought to relinquish their membership in 2016 after being contacted by unscrupulous third parties. This was inconsistent with a belief that their purchase was an investment.

The case has now been returned to me to decide.

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.

And having done so, I've arrived at the same set of conclusions for the same reasons as set out in my appended provisional decision. I have made a small amendment to my redress directions to account for the fact that Mr and Mrs N paid part of the purchase price using a card, and a refund in respect of this should have been expressly included in the directions. Mr and Mrs N have stated that no claims have been made to other potential respondents in relation to that payment.[1] The Lender was informed of my intention to make this change, and given an opportunity to comment. I understand no comments on this have been received specifically, although the Lender has reiterated its disagreement with the provisional decision.

Although my conclusions have not changed, it's important for me to address the points the

[1] Having considered the facts surrounding the payment, I would not have expected any claim made under Section 75 of the CCA specifically in relation to the payment to have been successful. This is because the facts appear to mirror those of the High Court case of *Steiner v National Westminster Bank Plc [2022] EWHC 2519*, in which the Court ruled that the technical pre-conditions had not been established for a successful Section 75 claim to be made.

Lender and Supplier have made in what have essentially been joint submissions following the provisional decision.

I think the Lender and Supplier may have misunderstood the exercise I undertook in the provisional decision, in which I had considered various pieces of general information available about the Supplier's sales practices.

The position the Lender and Supplier appeared to have taken (and seem still to maintain) was that, due to the very high level of compliance of the Supplier with the relevant regulations thanks to its training materials and corporate policies, it was more or less inconceivable that representatives of the Supplier could have marketed the Fractional Club product as an investment to a prospective purchaser and, therefore, it was not marketed in that way to Mr and Mrs N.

The analysis in my provisional decision, which included training or marketing materials which had not been used in Mr and Mrs N's specific case but had nonetheless been produced by the Supplier or its agents, was intended to illustrate that the picture was not as straightforward as the Lender and Supplier had suggested. It illustrated that the Supplier, or its agents, had produced training or marketing materials which appeared to be non-compliant with Regulation 14(3) of the Timeshare Regulations. I did not say that the materials in question were positive evidence the product was sold to Mr and Mrs N in a non-compliant way, rather they were evidence that it was not *implausible* that the Supplier could sell the product in a non-compliant way.

My conclusion that the Supplier, on the balance of probabilities, did market the Fractional Club membership to Mr and Mrs N at the time of sale as an investment, was based primarily on their testimony and, secondarily, the lack of any holiday-related benefits to them of moving their points from the holiday club to the Fractional Club, which I thought meant it was more likely the Supplier would have focused on the other benefits – including the share in the net proceeds of the sale of the Allocated Property.

I accept a point made by the Supplier, which is that Mr and Mrs N have never specifically said that they thought they would make a *profit* on the sale of the Allocated Property, or that the Supplier had told them this. However, Mr and Mrs N did say the following, when describing what they were told by the Supplier (my emphasis in bold):

*"We would get **a return on our money** after 15 years. The property would be sold and we'd get our money back. It would be a **good investment as we would be buying property**."*

Later, in an email to PR in 2019 (described as a witness statement by the Lender), they said:

"The product was marketed to us as a way of continuing investing in the company, assuring a return on the sale of the fractional properties in 15 years time…"

I understand the point the Lender has made that to have some money returned is not the same as a "return on investment" (which implies a financial gain). I also agree with the Lender that a person being told that there would be some money returned at the end of the membership, would be unlikely by itself to breach Regulation 14(3), although I would add that how such a statement would be understood, will depend on what else was said. And it's true that some of Mr and Mrs N's language suggests they thought (and therefore were likely told) they would just get some money back. However, they also refer to being told they would get "a return **on** our money", which suggests an expectation of a financial gain, and of the Supplier referring to the purchase as a "good investment" because it was purchasing property, which I think carries with it the same implication.

I accept Mr and Mrs N's testimony is likely to be representative of what they were told by the Supplier. I do not share the concerns the Lender has with their testimony, for the reasons already explained in the appended provisional decision. I will add, however, that I don't think it's irrational to favour Mr and Mrs N's testimony of what happened at the Time of Sale over general evidence given by representatives of the Supplier about the product. And that's because while Mr and Mrs N may not be experts in the product, they *were* present at the Time of Sale.

Overall, it seems to me that the Supplier probably said or implied to Mr and Mrs N that the product was a *good investment* (which I think, in context, implies it was more likely to go up in value, thus resulting in a financial gain) and they could hope for or expect a return on their money. In my view this breached the prohibition on selling or marketing timeshares as investments.

Regarding the question of whether or not this was material to Mr and Mrs N's purchasing decision, I am not sure the Lender's point that it was the *overall* package of rights conferred by the Fractional Club membership which had a material impact on Mr and Mrs N's purchasing decision, assists its case. I explained in the provisional decision why the parts of the package other than the share in the net sale proceeds of the Allocated Property, either could not reasonably have stood alone as a material reason for Mr and Mrs N's purchasing decision, or were consistent with them being motivated by the prospect of a financial return. I don't agree with the Lender that not enough weight was given to the other potential reasons. These were all subjected to analysis in the provisional decision, and a process of elimination left the share in the net sale proceeds as the main benefit of the Fractional Club membership which Mr and Mrs N could not have acquired except by making their purchase. As I noted in the provisional decision, without this element of the package, the purchase made no financial sense for people in Mr and Mrs N's circumstances.

Finally, the Supplier has questioned why, if Mr and Mrs N thought that what they were buying was an investment, did they attempt to relinquish or terminate their Fractional Club membership in 2016? The implication is that Mr and Mrs N's behaviour is inconsistent with that of people who thought they had made an investment, and so it's unlikely this was why they bought the membership or that it was marketed to them in this way. But I think the Supplier has answered its own question in the rest of its submissions. It appears Mr and Mrs N were told by a third party that the Fractional Club product was illegal, and this prompted them to attempt to leave their membership. I understand Mr and Mrs N handed over significant sums of money to the third party which, unfortunately, it seems possible was perpetrating a scam which commonly targets timeshare owners.

In light of what I've said above, I remain of the view that the Supplier's sale of the Fractional Club product to Mr and Mrs N in February 2014 breached Regulation 14(3) of the Timeshare Regulations and that this had a material impact on their purchasing decision, rendering the credit relationship between them and the Lender under the linked credit agreement, unfair.

Fair compensation

Having found that Mr and Mrs N would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and Mr and Mrs N 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 purchased the Fractional Club membership and therefore not entered into the Credit Agreement, provided Mr and Mrs N agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

As noted in the appended provisional decision, Mr and Mrs N were existing holiday club members and a proportion of their holiday club points was traded in against the purchase price of Fractional Club membership. Under their holiday club membership, they previously had 30,000 points (of which 12,000 were then converted to Fractional Club points). And, like Fractional Club membership, they had to pay annual management charges as a holiday club member. So, had Mr and Mrs N not purchased Fractional Club membership, they would have always been responsible to pay an annual management charge of some sort on the 12,000 points they'd have left in the holiday club. With that being the case, any refund of the annual management charges paid by Mr and Mrs N from the Time of Sale as part of their Fractional Club membership should amount only to the difference between those charges and the annual management charges they would have paid had they left their 12,000 points in the holiday club.

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

(1) The Lender should refund Mr and Mrs N's repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one. The Lender should also reimburse Mr and Mrs N the amount of any payments they made towards the price on the Purchase Agreement via other means, such as by card, so long as evidence is provided for these payments.

(2) In addition to (1), the Lender should also refund the difference between Mr and Mrs N's Fractional Club annual management charges paid after the Time of Sale and what their holiday club annual management charges would have been had they not purchased Fractional Club membership.

(3) The Lender can deduct:

   i. The value of any promotional giveaways and Wish to Rent pay-outs that Mr and Mrs N used or took advantage of; and

   ii. The market value of the holidays* Mr and Mrs N took using their Fractional Points *if* the Points value of the holiday(s) taken amounted to more than the total number of holiday club points they would have been entitled to use at the time of the holiday(s) as ongoing holiday club members. However, this deduction should be proportionate and relate only to the additional Fractional Points that were required to take the holiday(s) in question.

   For example, if Mr and Mrs N took a holiday worth 2,550 Fractional Points and they would have been entitled to use a total of 2,500 holiday club points at the relevant time, any deduction for the market value of that holiday should relate only to the 50 additional Fractional Points that were required to take it. But if they

would have been entitled to use 2,600 holiday club points, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

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

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

(5) The Lender should remove any adverse information recorded on Mr and Mrs N's credit files in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr and Mrs N'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.

*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 N 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, subject to the directions regarding proportionality in section (3) ii.

**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 my appended provisional decision, I uphold Mr and Mrs N'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 and Mrs N to accept or reject my decision before **15 May 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 overall conclusions as our Investigator, but I have expanded on their reasoning. Because of this, I'm giving the parties to the complaint an opportunity to comment further in the interests of procedural fairness.

The deadline for both parties to provide any further comments or evidence for me to consider is **14 March 2025**. Unless the information changes my mind, my final decision is likely to be along the following lines.

If Shawbrook Bank Limited accepts my provisional decision, it should let me know.

The complaint

Mr and Mrs N'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

Mr and Mrs N were long-time customers of a timeshare provider (the 'Supplier') and various predecessor companies which were later acquired by or merged into it. While this complaint relates only to their final purchase from the Supplier in February 2014, I've set out briefly the history of their purchases below.

Mr and Mrs N made their first purchase in July 1999, in a points-based holiday club operated by the Supplier. They purchased 4,000 'points', which could be redeemed annually for holiday accommodation in the Supplier's portfolio.

Between August 2000 and July 2010 Mr and Mrs N made a further seven purchases from the Supplier, of holiday club points. After July 2010 they had a total of 30,000 points in the holiday club.

The purchase about which Mr and Mrs N complain, was a purchase of a different type of product from the Supplier. This was membership to a timeshare I'll call the 'Fractional Club', on 16 February 2014. On this date, Mr and Mrs N purchased 12,000 points in the Fractional Club, for a total price of £19,344. As part of the purchase, they traded in 12,000 of their holiday club points, for which they were given consideration of £12,000, meaning the final price payable was £7,344.

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

Mr and Mrs N part-paid for their Fractional Club membership by taking finance of £5,876 from the Lender in joint names (the 'Credit Agreement'). The remainder of the price was paid by Mr and Mrs N by other means. Under the terms of the loan Mr and Mrs N were expected to pay £94.76 per month for 60 months, and then variable repayments for a further 60 months, depending on the interest rate.

Mr and Mrs N – using a professional representative (the 'PR') – wrote to the Lender on 20 June 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. 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

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

1. told them that Fractional Club membership had a guaranteed end date when that was not true because the Allocated Property wasn't guaranteed to be sold at that time.
2. told them that they were acquiring some or all of the freehold in the Allocated Property, which wasn't true because they were only gaining an equitable interest.
3. told them that Fractional Club membership was an "investment" on which they'd receive a return, when that was not true because it was illegal for timeshares to be sold as investments.

Mr and Mrs N say 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 Mr and Mrs N.

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

The Letter of Complaint set out one main reason why Mr and Mrs N say that the credit relationship between them and the Lender was unfair to them under Section 140A of the CCA. This was that:

1. The contractual terms of their Fractional Club membership were opaque, difficult to understand and contained significant imbalances in the Supplier's favour, making them unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').

The Lender dealt with Mr and Mrs N's concerns as a complaint and issued its final response letter on 16 September 2019, rejecting it on every ground.

Mr and Mrs N then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, upheld the complaint on its merits.

The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr and Mrs N 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 N 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 could summarise the Lender's arguments against our Investigator's assessment as follows:

- The Supplier had not marketed or sold Fractional Club membership as an investment, and Mr and Mrs N had signed a disclaimer or declaration at the Time of Sale which stated the purchase was not an investment.

- Regardless of whether the Supplier had sold or marketed Fractional Club membership to Mr and Mrs N as an investment in breach of the Timeshare Regulations, it was unconvinced this had been material to their purchasing decision because:

    - The shorter term of Fractional Club membership compared to their existing Holiday Club membership, was a benefit to them.
    - The Supplier's 'Wish to Rent' scheme, which they'd made use of, had also been a benefit to them.

- Mr and Mrs N's testimony lacked credibility because:

    - They had made inaccurate statements, such as saying they hadn't used their points, when they had used them several times.
    - They had made two witness statements which said different things.

The legal and regulatory context

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

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

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

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

Good industry practice – the RDO Code

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

What I've provisionally decided – and why

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

- The terms of the Fractional Club membership contract were unfair.
- The Supplier falsely claimed they were buying part of the freehold of the Allocated Property.
- The Supplier falsely claimed the membership had a guaranteed end date.

And that's because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs N in the same or a better position than they would be if the redress was limited to what would be fair and appropriate in the event their other points of complaint were upheld.

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

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

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

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

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

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

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

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

“[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose

of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[2]

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

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

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

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

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

I have considered the entirety of the credit relationship between Mr and Mrs N 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 N and the Lender.

<u>The Supplier's breach of Regulation 14(3) of the Timeshare Regulations</u>

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

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

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

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

But Mr and Mrs N say that the Supplier did exactly that at the Time of Sale. They've supplied a detailed witness statement dating to 2017, in which they described having received a phone call from the Supplier inviting them for a weekend in Edinburgh in February 2014. During their stay they say the Supplier told them that with Fractional Membership they'd get a return on their money after 15 years, and that it was a freehold which meant they'd have something to sell, and was a good investment because it was buying property.

Mr and Mrs N allege, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because:

(1) They were told by the Supplier that they would get their money back or more during the sale of Fractional Club membership.
(2) They were told by the Supplier that Fractional Club membership was a good investment because it was buying 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.

Mr and Mrs N'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 N 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 N, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs N as an investment. The Lender has highlighted these parts of the paperwork.

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And there are a number of strands to Mr and Mrs N allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that membership of the Fractional Club was expressly described as an *"investment*", and not only in the sense of an investment in holidays, and (2) that membership of the Fractional Club would at least retain its value.

So, I have considered:

(1) whether it is more likely than not that the Supplier, at the Time of Sale, sold or marketed membership of the Fractional Club as an investment, i.e. told Mr and Mrs N 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

I've seen a variety of internal materials produced by the Supplier and dating to around the time it began selling Fractional Club membership. I think, in general, these materials indicate that the Supplier was concerned at a senior leadership level to avoid breaching Regulation 14(3). I've seen copies of Sales Policies, for example, which warned staff that promoting the Fractional Club product as an investment, or discussing resale values with potential purchasers, was considered unacceptable. I've also seen evidence that the Supplier did not consider promoting the residual value of the Allocated Property to be a part of its sales strategy. The documents I've seen indicate that the Supplier's management considered the strategy should be to market the product as something that could be used to go on holiday, but with a shorter term than other types of membership it offered.

On the other hand, it's apparent from the materials I've considered that the Supplier was aware that the sale of the fractional asset at the end of the term was a benefit to a potential purchaser. For instance, I've seen presentation slides dating to September 2012 which, in my view, implied that the Supplier's brand and other positive attributes would contribute to enhancing the value of the fractional asset at the end of the membership term. I am aware the Supplier now denies that these slides were ever used to promote the Fractional Club to potential customers[3], but based on the communications the Financial Ombudsman Service received from the Supplier at the time these slides first came to light, it's apparent that there were members of staff at the Supplier who had different recollections of how the slides were used.

[3] The Supplier has not, to my knowledge, denied the slides were ever used to *train* staff, only that they were shown to potential customers.

Additionally, I'm aware of other materials the Supplier or its agents or representatives are alleged to have used to promote the Fractional Club product, and which appeared explicitly to refer to it as an investment. A copy of such a document was submitted by PR in this case, but my understanding, after further investigation, is that PR's position is that this document was relevant to litigation involving other complainants and was *not* used in the sale of the Fractional Club product to Mr and Mrs N. It was supplied as an example of how the Supplier had sold Fractional Club membership. Given Mr and Mrs N have not referred to having seen such a document, I am satisfied that it was not used at the Time of Sale. I note that the Supplier has previously commented on this document and said it was *"…not produced by [us] as an official collateral document to be used in sales presentations",* but acknowledged it was *"…possible that a sales representative or sales agency team member created this document to assist in explaining how the Fractional timeshare worked".* The Supplier emphasised that any such document would have been very limited in the way it was used and, as I've already said, I conclude it was not used to promote the Fractional Club product to Mr and Mrs N.

Of course, I can't be certain of what was shown to Mr and Mrs N, or what specifically any sales representatives may have said to them, any more than the Supplier or the Lender can. But I think the analysis above highlights that there was the *potential* for the Fractional Club product to be sold in a way which did not accord with the Supplier's official policy. And I don't think the Supplier would have needed to have deviated very far from a simple description of how the Fractional Club product worked in terms of the sale of the fractional asset at the end of the term, to have fallen foul of Regulation 14(3). When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that *'[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).'"*[4] And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.

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

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

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

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

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[4] 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."*

Looking at the relevant circumstances at the Time of Sale, I think it's difficult to see how the Supplier could have marketed the membership to Mr and Mrs N on the basis of its holiday-related benefits. Mr and Mrs N already had 30,000 points in the Supplier's existing holiday club, which they could exchange for holiday accommodation. Fractional Club membership offered them nothing more, in terms of holidays, than they already had access to.[5] They were simply making a "like-for-like" exchange of their points and paying £7,344. It seems likely to me, given this set of facts, that the Supplier would have focused on other benefits of Mr and Mrs N converting their points to Fractional Club membership.

And indeed, that is what comes across in Mr and Mrs N's testimony. They say the selling points for them on the day were:

- Being able to get out of their relationship with the Supplier earlier (Fractional Club membership ended in 2028, whereas their existing membership ended in 2054)
- Getting their money back when the Allocated Property was sold because Fractional Club membership was a good investment.

I'm aware the Lender has concerns about Mr and Mrs N's testimony. The Lender has pointed to what it has described as another witness statement dating to 2019 which it considers to be materially different and calls into question the credibility of Mr and Mrs N's testimony. After requesting a copy of this other statement from the Lender, I've had an opportunity to read it. So far as it's relevant to Mr and Mrs N's allegations that the Supplier sold or marketed the membership as an investment, it says:

"*We were told that this event was to inform us of new company developments. We were presented with an investment opportunity as we understood it, the Fractional Points. … Since we had been members of the company for a good number of years we had ample points for our family holiday needs already.*

…

This product was marketed to us as a way of continuing investing in the company, assuring a return on the sale of the fractional properties in 15 years' time and at the same time assuring and adding to the flexibility and continuing benefits of our membership over the coming years."

I see no contradiction between what Mr and Mrs N say here, and what they said in their 2017 statement. Indeed, the statements appear to be consistent with one another. So I don't find the Lender's arguments on this point very convincing. I certainly see no reason to doubt

[5] I acknowledge there was a "Wish to Rent" scheme which appears to have been an additional feature of Fractional Club membership, and which Mr and Mrs N used in one year. This involved depositing points in a rental scheme – and £199 would be paid if the points were rented to other customers, plus a commission based on the number of points sold to those other customers.

the credibility of either of the statements based on the contents of the other. In both statements I think Mr and Mrs N are quite clear about the Supplier having marketed the Fractional Club membership to them as an investment. That's been a consistent thread of their testimony from 2017 to date.

The Lender also says that Mr and Mrs N's recollections contain inaccuracies. In particular, they say that Mr and Mrs N claimed that they had never used their Fractional points, but this wasn't true because the points were used for holidays in 2014, 2015, 2016 and 2019.

Mr and Mrs N have said two different things about their use of the Fractional points. In their 2017 statement, they refer to *"…not using our Points fully at this time"* in the context of depositing their Fractional points into the Supplier's "Wish to Rent" scheme in 2015. In their 2019 statement they refer to having *"…had absolutely no usage of our Fractional Points whatsoever!"*

These do appear to be materially different statements, however I think it's worth restating that as well as having 12,000 Fractional points, Mr and Mrs N retained 18,000 points in the Supplier's holiday club. Based on the Purchase Agreement, the Supplier equated 6,000 points to a week's holiday accommodation in the Allocated Property. So after converting 12,000 of their points to the Fractional Club, they had three weeks in the holiday club and two weeks in the Fractional Club.[6] Based on the reservation history shared by the Supplier, Mr and Mrs N never booked more than three weeks of accommodation per year using their points[7], after the Time of Sale. In light of this, it's not implausible that Mr and Mrs N may have used their Fractional points very little, or even not at all. But even if that's not quite right, I'm not convinced this type of inaccuracy calls into question the overall credibility of Mr and Mrs N's recollections.

Taking everything I've said above into account, I think it's more likely than not that the Supplier strayed from describing how the sale of the Allocated Property worked, and either stated or implied that Mr and Mrs N would at least get their money back when the Allocated Property was sold. In doing so, it breached Regulation 14(3) of the Timeshare Regulations.

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

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

[6] I appreciate this is an approximation as the Supplier would have attributed different points values to different properties and different times of year.
[7] As opposed to, for example, promotional or marketing holidays offered by the Supplier, which did not use points.

debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"

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

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

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

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs N and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

I've already outlined above how Mr and Mrs N were unlikely to have seen any holiday-related benefit to converting their points to the Fractional Club, given they were not getting any additional holiday rights in exchange for the £7,344 they'd agreed to pay, compared to what they already had in the Supplier's holiday club.

This leaves the two selling points which Mr and Mrs N have referred to their testimony: the shorter term of 15 years compared to their existing holiday club membership, and the prospect of getting their money back when the Allocated Property was sold. While not something Mr and Mrs N have specifically referred to as being a reason for their purchase, the "Wish to Rent" scheme was a potential motivating factor which I'll also cover below.

I note Mr and Mrs N say they were made aware by the Supplier at the Time of Sale that they could, when one of them reached the age of 75, surrender their points in the holiday club. For Mr and Mrs N, that would have been in 2022. The Fractional Club was due to come to an end in 2028. So if Mr and Mrs N had simply wanted a shorter membership, there would have been little sense in their paying £7,344 to convert some of their points to the Fractional Club which would have ended six years *after* they could have exited their membership as a whole at no cost.

Given such a decision would not have made financial sense in light of Mr and Mrs N's situation, I think the circumstantial evidence indicates strongly that there must have been another material reason why Mr and Mrs N went ahead. I think the most plausible reason, given the circumstances, the fact that the share in the Allocated Property was a key feature of the fractional product, and what Mr and Mrs N have said, is that they were motivated to convert their points to the Fractional Club because they hoped or expected they would make a financial return, due to the Supplier having marketed the product in a way which stated or implied this was a good reason to buy it. While I think Mr and Mrs N had some interest in the Wish to Rent scheme, as evidenced by them using it in one year, I don't think such an interest was incompatible with them making their purchase with investment in mind. Indeed, given the fact a member had to choose not to use their points for holidays in any given year they wanted to use the scheme, in exchange for a speculative return, I would say interest in

the scheme is consistent with someone having made the purchase for investment-related reasons.

And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision Mr and Mrs N ultimately made, and their credit relationship with the Lender was rendered unfair as a result.

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

As already noted, Mr and Mrs N were existing holiday club members and a proportion of their holiday club points was traded in against the purchase price of Fractional Club membership. Under their holiday club membership, they previously had 30,000 points (of which 12,000 were then converted to Fractional Club points). And, like Fractional Club membership, they had to pay annual management charges as a holiday club member. So, had Mr and Mrs N not purchased Fractional Club membership, they would have always been responsible to pay an annual management charge of some sort on the 12,000 points they'd have left in the holiday club. With that being the case, any refund of the annual management charges paid by Mr and Mrs N from the Time of Sale as part of their Fractional Club membership should amount only to the difference between those charges and the annual management charges they would have paid had they left their 12,000 points in the holiday club.

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

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

(8) In addition to (1), the Lender should also refund the difference between Mr and Mrs N's Fractional Club annual management charges paid after the Time of Sale and what their holiday club annual management charges would have been had they not purchased Fractional Club membership.

(9) The Lender can deduct:

iii. The value of any promotional giveaways and Wish to Rent pay-outs that Mr and Mrs N used or took advantage of; and

iv. The market value of the holidays* Mr and Mrs N took using their Fractional Points *if* the Points value of the holiday(s) taken amounted to more than the total number of holiday club points they would have been entitled to use at the time of the holiday(s) as ongoing holiday club members. However, this deduction should be proportionate and relate only to the additional Fractional Points that were required to take the holiday(s) in question.

For example, if Mr and Mrs N took a holiday worth 2,550 Fractional Points and they would have been entitled to use a total of 2,500 holiday club points at the relevant time, any deduction for the market value of that holiday should relate only to the 50 additional Fractional Points that were required to take it. But if they would have been entitled to use 2,600 holiday club points, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

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

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

(11) The Lender should remove any adverse information recorded on Mr and Mrs N's credit files in connection with the Credit Agreement reported within six years of this decision.

(12) If Mr and Mrs N'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.

*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 N 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.

**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 N's complaint. I now invite all parties to the complaint to let me have any further submissions they'd like me to consider, by **14 March 2025**. I will then review the case again.

Will Culley
Ombudsman