DRN-5529422

The complaint

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

Background to the complaint

Mr and Mrs P purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 14 October 2015 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy Fractional Club membership, which included a one-week fraction of a holiday apartment (the 'Allocated Property') at a cost of €16,883 (the 'Purchase Agreement').

Fractional Club membership gave Mr and Mrs P the right to use the Allocated Property in the allocated week each year from 2017 until their membership term ends in 2030. But it was asset backed – which meant it also gave Mr and Mrs P a share in the net sale proceeds of the Allocated Property after their membership term ends.

Mr and Mrs P paid for their Fractional Club membership by taking finance of £13,000 from the Lender in both their names (the 'Credit Agreement').

Mr and Mrs P – using a professional representative (the 'PR') – wrote to the Lender on 2 March 2020 (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.

(3) The credit agreement being unenforceable.

(4) Irresponsible lending.

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

Mr and Mrs P 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 was not a timeshare when that was not true.

2. Told them that they could recover money they had paid for Fractional Club membership by selling it on the open market at any time or when the Allocated Property is sold at the end of the membership term when that was not true.

3. Told them that he Allocated Property was guaranteed to be sold on the Sale Date (31 December 2030) specified in the Purchase Agreement when that was not true.

4. Told them that Fractional Club membership was more valuable than their existing timeshare ('Timeshare D') with another timeshare provider ('Provider D'), and that Timeshare D would be traded in and terminated by the Supplier when that was not true.

5. Told them that Fractional Club membership would give them benefits including:

    a. accommodation exclusive to members,

    b. good availability at worldwide destinations at peak times of the year,

    c. maintenance fees would not increase above inflation,

    d. they would secure future holidays at today's prices avoiding inflationary increases,

    when none of that was true.

Mr and Mrs P 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 Mr and Mrs P.

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

The Letter of Complaint set out several reasons why Mr and Mrs P 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 Fractional Club Rules allow the Supplier to cancel the contract due to non-payment of maintenance fees without compensating Mr and Mrs P.

2. The Supplier controls the sale of the Allocated Property at the end of the membership term and can postpone the sale at its absolute discretion.

3. There is no transparency about how much will be charged in maintenance fees or how maintenance fees will be calculated, with no provision for independent auditing of this.

4. Misrepresentations as stated in the section above.

5. The Lender paid commission to the Supplier but did not tell Mr and Mrs P about this or obtain her informed consent.

6. The Supplier acted as a credit broker/intermediary but was not authorised to do so by the Financial Conduct Authority at the Time of Sale, so there was a breach of Section 19 of the Financial Services and Markets Act 2000 ('FSMA') and the Credit Agreement is therefore unenforceable under Section 26.

Because the Lender didn't provide its final response within eight weeks, Mr and Mrs P then referred the complaint to the Financial Ombudsman Service.

The Lender dealt with Mr and Mrs P's concerns as a complaint and issued its final response letter on 19 January 2021, rejecting it on every ground.

Our investigator's assessment of the complaint

The complaint was assessed by one of our Investigators 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 P 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 P 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.

My provisional decision and responses

I issued a provisional decision explaining that I was upholding the complaint and explaining my reasons for this. A copy of my provisional findings is included below and this forms part of my final decision.

The PR responded on behalf of Mr and Mrs P to say that they were happy with the provisional decision and had no comments to make.

The Lender responded to say that it disagreed with my provisional decision and provided its reasons for this at some length. I summarise what I think are the important points below.

Overall, the Lender said that there is no clear and compelling evidence that Fractional Club membership was sold to Mr and Mrs P with the intention of financial gain at all or, alternatively, not in a manner that was of importance as against their motivation for purchasing a product for holiday related benefits. The Lender expanded on this, including by making the following points:

1. I erred in my approach to the prohibition under Regulation 14(3) of the Timeshare Regulations, undermining my approach to Mr and Mrs P's witness testimony.

    a. A customer will be told that they will receive a return on the sale of the Allocated Property since this is a feature of Fractional Club membership. This does not breach Regulation 14 (3). Not telling a customer about this feature of the product would likely breach other parts of the Timeshare Regulations regarding the provision of information.

    b. There is nothing inherent in Fractional Club membership that contravenes the prohibition in Regulation 14(3).

    c. My provisional decision is inconsistent with the stated definition of *"investment"*, conflating the meaning of a *"return on investment"* (a measure of profit) with *"some money will be returned"* (no connotation of investment or profit).

    d. The Lender does not accept that Fractional Club membership was described or sold as an investment in this case, bearing in mind:

i. The sales documents including the Declaration or Treating Customers Fairly Sales Practice which should be preferred over Mr and Mrs P's recollections many years later, and do not mention the word investment or profit other than in the declaration cited noted below.

ii. The declaration that states Mr and Mrs P *"have not entered into this purchase purely for a wider Investment opportunity or financial gain"* is clearly intended to ensure compliance with Regulation 14(3) of the Timeshare Regulations and obtain clear confirmation from customers that their fractional purchases are not motivated by investment or financial gain.

- A reasonable person would have questioned this declaration if they were purchasing Fractional Club membership as an investment and Mr and Mrs P did not do so.

- The Lender referenced another ombudsman's decision where it said the ombudsman to a wholly different approach to the declaration – recognising it as evidence Fractional Club membership was not sold as an investment.

iii. The Purchase Agreement included a condition which refers to *"net sales proceed (if any) of the Allocated Property"*, which is very different from guaranteed profit and supports that Fractional Club membership was not sold as an investment.

iv. The witness testimony does not include any detail about the potential return and is brief and vague on how the product was allegedly sold as an investment. The Lender suggests that a person investing would want to know what their likely return would be.

e. Selling as an investment requires both the finding of a representation by the seller that the reason, or significant motivating reason, for a customer to purchase the product was the prospect of an overall financial gain/profit, together with a corresponding financial gain/profit motive on the part of the customer. Referring to the motive on the part of the customer alone does not satisfy that test.

2. The provisional decision is premised on a material error of law in its approach to the legal test to determine the existence of an unfair relationship.

    a. The Lender says that I cited the appropriate test set out in relevant case law – that is, did the Supplier marketing or selling Fractional Club membership to Mr and Mrs P as an investment have a material impact on the debtor when deciding whether or not to enter the agreement? But that I actually applied a different test, reversing the burden of proof.

3. The witness testimony and Letter of Complaint contain factual inaccuracies, and the Lender says I haven't taken all of these into consideration. Instead, I have placed more weight on Mr and Mrs P's recollections than on the contemporaneous evidence which contradicts what they have said.

    a. The Lender would've expected further clarity and consistency in the witness statement given when it was written. But it lacks detail and is generic on a number of points such as:

i. The reference to investment is vague and extremely brief. The Lender says that if something was sold as an investment the customer would be told about the potential return or profit and/or how they go about realising that.

ii. The testimony is vague as to how the Supplier presented the product as an investment.

iii. Why did Mr and Mrs P not make contact with the Supplier regarding realising the investment?

iv. Mr and Mrs P say they were told they would receive some rent if they didn't use the Allocated Property, but this incorrect as the Supplier does not operate a rental programme.

v. The witness statement is contradictory in that in one place it says Mr and Mrs P *"were left alone and eventually agreed to go ahead",* and that they signed the paperwork the next day, but later says that they *"were not given an opportunity to read [the sales documents] before we signed the contracts"*.

vi. The Letter of Complaint says that Mr and Mrs P were approaching retirement, but at the Time of Sale Mrs P was already retired.

vii. The witness statement refers to medical issues, but an email with the Supplier on 28 March 2016 suggested any medical issues did not impact their decision making. The Lender suggests that this was included in the witness statement to impress that the purchase was not suitable.

b. The Lender says that I should not on the one hand suggest Mr and Mrs P's recollections are true and on the other disregard factual inaccuracies.

4. The witness testimony and Letter of Complaint make clear that Mr and Mrs P's motivation for the purchase was as follows, which correlates with their experience as timeshare owners since 1997:

a. Taking 4-5 star holidays with their family. A factor mentioned in a number of other complaint letters from the PR for different customers.

b. They wanted worldwide holidays.

c. They were unhappy with their existing timeshare with a different provider (particularly around availability).

d. They enjoyed holidaying as a couple and occasionally as a family.

e. They didn't want something long-term due to their age.

5. With regards to the Supplier's sales process, the Lender said:

a. The Supplier's sales process was a meeting or conversation between the Supplier and prospective customers.

b. There was no presentation given to customers or sales training materials given to salespeople.

c. The sales documentation including the disclaimer and Standard Information Form set out the features of the product and how it was presented.

6. The Supplier was not a member of the Resort Development Organisation ('RDO'). The RDO Code of Conduct dated 1 January 2010 (the 'RDO Code') does not apply to non-members. So, it would be incorrect for me to hold the Supplier to the RDO Code.

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, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
- The Consumer Rights Act 2015 ('CRA').
- The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations').
- Case law on Section 140A of the CCA – including, in particular:
    - The Supreme Court's judgement 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 judgement 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 RDO Code.

In this case, the Supplier was not a member of the RDO. However, I still think the RDO Code is a relevant consideration in setting out what good industry practice looked like at the Time of Sale.

What I've decided – and why

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

Having done that, including considering the responses to my provisional decision. I have decided 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 P 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 several aspects to Mr and Mrs P's complaint, it isn't necessary to make formal findings on all of them. This includes allegations relating to misrepresentations by the Supplier, the credit agreement being unenforceable, and irresponsible lending. This is because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs P in the same or a better position than they would be if those aspects of the 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.

I issued a provisional decision on 3 April 2025. A copy of my provisional findings from that is below and forms part of my final decision.

START OF COPY OF MY PROVISIONAL FINDINGS

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 P 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 P'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 Mr and Mrs P 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.

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.

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

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 P and the Lender.

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

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

I note that the Supplier's director, when commenting on this complaint, said of Mr and Mrs P that *"They do not own timeshare it is a Fractional Apartment that will be sold in 2030 and they own 1/51 of apartment 504."* But I think the Supplier's director is mistaken. At Regulation 7, the Timeshare Regulations define a timeshare contract as follows:

> *"(1) A "timeshare contract" means a contract between a trader and a consumer—*
>
> > *(a) under which the consumer, for consideration, acquires the right to use overnight accommodation for more than one period of occupation, and*
> >
> > *(b) which has a duration of more than one year, or contains provision allowing for the contract to be renewed or extended so that it has a duration of more than one year.*
>
> *(2) The reference to "accommodation" in paragraph (1) includes a reference to accommodation within a pool of accommodation."*

In this case Mr and Mrs P paid €16,883 to acquire the right to use the Allocated Property during the same week each year from 2017 until 2030. So, this was overnight accommodation for more than one period, and the contract was for more than one year. In my opinion the Fractional Club membership they purchased was clearly a timeshare contract.

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 P say that the Supplier did exactly that at the Time of Sale – saying the following during the course of this complaint:

- In their witness statement, when describing what was said by the sales representative, Mr and Mrs P said:
    - *"[The Supplier's representative] emphasised that [Fractional Club membership] would be an excellent investment as the… resort was in a prime position on the sea front and with the hotel good facilities and in good position within the hotel."*
    - *"… in 15 years [the Allocated Property] would be sold for us by the company and like all bricks and mortar would be a good investment for the future."*

- *"He went on to say that the problem with other fractional properties is there [sic] location and no end selling date which the location of the apartments being sea front and only 15 years was all pointing to a secure investment, a no brainer in his words."*

- *"He told us we would be in a position to keep the investment or sell our interest."*

- And, when going on to describe what happened the day after the presentation when they decided to purchase membership, Mr and Mrs P said:

    - *"The next day we went to sign the necessary paperwork with [another sales representative]…she said it was a good investment …"*

    - *"We just thought it was a good investment if a major UK Bank was going to lend money against it."*

Mr and Mrs P allege, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because it explicitly described Fractional Club membership as an *"excellent investment"*.

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 P'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 P 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.

Mr and Mrs P say that the Supplier explicitly described Fractional Club membership as an *"excellent investment*" and *"good investment"*. If I am satisfied that, on balance, the Supplier did this, then that is a clear breach of Regulation 14(3) of the Timeshare Regulations. On the other hand, there is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment'.

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

and arguments to determine the following questions:

(1) Is it 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 P 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) Did 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 questions is 'yes'.

How the Supplier marketed and sold Fractional Club membership

In this case there is limited information about what processes the Supplier had in place for marketing and selling Fractional Club membership at the Time of Sale, or how it trained its salespeople.

The Lender has provided the comments of the Supplier in relation to this complaint. In relation to the allegation that Fractional Club membership was sold as an investment, the Supplier has said:

- *"The apartments were not sold as an investment but they are sold in 2030 which in the case of these clients would have been approx 15 years time. Once sold the clients receive their share less a small fee for the Trustees".*

So, the Supplier denies that Fractional Club membership was sold as an investment. However, it has not been able to provide any evidence of how it normally sold memberships like Mr and Mrs P's to its customers, so in deciding what most likely happened, the only evidence I have is from Mr and Mrs P directly, as well as the documents from the Time of Sale.

I start by noting that Mr and Mrs P's statement was dated 10 April 2018, so around two and a half years after the Time of Sale. Although Mr and Mrs P's PR didn't make a complaint to the Lender until March 2020, it did make a complaint to the Supplier before then in September 2019. So, I think it likely this statement was taken in April 2018, when the PR was first approached. Given that, I would expect Mr and Mrs P's memories to have been relatively fresh at that time. Although the statement is, in my view, a plausible account of what happened, the Supplier and Lender have raised several questions about its veracity that I will now consider.

The Supplier points out that Mr and Mrs P are mistaken in saying they paid £16,883 for Fractional Club membership, using their credit card to pay the difference between that amount and the £13,000 they borrowed via the Credit Agreement. This appears to be an error on the part of Mr and Mrs P and the PR, due to the Purchase Agreement showing the price in Euros (€) rather than Pounds (£). So, although I don't think Mr and Mrs P used a credit card in the way they said they did in the purchase, I think that is likely to be a mistake based on them thinking the membership cost more than they borrowed.

The Supplier's director says she cannot comment about some aspects of Mr and Mrs P's witness statement where they describe what they were told, because she wasn't part of the conversation with them. But she also confirmed that Mr and Mrs P accurately described some aspects of the sales process, such as being given a tour of the hotel and show apartment.

As noted above, the Supplier has not provided any information on the training and/or guidance provided to its salespeople about how they were expected to sell Fractional Club membership. That being the case, it is not clear to me what the Supplier's expectations were of its salespeople and what if any steps were taken to ensure that the Timeshare Regulations were adhered to during the sale. As the judge noted in *Shawbrook & BPF v FOS*, there are real challenges in marketing fractional timeshares in a way that is consistent with Regulation 14(3) (see para 77 and 78), due to the investment elements. So, although I do accept it was possible for the Lender to have presented Fractional Club membership to Mr and Mrs P without breaching the prohibition, I am unaware of how its sales staff would have presented the membership orally and the only evidence of what happened during that part of the sale is from Mr and Mrs P.

I'm also mindful that the Supplier has suggested that what Mr and Mrs P purchased was not a timeshare. To me that implies that there is a risk that the Supplier may not have taken the relevant prohibition in the Timeshare Regulations into consideration when selling Fractional Club membership, since if in the Supplier's view it was not selling a timeshare then, the Timeshare Regulations may not have been a relevant consideration in how they sold it.

On the face of it, the Supplier's salespeople would've been free to sell Fractional Club membership as they saw fit. There is insufficient evidence to lead me to conclude that the Supplier's salespeople were aware of and mindful of the Timeshare Regulations and the prohibition of selling or marketing Fractional Club membership as an investment at the Time of Sale. So, it appears that there was a real risk of them breaching Regulation 14(3), especially when the product they were selling had an investment element within it.

I have also considered other documents from the Time of Sale to see if this gives any further indications about how the Supplier may have approached the sale.

The Fractional Club Rules included the following on page 14:

- *10.7 The Club has been established to provide holidays to Owners and not as an investment product. Any clause or sub-clause of these Rules shall be null and void in respect of any particular Purchase Agreement if the application of that clause or sub-clause would bring any party to this Club Documentation or the Purchase Agreement itself within the scope of any legislation relating to investment in the country in which that Agreement was entered into…"*

I think this points to the Supplier seeing Fractional Club membership as being primarily for holidays and not as an investment.

At the Time of Sale, Mr and Mrs P signed a form entitled, Declaration of Treating Customers Fairly Sales Practice. This included the following declarations:

> *"2. I/We understand that this is a holiday based purchase and I/We believe that meets our future holiday needs that I/We will be able to use and enjoy.*
>
> *3. My/Our representative Richard and his Manager Reuben has fully explained how this membership product will benefit us in the future.*
>
> *…*
>
> *5. I/[We] have not entered into this purchase purely for a wider investment opportunity or financial gain."*

It appears that Mr and Mrs P engaged with this form beyond simply signing it, as they wrote on it, *"Richard was friendly & informative"* under the question, *"How did you enjoy your presentation and how would you describe the way that you were looked after and treated."* So, I think it is likely that they read and agreed with the declarations on it.

Given this, I am satisfied that at the Time of Sale Mr and Mrs P intended to use the holiday rights attached to their Fractional Club membership. The Supplier has provided emails from Mr and Mrs P from after the sale where they arranged to change the Allocated Property so they could get a particular week, and which explicitly confirms their intention to use the Allocated Property in 2017. So, I'm satisfied that Mr and Mrs P intended to us the holiday rights and did not, as point 5 says above, purchase Fractional Club membership purely (or only) as an investment.

However, Mr and Mrs P agreeing to this declaration does not preclude them from having an investment motivation when entering into the purchase. Nor does it confirm that the Supplier did not sell or market Fractional Club membership as an investment. In fact, I think disclaimer 5 specifically leaves open the possibility that Fractional Club membership was described to Mr and Mrs P as an investment (in line with their recollections).

I think the declarations as a whole point to the Supplier looking to ensure that customers should purchase Fractional Club membership so they could use the accommodation rights and not purchase it purely as an investment. However, the disclaimers do not go so far, in my view, as to explicitly state that Mr and Mrs P ought not to have taken Fractional Club membership as an investment. That was something that could have been put simply and clearly, but it was not. Instead, the disclaimers were somewhat equivocal, on one hand trying to minimise any impression that Fractional Club membership was an investment, but on the other leaving open the door for such an interpretation to be taken.

It is also relevant that these disclaimers were contained in the paperwork that was presented to be signed by Mr and Mrs P *after* they had already agreed to take out Fractional Club membership. So even if they did attempt to minimise any impression that membership was an investment, that was done after the oral part of the sale – the part in which Mr and Mrs P's evidence is that the sales staff explicitly told them it was an investment.

Overall, I find Mr and Mrs P's recollections of what happened at the Time of Sale to be plausible and persuasive. They accurately recall significant details about the sale, including some aspects of the sales process as confirmed by the Supplier and the names of two of the three people they dealt with at that time. There are some minor inaccuracies, such as getting the name of the salesperson wrong, but that is not unusual when recalling memories of things that happened a long time ago. And this is not sufficient to undermine the rest of what they remember.

As such, I find it likely that the Supplier breached Regulation 14(3) when selling Fractional Club membership to them. I think the Supplier breached Regulation 14(3) during the sales presentation and before Mr and Mrs P signed the sales documentation. And, for the reasons set out above, I do not think that the disclaimers I have pointed to went sufficiently far to lesson or undo the impression created that membership was an investment.

<u>Was the credit relationship between the Lender and the Consumer rendered unfair?</u>

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 P and the Lender under the Credit Agreement and related Purchase Agreement.

As the Supreme Court's judgment in *Plevin* makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in *Carney* and *Kerrigan* (respectively) on causation.

In *Carney*, HHJ Waksman QC said the following in paragraph 51:

> *"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"*

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

> *"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court **may** make an order **if** it determines that the relationship is unfair to the debtor. […]*
>
> *[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"*

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs P and the Lender that was unfair to them and warranted relief as a result, it is important to consider whether the Supplier's breach of Regulation 14(3)[2] led them to enter into the Purchase Agreement and the Credit Agreement.

Mr and Mrs P were clearly interested in taking holidays. They already owned timeshare points through two other providers, which they relinquished to the Supplier at the Time of Sale. The Supplier then arranged for those points (and associated timeshare club memberships) to be surrendered. So, it seems they were interested in taking holidays, but no longer wanted to do so with those other timeshare providers, which had long membership terms. So, the shorter membership term of the Fractional Club may have been of interest to them as well.

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[2] Which, having taken place during its antecedent negotiations with Mr and Mrs P is covered by Section 56 of the CCA and so 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.

Having said that it seems that Mr and Mrs P paid a significant sum to the Supplier in exchange for the right to use the Allocated Property in one specified week each year. In terms of holiday rights, that would give them less flexibility than they had with their existing timeshares, and potentially less time on holiday (their existing timeshares giving them significant flexibility in terms of when, where and how long they could be on holiday for). So, in terms of holiday rights, it seems that by entering into the Purchase Agreement Mr and Mrs P were not clearly getting more than they already had.

One of the advantages Mr and Mrs P highlight in their witness statement as being discussed was that they would get money back at the end of the 15 years when the Allocated Property was sold. This was compared to their existing timeshares, which they would still be paying for after 15 years – with no prospect of receiving any money back. It seems clear that this was an attractive prospect for them.

Mr and Mrs P also say in the witness statement that having taken some time to think about the purchase they decided to agree to it for two reasons:

> "*it would get us out of [the existing timeshare] which had no end date and no real end value, and this seemed a good investment for a relatively short time which fitted into our plans. We were really taken in and relied on what the sales representatives told us.*"

It is clear to me that Mr and Mrs P were strongly motived by the investment element of Fractional Club membership when deciding to buy it. And, although it's also the case that they bought it to get out of their existing membership, one of the reasons they gave for that was that the earlier membership had "*no real end value*", i.e. it did not provide the monetary returns that Fractional Club membership gave. This is further supported by written notes Mr and Mrs P provided, which they took at the Time of Sale. These notes appear to be Mr and Mrs P's own, and I do not find that they were prepared by the Supplier. However, what is clear is that they are focused on the financial implications of the purchase, rather than any holidays or other benefits that Fractional Club membership gave them. On balance, I think the investment element of Fractional Club membership was the main reason behind their purchase.

Given the evidence in this case, I do not think that Mr and Mrs P would've entered into the Purchase Agreement if it was not for the Supplier marketing and selling Fractional Club membership to them as an investment in breach of Regulation 14(3) of the Timeshare Regulations. If it was not for the investment side of Fractional Club membership, I think it is likely they would've refused to enter into the Purchase Agreement, given that their existing timeshares already offered them holiday rights.

That being the case and bearing in mind the financial commitment they undertook in order to enter into the Purchase Agreement, which they otherwise would not have entered into, I think this created an unfair credit relationship between them and the Lender.

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 P 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.

END OF COPY OF MY PROVISIONAL FINDINGS

My comments on the Lender's response to my provisional decision

I have considered the Lender's response to my provisional decision, which I discuss below. But having done so, I have decided not to depart from my provisional findings. And my final decision is that I uphold this complaint.

My approach to reaching my provisional decision

I explained in my provisional decision that *"the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold."* I did not provisionally decide to uphold the complaint simply because Fractional Club membership was asset backed and could potentially lead to Mr and Mrs P making a profit when receiving their share of the net sale proceeds of the Allocated Property.

I do not think I have conflated the meaning of a *"return on investment"* and *"some money being returned"*. I set out the definition of investment I was using in my provisional decision – *"a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit"* – and I had this in mind throughout my provisional decision (as I do now).

If I was satisfied that the Supplier had gone no further than describing the features of Fractional Club membership, I would not uphold this complaint. But I think that the Supplier went further than telling Mr and Mrs P they would receive their share of the net sale proceeds of the Allocated Property at the end of the membership term. Instead, on the balance of probabilities, I'm satisfied that the Supplier explicitly described Fractional Club membership as an "investment" (which itself implies the potential for a profit) in breach of Regulation 14(3) of the Timeshare Regulations.
I reached this conclusion based on what I consider to be fair and reasonable in all the circumstances of this complaint, as set out in my provisional decision.

The sales process and my analysis of it

The Lender says there were no sales training materials given to the Supplier's salespeople nor any presentation given to customers, just a conversation had with prospective customers alongside the sales documents. And that the content of those sales documents indicates what would've been discussed, which should be given more evidential weight than Mr and Mrs P's recollections of the sale made some time later.

In making my provisional decision I considered those sales documents alongside all the other evidence and explained my reasons for upholding the complaint. I appreciate that the Lender disagrees with my analysis and conclusions, but I am not persuaded by its comments to change my decision.

I remain of the opinion that Declaration 5 of the Declaration of Treating Customers Farly Sales Practice does not confirm that Mr and Mrs P did not enter the purchase as an investment or while being motivated by the hope or expectation of a profit. It says that Mr and Mrs P have not entered the purchase *"purely for a wider investment opportunity or financial gain"*. It seems clear to me that Mr and Mrs P would have no reason to challenge this, since it appears they entered the purchase for multiple reasons:

1. To be able to holiday in the Allocated Property in the specified week.

2. As an investment (in the hope or expectation of making a profit on the sale of the Allocated Property).

3. They wanted to give up their existing timeshares (which did not provide any potential profit and had a longer membership term) and the Supplier offered to assist them with this if they purchased.

So, their reasons were not *purely* for a wider investment opportunity or financial gain. While the Supplier may have included this declaration in the document with a view to complying with Regulation 14(3), I do not think it achieves that aim due to the inclusion of the word *"purely"*. The ordinary reading of which in this context I think means exclusively, only, or solely – that is, for only one purpose.

The Lender has referred to the decision of another ombudsman in a complaint relating to its response to a Section 75 claim, where the ombudsman referred to the above document and declaration. In that case the ombudsman was not considering whether there was a breach of Regulation 14(3) of the Timeshare Regulations, nor does he appear to have made any findings on the declaration that are of relevance to the outcome of Mr and Mrs P's complaint. In any case, each complaint is decided on its individual merits, and I must make my decision based on what is in my opinion fair and reasonable in this case.

I accept the part of the Purchase Agreement the Lender has quoted does not indicate there will be a profit. It indicates that Mr and Mrs P will receive their share of the net sale proceeds when the Allocated Property is sold and that by saying *"if any"* it indicates they may get nothing. But, while this does not indicate there was a breach of Regulation 14(3), nor does it prevent there being a breach as a result of in the Supplier's conversation with Mr and Mrs P. The lack of a sales script or even any evidence of training or guidance provided to salespeople about how to sell Fractional Club membership (or informing them of Regulation 14(3) of the Timeshare Regulations) means it is possible that the salespeople in this case may have had significant freedom to sell Fractional Club membership as they saw fit. I do not think the content of the sales documents are sufficient to significantly undermine Mr and Mrs P's recollection of what happened.

Definition of investment

As mentioned above, in my provisional decision I set out the definition of investment I was using – *"a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit"* – and I had this in mind throughout my provisional decision and when making my final decision.

The Lender appears to suggest that there could only be a breach of Regulation 14(3) if the Supplier discussed the potential returns a consumer could make – as opposed to simply implying or stating that there is the potential for making a profit. Or that if Fractional Club membership was sold as an investment the customer would ask and therefore be told what their likely profit would be. And that because there is no indication that happened here, this undermines what Mr and Mrs P have said and supports the Lender's view that there was no breach of Regulation 14(3) in this case. But I disagree. The Lender appears to be attempting to expand the stated definition of "investment" or reduce the protection afforded to Mr and Mrs P by the Timeshare Regulations.

I said in my provisional decision that to conclude that Fractional Club membership was marketed or sold to Mr and Mrs P as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit). I think that is in line with the stated definition, and in my opinion it does not require the Supplier to have gone on to explain what any potential profit would be – only for the Supplier to have said explicitly that Fractional Club membership was an investment (which itself

indicates the potential for a profit) or to have said or implied (without using the term investment) that Mr and Mrs P may profit from it.

In my provisional decision I set out why I though the Supplier had breached Regulation 14(3) when selling Fractional Club membership to Mr and Mrs P. I went on to explain why I was satisfied this was material to their decision to go ahead with the purchase. As such I am satisfied that I have followed the appropriate route to reaching my decision, taking into account relevant law and regulations, regulators' rules guidance and standards, codes of practice, and (where appropriate) what I consider to have been good industry practice at the relevant time.

Reliance on the witness statement

The Lender says I've given too much weight to Mr and Mrs P's recollections of what happened at the Time of Sale. Particularly due to what the Lender says are factual inaccuracies in their witness statement, a lack of detail, clarity and consistency, and it being generic on several points.

Inconsistencies in evidence are a normal part of someone trying to remember what happened in the past. So, I would not be surprised to see some inconsistencies between Mr and Mrs P's recollections of what happened at the Time of Sale and what other evidence shows. The question is whether there is a core of acceptable evidence from them that the inconsistencies have little to no bearing on, or whether such inconsistencies are fundamental enough to undermine or contradict what they say about what the Supplier said and did to market and sell Fractional Club membership to them as an investment.

The Lender says the reference to investment is vague and brief, and that, as above, if the Supplier had sold or marketed Fractional Club membership to them as an investment then Mr and Mrs P would've been told about the potential profit they would make and how they go about realising that. But I disagree.

Mr and Mrs P have referred to the Supplier telling them Fractional Club membership was a good, excellent or secure investment at various points in their statement, and that the Supplier justified this by pointing out:

- The resort was in a prime position on the sea front, had good facilities
- The Allocated Property was in a good position in the resort.
- It was *"bricks and mortar"*.
- The location of the apartment and the 15-year membership term.
- It was a *"no brainer"*.

The potential profit Mr and Mrs P might make (if any) would be unknown at the Time of Sale and dependent on the property market. So, it would be hard for anyone to make any predictions about what if any profit might be realised. In my opinion, to sell Fractional Club membership as an investment the Supplier would not need to quantify what profit could be made, just explicitly describe it as an investment (as Mr and Mrs P allege) or state or imply that there was a hope or expectation of a profit. I think describing Fractional Club membership as a good or excellent investment and how the Supplier justified this (as above) do imply that a profit could be expected or at least hoped for.

So, in my opinion, Mr and Mrs P's description of how the Supplier sold Fractional Club membership to them as an investment do not appear to be vague, inconsistent, or unclear.

The Supplier has confirmed that Mr and Mrs P's recollections about how the sale took place are accurate in some regards, such as there being a tour of the hotel and the show apartment. They also accurately recalled the names of two of the three representatives of the Supplier that were involved in the sale. And other details that matched with other evidence, such as the Supplier agreeing to take responsibility for terminating their existing timeshare contracts through other timeshare providers as part of deal. So, I do not think that Mr and Mrs P's recollections are generic. Rather, they appear to be largely specific to their circumstances.

The Lender questions why Mr and Mrs P did not contact the Supplier about realising their investment. But I do not think this is relevant to what happened at the Time of Sale. It seems clear from the sales documents, how the Lender says Fractional Club membership would've been sold, and Mr and Mrs P's recollections that any return would be realised at the end of the membership term when the Allocated Property was sold. So, it appears Mr and Mrs P understood that any return would be realised after 15 years. As such I do not think they would have had any reason to query this further.

The Lender has said that Mr and Mrs P's recollection of being told they would receive some rent if they didn't use the Allocated Property was incorrect as the Supplier does not operate a rental program. However, I do not think this fundamentally undermines their recollections. I am aware of another case involving this Fractional Club and Supplier which has been decided by the Financial Ombudsman Service where the customer said they were told a similar thing and did receive some rent on occasion. So, Mr and Mrs P's recollection here does not seem so far-fetched, nor does it in my opinion call into question the rest of their recollections.

I acknowledge the potential inconsistency in terms of Mr and Mrs P's recollection of whether they were given time to read the sales documents. They have said they were left alone and eventually agreed to go ahead. And that they didn't sign the sales documents until the next day. However, it is not clear to me that they were left alone *with the sales paperwork* and given sufficient time to read it before they agreed to go ahead with the purchase, or that they were *given the sales paperwork to consider overnight* (as opposed to being presented with it the next day shortly before signing it). So, I do not think this potential discrepancy is enough to undermine the rest of their recollections. It seems that what Mr and Mrs P recall may be accurate, given it is unclear when they were given the sales documents or whether they did actually have the opportunity to read them before they signed them.

Likewise, I do not think Mr and Mrs P making a mistake in terms of whether they were already retired at the Time of Sale or their comments on medical issues are of such importance that they detract from other parts of their witness statement. I do note that the Supplier surrendered their existing timeshares with another provider on their behalf by citing medical reasons, suggesting they may have had some such issues around the Time of Sale. But I do not think this has much bearing on nor significantly undermines their recollections about whether Fractional Club membership was sold to them as an investment.

Considering all these potential inconsistencies or inaccuracies in Mr and Mrs P's witness statement, I do not think they are sufficient such that I should give significantly less weight to what they have said about how the Supplier sold and marketed Fractional Club membership to them at the Time of Sale.

I have acknowledged that Mr and Mrs P had more than one reason for entering the purchase. And that their motivations were both related to holidays and that Fractional Club

membership was an investment, as well as that the Supplier agreed to take over or get them out of their existing timeshares. Overall, I concluded in my provisional decision that the Supplier sold Fractional Club membership to Mr and Mrs P as an investment at the Time of Sale and that this was material to their decision to go ahead with the purchase. I see no reason to reach a different conclusion now.

The RDO Code

I acknowledged above, and in the "legal and regulatory context" section of my provisional decision, that the Supplier was not a member of the RDO Code. But I said that it was reflective of good industry practice at the Time of Sale. I do not think I was misguided in saying that or that my provisional decision relied upon me unreasonably holding the Supplier to the standards of the RDO Code. The determining factors in my decision were whether the Supplier breached Regulation 14(3) at the Time of Sale, and whether this was material to Mr and Mrs P's decision to enter into the Purchase Agreement and Credit Agreement.

Conclusion

Given the facts and circumstances of this complaint, and having considered the responses to my provisional decision, I think the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs P 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 P 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 P agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

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

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

(2) In addition to (1), the Lender should also refund the annual management/maintenance charges Mr and Mrs P paid as a result of Fractional Club membership.

(3) The Lender can deduct:

i. The value of any promotional giveaways (such as cashback) that Mr and Mrs P received; and

ii. The market value of the holidays* Mr and Mrs P took using their Fractional Club membership.

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

(6) If Mr and Mrs P'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 P took using their Fractional Points, deducting the relevant annual management/maintenance 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 final decision

For the reasons I have explained, I uphold this complaint. I direct Shawbrook Bank Limited to pay fair compensation to Mr and Mrs P as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P and Mrs P to accept or reject my decision before 5 June 2025.

Phillip Lai-Fang
Ombudsman