DRN-5575650

The complaint

Mr and Mrs M 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 a claim under Section 75 of the CCA.

What happened

I issued a provisional decision on Mr and Mrs M's case on 25 April 2025, in which I set out the background to the complaint and my provisional findings on it. A copy of the provisional decision, and an appendix referred to in it, are appended to and form a part of this final decision. Because of this, it's not necessary for me to go into all the details of how this complaint came about, but in very brief summary:

- Mr and Mrs M bought a membership of a timeshare product (the "Fractional Club") from a timeshare provider (the "Supplier") in December 2016, trading in a "Trial" membership they'd purchased from the Supplier in June the same year (the "Purchase Agreement"). The timeshare cost £15,560, reduced to £11,565 after trading in the Trial membership. The balance, along with an existing debt with the Lender, was financed by a loan (the "Credit Agreement") of £14,861 with the Lender which was arranged by the Supplier for this purpose.

- Fractional Club membership provided holiday rights, in the form of "points" which renewed annually and could be used to book holiday accommodation, and the right to a share in the net sale proceeds of a specific named property (the "Allocated Property"), when the membership was due to end in 19 years.

- Mr and Mrs M complained via a professional representative ("PR") in February 2021 to the Lender about several matters, which included the Lender being party to an unfair credit relationship under the Credit Agreement and the Purchase Agreement for the purposes of Section 140A of the CCA. The Lender rejected their complaints, following which they contacted the Financial Ombudsman Service for an independent assessment.

- One of our Investigators concluded that the Supplier had marketed or sold the Fractional Club membership to Mr and Mrs M as an investment, in breach of Regulation 14(3) of the *Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010* (the "Timeshare Regulations"), and this had rendered the credit relationship between them and the Lender unfair to them. The Lender disagreed with this conclusion and the case was subsequently passed to me to decide.

In my provisional decision, I said I was minded to uphold Mr and Mrs M's complaint. The full reasons for this can be found in the appended provisional decision, but again summarising briefly:

- I noted that while there was nothing wrong with a timeshare product including an

investment aspect or feature (as Fractional Club membership did in the form of the right to the share of the sale proceeds of the Allocated Property) it would have been a breach of Regulation 14(3) of the Timeshare Regulations for the Supplier to have marketed or sold the Fractional Club membership to Mr and Mrs M as an investment. I explained that I was defining "investment" as a *"transaction in which money or other property is laid out in the expectation or hope of financial gain or profit".*

- I acknowledged there were disclaimers within the paperwork signed by Mr and Mrs M at the Time of Sale, which indicated the Supplier had tried to avoid describing Fractional Club membership as an investment or quantifying the financial value of the investment aspect. On the other hand, I noted one of the Supplier's disclaimers suggested the Supplier expected its representatives to talk about the concept of financial investment when promoting the Fractional Club product. Overall, I thought the paperwork contained mixed messages on the topic of investment.

- I thought the sales and marketing materials the Supplier had used to sell Fractional Club membership at the Time of Sale, indicated that the Supplier's representatives would likely have framed the sale in such a way as to imply, and lead Mr and Mrs M to believe, that membership would be an investment that *may* lead to a financial gain in the future.

- Mr and Mrs M had also recalled the Supplier marketing the Fractional Club product to them in this way (i.e. as an investment). Words attributed to Mr and Mrs M in a witness statement dated to July 2023 indicated they had been told the purchase was an investment and a *"means for financial growth and return on investment*". While this statement had been put together many years after the Time of Sale, I considered it was supported by much earlier evidence, specifically:

    - An email enquiry from Mr M to a company specialising in timeshare complaints ("TAL") on 17 November 2020, in which he'd referred to *"getting some kind of refund for my investment".*

    - A pro-forma document produced by TAL following a phone call with Mr M on 18 November 2020, which indicated he had recalled the Supplier telling him that the Fractional Club membership would increase in value and that it was a financial investment.

    - Handwritten notes made by PR of a phone call with Mr and Mrs M on 3 December 2020, in which PR had recorded Mr and Mrs M recalling the Supplier having told them the timeshare *"is a financial growth and return of investment".*

- I acknowledged certain deficiencies in the evidence, such as Mr and Mrs M appearing to mistake the term of the loan (15 years) with the term of the timeshare (19 years), and recalling purchasing the Trial membership in July 2016 when they'd in fact bought it in June that year. But overall, and on balance, I concluded the Supplier had marketed or sold the Fractional Club membership to them as an investment, in breach of the Timeshare Regulations.

- I then went on to note that a technical breach of the Timeshare Regulations was not enough by itself to render the credit relationship between the Lender and Mr and Mrs M unfair. The breach had to be material to Mr and Mrs M's decision to purchase the membership. And, in this case, I thought it had been, for the following reasons:

    - They had told TAL in November 2020 that a return on investment was one of

their two reasons for purchasing the Fractional Club membership.

- Mr M's initial email enquiry to TAL had indicated that he viewed the product as an investment.

I concluded, based on the above, that the Credit Agreement between Mr and Mrs M and the Lender had been rendered unfair to them for the purposes of Section 140A of the CCA and that they should receive fair compensation. What I considered fair compensation to be is, once again, set out in full in the appended provisional decision, but broadly speaking it involved putting Mr and Mrs M back in the position they'd have been in (as far as practical) had they not purchased Fractional Club membership. This included refunding all payments they'd made towards the loan and cancelling any remaining balance, refunding any regular management or maintenance fees they'd paid, and (if needed) indemnifying Mr and Mrs M against any ongoing liabilities as a result of them still having the membership. I noted that certain deductions could be made from the compensation to account for any benefit Mr and Mrs M had received from the membership, such as holidays taken.

I asked the parties to the complaint to let me have any further submissions they wanted me to consider. Mr and Mrs M, through PR, said they accepted the provisional decision. The Lender said it did not, and made a number of arguments against my provisional findings. I think its arguments could fairly be summarised as follows:

- It considered I had gone beyond the definition of "investment" that I said I had adopted in my provisional decision, conflating a "return of money", which didn't imply a financial gain, with a "return on money", which did imply a financial gain. It didn't consider there was compelling evidence that the Supplier had sold or marketed the Fractional Club product as an investment and disagreed with my analysis of the sales and marketing materials.

- I had reversed the burden of proof when deciding that the Supplier's alleged selling or marketing of the Fractional Club membership as an investment, had played a material part in Mr and Mr M's purchasing decision. I had *assumed* it was material as a starting point, rather than looking for positive evidence that it had played a material part.

- I had attached insufficient weight to the contemporaneous documents from the Time of Sale, which it considered were more reliable that PR's letter of complaint and Mr and Mrs M's testimony, which it thought rather dubious.

- It considered Mr and Mrs M's testimony was brief, generic, vague, inconsistent, and inaccurate about key facts. Some of the complaints made in PR's letter of complaint did not appear in Mr and Mrs M's testimony.

- It questioned the provenance of the email enquiry from Mr M to TAL in November 2020. It thought it more likely that this was an internal email between colleagues at TAL, rather than an email from Mr M, because the email address in the "from" field was on TAL's domain. But even if this *was* an email from Mr M, his mention of the timeshare being an investment was likely coloured or tainted by the way in which TAL positioned potential timeshare claims on its website. The Lender said in its experience claims managers at that time invited people to make claims if they'd been sold timeshare as 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.

Having done so, I've arrived at the same conclusions as my appended provisional decision, and for the same reasons. However, I think it's important to address the Lender's submissions where these have not already been dealt with in the provisional decision.

Firstly, I don't agree that I adopted a more expansive definition of investment than I said I would in the provisional decision, or that it was more likely the Supplier simply told Mr and Mrs M some money would be returned at the end of the membership. I explained in some detail why I thought the Supplier's sales and marketing materials would have implied and led Mr and Mrs M to believe that the product was an investment as per the definition I adopted. While I appreciate the Lender disagrees, I don't think it has said anything new about this.

Secondly, I also don't agree that I reversed the burden of proof as the Lender has suggested. I don't recognise that in the provisional decision at all, which I think was in fact focused on the positive evidence for an investment motive on Mr and Mrs M's part.

The Lender has also suggested I didn't attach appropriate weight to the contemporaneous paperwork. On this I think there's little more I can say than I did in the appended provisional decision. For the reasons explained in the provisional decision, I don't think the Supplier's disclaimers relating to the matter of the Fractional Club product being an investment were as effective as the Lender has suggested. In fact, to some extent I think they would have given Mr and Mrs M mixed messages.

The remainder of the Lender's concerns are about the quality of the evidence put forward by Mr and Mrs M and PR on their behalf. I have already dealt with most of these concerns in the provisional decision – such as confusing June with July, and mixing up the term of the membership with the term of the loan. I didn't think these were a reason to doubt the overall credibility of Mr and Mrs M's testimony, and my views on that haven't changed.

I agree that PR's letter of complaint is not entirely consistent with the claims made by Mr and Mrs M in their witness statement, but that is (unfortunately) not unusual when claims managers are involved, who may put forward a generic set of arguments. My focus in the provisional decision was on trying to ascertain what Mr and Mrs M's actual recollections were of the Time of Sale, and whether the words attributed to them were likely to be representative of what they recalled. For the reasons explained in that provisional decision, I think it's likely Mr and Mrs M did recall being told by the Supplier that the Fractional Club membership was an investment in the sense that it was something from which they could hope for or expect a financial gain. And I think that's not inconsistent with how, based on my analysis of the Supplier's relevant sales and marketing materials, it's likely the Supplier's representatives would have positioned the Fractional Club product.

I acknowledge the Lender's concerns about Mr M's email enquiry to TAL, but I don't think these are well founded. I don't think it's likely the email enquiry was an internal email between colleagues at TAL. It's correct that the email comes from an address on TAL's domain (albeit with Mr M's name in the "from" field), however this is not an uncommon way for enquiry forms filled out on a website to be submitted. And I note from archived versions of TAL's website that it did contain such a form for consumers to make enquiries. I think it's likely Mr M filled out the form on TAL's website and this generated the email in question.

Finally, the Lender has also suggested TAL (or other claims managers) may have influenced Mr M's reference to "investment" in his initial enquiry because of the way they were

promoting claims at that time. I'm not sure this assist the Lender – as one would think that if TAL's marketing suggested mis-sale claims could be made where timeshare had been sold as an investment, the fact that Mr M responded to this marketing by enquiring about making a claim on that basis, suggests that he considered the Supplier had sold the Fractional Club product to him as an investment. In other words, he contacted TAL because he identified the Supplier as having sold the product to him in that way.

In light of the above, I remain of the view that the Supplier breached Regulation 14(3) when selling the Fractional Club membership to Mr and Mrs M, that this was material to their purchasing decision, and rendered their credit relationship with the Lender unfair to them for the purposes of Section 140A.

Fair Compensation

What I consider to be fair compensation remains unchanged, so I have copied the relevant text from my appended provisional decision below.

Having found that Mr and Mrs M 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 M agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

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

If, after purchasing trial membership, a consumer went on to purchase membership of one of the Supplier's longer-term products, their trial membership was usually cancelled and traded in against the purchase price of their timeshare – which was what happened at the Time of Sale. Mr and Mrs M's trial membership was, therefore, a precursor to their Fractional Club membership. With that being the case, the trade-in value acted, in essence, as a deposit on this occasion and I think this ought to be reflected in my redress when remedying the unfairness I have found.

So, given all of the above, here's what I think needs to be done to compensate Mr and Mrs M – whether or not a court would award such compensation:

(1) The Lender should refund Mr and Mrs M'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:

i. The annual management charges Mr and Mrs M paid as a result of Fractional Club membership.
ii. The difference between the trade-in value given to Mr and Mrs M's trial membership and the capital sum refinanced from the loan taken to pay for the trial membership into the Credit Agreement.

(3) The Lender can deduct:

i. The value of any promotional giveaways that Mr and Mrs M used or took advantage of*; and
ii. The market value of the holidays** Mr and Mrs M took using their Fractional Points.

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

(6) If Mr and Mrs M'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.

*This should not include the value of any holidays or breaks which were promotional in the sense they were holidays on which the Supplier would hope to sell Mr and Mrs M a product at a presentation or meeting that it was compulsory they attend.

**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 M 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 final decision

For the reasons explained above, and in the appended provisional decision, I uphold Mr and Mrs M'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 M to accept or reject my decision before **18 June 2025**.

Will Culley

Ombudsman

COPY OF PROVISIONAL DECISION

I've considered the relevant information about this complaint.

Having done so, I've arrived at broadly the same conclusions as our Investigator, but I've explained my reasons in more detail and some of my recommendations as to what should be done to put things right, are different. Because of that, I'm issuing a provisional decision to allow an opportunity for further comment.

The deadline for both parties to provide any further comments or evidence for me to consider is **9 May 2025**. Unless the information changes my mind, my final decision is likely to be along the following lines.

The Complaint

Mr and Mrs M 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 a claim under Section 75 of the CCA.

What happened

In June 2016 Mr and Mrs M purchased a 'Trial' membership – a type of holiday product – from a timeshare provider (the 'Supplier'), for £3,995. The purchase was financed by a loan from a different lender.

Mr and Mrs M then purchased membership of a timeshare (the 'Fractional Club') from the Supplier in December 2016 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 910 fractional points at a cost of £15,560 (the 'Purchase Agreement'). Mr and Mrs M also traded in the Trial membership for the same £3,995 they bought it for, leaving £11,565 to pay.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs M 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 M paid for their Fractional Club membership by taking finance from the Lender. This included the consolidation of the loan which had been used to purchase the Trial membership – meaning the amount they borrowed from the Lender came to £14,861. This was repayable over 180 months at £171.72 per month.

Mr and Mrs M – using a professional representative ('PR') – wrote to the Lender on 1 February 2021 (the 'Letter of Complaint') to make a complaint. The complaint was not well-particularised in places so I have summarised and grouped PR's points under the following categories:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. A breach of contract by the Supplier giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.
4. The decision to lend being irresponsible because the Lender did not carry out the right

creditworthiness assessment.

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

The Letter of Complaint says that the Supplier made pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. told them that they would own a part of one of the Supplier's resorts and this would grow in value allowing them to sell and recoup some of their investment.
2. failed to tell them that the liabilities associated with the product could pass to their children on their death.

Mr and Mrs M 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 M.

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

The Letter of Complaint says that the Supplier breached the Purchase Agreement because Mr and Mrs M found it increasingly difficult to secure holidays due to long waiting lists and poor availability of accommodation.

Because of this, Mr and Mrs M say that they have a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs M.

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

The Letter of Complaint referred to several matters which I've interpreted as being concerns which could mean that the credit relationship between Mr and Mrs M and the Lender was unfair to them under Section 140A of the CCA. In summary, they include the following:

1. The Fractional Club product was an Unregulated Collective Investment Scheme (UCIS) which was illegal to market to consumers and which it had been wrong of the Lender to finance.
2. There had been unfair terms in the Credit Agreement – specifically that the interest rate had been extortionately high at 11.3% p.a., compared to the Bank of England base rate at that time.
3. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
4. The Lender had paid a secret commission to the Supplier for arranging the Credit Agreement.

The Lender dealt with Mr and Mrs M's concerns as a complaint and issued its final response letter on 22 April 2021, rejecting it on every ground.

Mr and Mrs M 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 M at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. The Investigator concluded that the credit relationship between the Lender and Mr and Mrs M was therefore rendered unfair to them for the

purposes of section 140A of the CCA.

Both the Lender and PR disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

Given our Investigator thought the complaint ought to be upheld, it may seem surprising that PR disagreed with his assessment. However, PR's concerns were primarily around the redress proposed by the Investigator. PR made lengthy submissions on this issue, but to summarise very briefly:

- PR did not consider the Trial membership should be reinstated or that Mr and Mrs M should be in any way responsible for the amount consolidated from the loan granted by the previous lender into the Credit Agreement.
- Mr and Mrs M should receive a refund for the Trial membership.
- It did not agree that deductions should be made from any redress for promotional giveaways, because Mr and Mrs M had not taken advantage of any such giveaways.

The Lender's disagreement with the Investigator's assessment could be summarised as follows:

- It did not think the sales presentation associated with the version of the Fractional Club product which had been sold by the Supplier to Mr and Mrs M, contained content which presented the product as an investment.

- It felt there were errors and inconsistencies in Mr and Mrs M's witness statement, which was undated and had been submitted later in the complaints process, meaning it was difficult to rely on. The errors included that Mr and Mrs M had got the date they bought the Trial membership wrong; that they'd said the length of the Fractional Club membership was 15 years when it was actually 19 years; that they'd said they couldn't make holiday bookings when the Supplier had no evidence they'd ever been declined any booking requests, and that they'd been asked to pay booking fees when this wasn't true.

- It thought notes from the Supplier's systems from the Time of Sale suggested Mr and Mrs M had purchased the membership, not because they thought it was an investment, but because they wanted to use it to take holidays.

Before arriving at this provisional decision I arranged for further enquiries to be made of PR about the provenance of Mr and Mrs M's witness statement, given its undated nature.

PR said that the witness statement had in fact been produced in July 2023, but insisted that Mr and Mrs M had always maintained the Supplier told them the Fractional Club product was an investment and that this had been a factor in their purchasing decision. It produced three documents which it said supported this contention:

1) An email enquiry dated 17 November 2020 from Mr M to a company ('TAL') which appeared to specialise in timeshare complaints. In this email, Mr M had referred to *"getting some kind of refund for my investment".*

2) A pro-forma document from TAL which appeared to have been produced after further communication with Mr M on 18 November 2020. Under the question: *"Did the sales representative say any of the following?"* were a number of tick-boxes. Ticks appeared next to the statements *"Your timeshare would increase in value"* and *"Your timeshare is a financial investment"*. In a comments box, TAL had written: *"Purchased fractional for holidays and return on investment at end of term".*

3) A handwritten note made by someone at PR dated 3 December 2020, which appeared to be notes of a phone call with Mr and Mrs M. In this note the following points appeared:
    a. *"[Previous lender] loan – consolidated into the FRACTIONAL INVESTMENT"*
    b. *"they pressured them to sign and the rep said that this Timeshare (Fractional) is a financial growth and return of investment"*

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.

The legal and regulatory context that I think is relevant to this complaint is set out in an appendix (the 'Appendix') which is attached to this provisional decision and should be read in conjunction with it.

What I've provisionally decided – and why

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr and Mrs M 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 M's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that:

- The Supplier misrepresented aspects of the Purchase Agreement to Mr and Mrs M.
- The Supplier was in breach of contract due to difficulties booking accommodation.
- The Supplier was operating a UCIS.
- The Lender lent to Mr and Mrs M irresponsibly or paid a secret commission to the Supplier.
- The interest rate on the Credit Agreement was so high as to be unfair.

And that's because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs M in the same or a better position than they would have been entitled to be put in, had any of those other points of complaint been successful.

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

Having considered the entirety of the credit relationship between Mr and Mrs M and the Lender along with all of the circumstances of the complaint, 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 M 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 M'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 M say that the Supplier did exactly that at the Time of Sale. In their July 2023 witness statement, they said:

"We were told that the purchase was an investment and we will be able to sell and recoup money after 15 years on the sale of the property" and *"We were sold this membership as a means for financial growth and return on investment".*

It also appears that, when PR and TAL spoke to them in November 2020 and December 2020, Mr and Mrs M had had very similar recollections of what they'd been told by the Supplier.

Mr and Mrs M allege, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because they were told by the Supplier that Fractional Club membership was (as well as being a holiday product) a financial investment that would increase in value.

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 M's share in the Allocated Property clearly 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 M 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 M, 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 primarily for the purpose of holidays and that the Supplier made no representations as to the future value of the share in the Allocated Property.

On the other hand, another of the Supplier's disclaimers warned that its representatives *were "not licensed investment advisors"* and *"all information has been obtained solely from their own experiences as investors and is provided as general information only…"* Our Investigator was concerned about this disclaimer. To me, the fact the Supplier considered this disclaimer necessary suggests it considered its representatives might talk to potential customers about financial investments and provide related information, when discussing the Fractional Club product. So, to some extent, I think the documents dating to the Time of Sale contained mixed messages on the topic of 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:

(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 M or led them to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered them the prospect of a financial gain (i.e., a profit); and, in turn
(2) whether the Supplier's actions constitute a breach of Regulation 14(3).

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

How the Supplier marketed and sold the Fractional Club membership

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

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

Neither the 2013/2014 Induction Training nor the ESA I've seen included notes of any kind. However, the Fractional Club Training Manual includes very similar slides to those used in

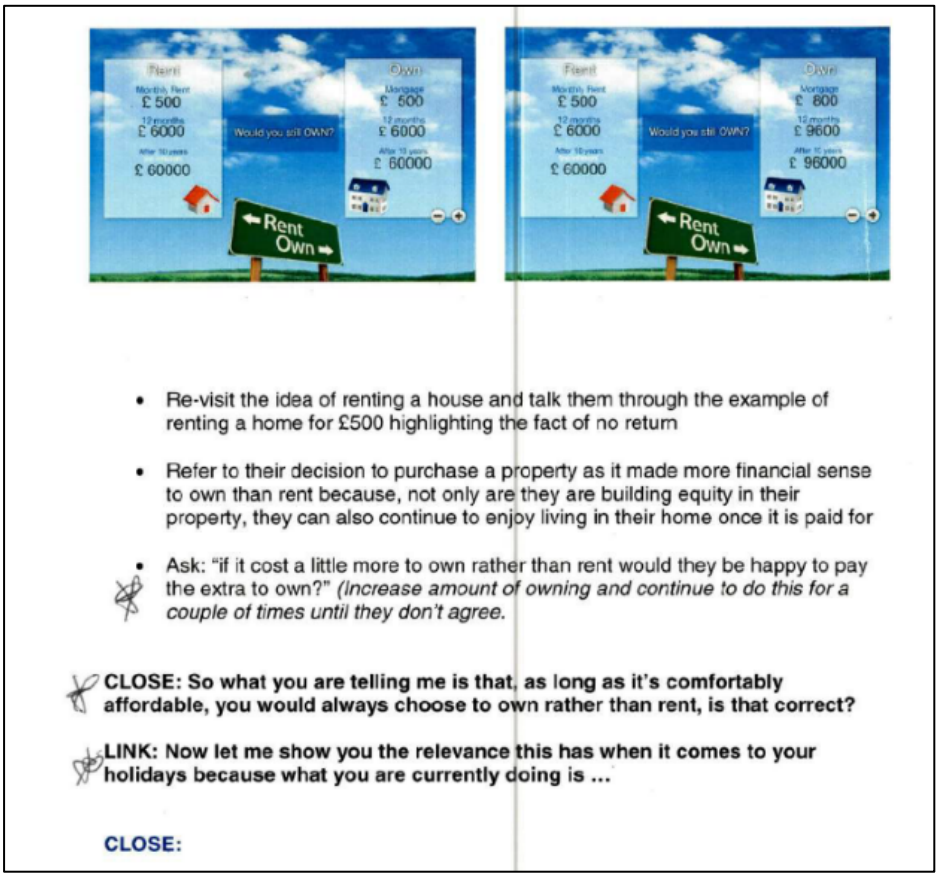
the ESA. And according to the Supplier, the Fractional Club Training Manual (or something similar) was used by it to train its sales representatives at the Time of Sale. So, it seems to me that the Training Manual is reasonably indicative of:

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

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

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

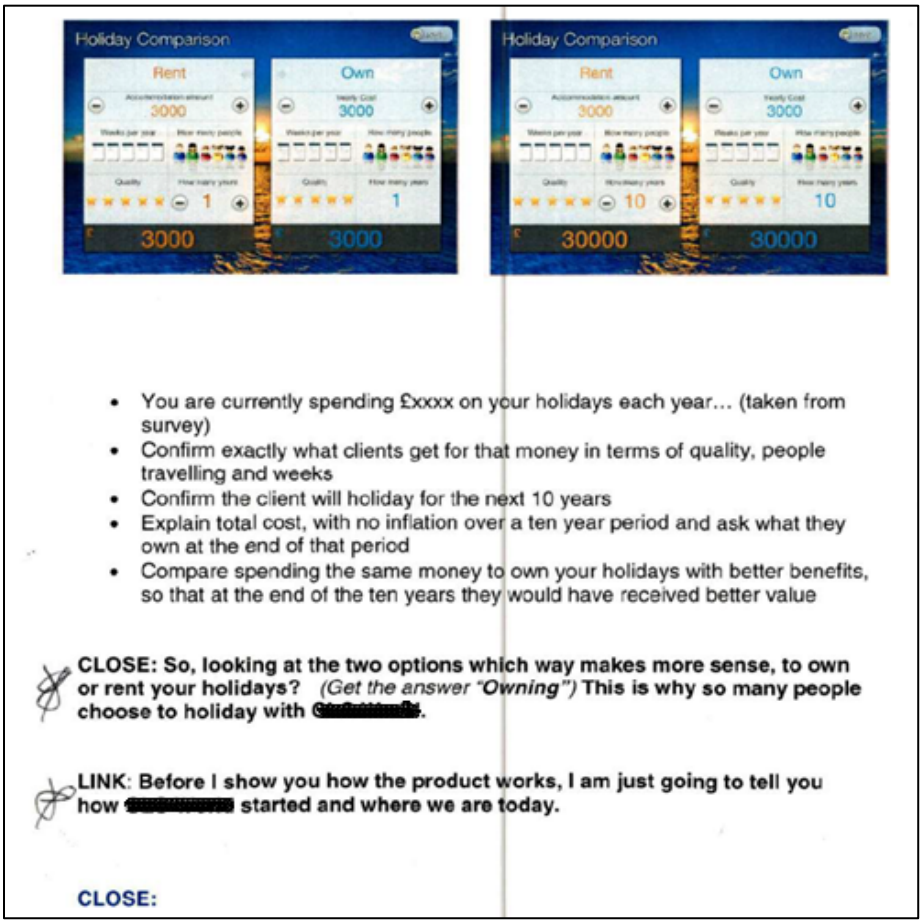
Page 32 of the Fractional Club Training Manual covered how the Supplier's sales representatives should address that comparison in more detail – indicating that they would have tried to demonstrate that there were financial advantages to owning property, over 10 years for example, rather than renting:



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

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

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



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

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

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

SUMMARISE LAST SLIDE:

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

[…]

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

[…]

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

(My emphasis added)

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

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

[…]

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

(My emphasis added)

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

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

[…]

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

I acknowledge that the slides above set out a "return" that is less than the total cost of the holidays and the "initial outlay". But that was just an example and, given the way in which it was positioned in the Training Manual, the language did leave open the possibility that the

return could be equal to if not more than the initial outlay. Furthermore, the slides above represent Fractional Club membership as:

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

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

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

I also acknowledge that there was no comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mr and Mrs M the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that *'[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).'"*[1] And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.

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

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

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

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

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

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

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

Overall, therefore, as the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members, they indicate that the Supplier's sales representative was likely to have led Mr and Mrs M to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e., a profit) in the future. And with that being the case, I don't find them either implausible or hard to believe when they say they were told the membership was an investment, and that it would provide "financial growth" and a "return on investment". On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mr and Mrs M were led by the Supplier to believe at the relevant time. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

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

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

It also it seems to me in light of *Carney* and *Kerrigan* that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs M 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.

At this point I think it's important to address the Lender's concerns about Mr and Mrs M's testimony. The fact that their witness statement dates to July 2023 (after the judgment in *Shawbrook & BPF v FOS*) is something that could lead to not-unreasonable suggestions that it was written with the benefit of hindsight and coloured by the presentation of a "winning formula" following the judgment of the High Court. But I think such a suggestion would not be fair in this case, as the references to the Fractional Club membership being an investment in the witness statement mirror what Mr and Mrs M appear to have said to TAL and PR in 2020, several years earlier. Indeed, the phrasing in the witness statement follows the notes which were made of those conversations at the time. Overall, my view is that the witness statement and the earlier notes (and email from Mr M) are likely to represent Mr and Mrs M's genuine recollections of their experiences with the Supplier as of late 2020.

It's true that there are some errors in the witness statement. For example, the mention of the membership being for 15 years isn't correct. I think this is a relatively minor error and shouldn't be taken as completely undermining the credibility of the testimony. It appears likely to be a confusion between the term of the loan (which *was* 15 years) and the term of the membership. Likewise, Mr and Mrs M recalling purchasing the Trial membership in July 2016 when they actually purchased it a month earlier, is a small mistake about the date something happened and not a good reason, in my view, to treat their recollections of how the Supplier sold the Fractional Club membership, and their motivations at the time, with caution.

On my reading of Mr and Mrs M's testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. It appears they told TAL in November 2020 that a return on investment was one of two reasons why they bought the product. Mr M's original email enquiry to TAL also indicates he viewed the product as an investment, given he uses that word to describe it. That doesn't mean he and Mrs M were not interested in holidays. Their own testimony demonstrates that they quite clearly were, and indeed "holidays" was the second reason given by them when speaking to TAL. And that is not surprising given the nature of the product at the centre of this complaint. But as Mr and Mrs M say (plausibly in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit, as that share was one of the defining features of membership that marked it apart from the more "standard" kind of timeshare available to them. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

Mr and Mrs M have not said or suggested, for example, that they would have pressed ahead with the purchase in question had the Supplier not led them to believe that Fractional Club membership was an appealing investment opportunity. And as they faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I'm not persuaded that they would have gone ahead with their purchase regardless.

Conclusion

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

I recognise that PR had concerns about the redress proposed by our Investigator. My proposals are different. If PR remains concerned following my own proposals, it should provide further submissions on this point in response to my provisional decision.

Having found that Mr and Mrs M 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 M agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

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

If, after purchasing trial membership, a consumer went on to purchase membership of one of the Supplier's longer-term products, their trial membership was usually cancelled and traded in against the purchase price of their timeshare – which was what happened at the Time of Sale. Mr and Mrs M's trial membership was, therefore, a precursor to their Fractional Club membership. With that being the case, the trade-in value acted, in essence, as a deposit on this occasion and I think this ought to be reflected in my redress when remedying the unfairness I have found.

So, given all of the above, here's what I think needs to be done to compensate Mr and Mrs M – whether or not a court would award such compensation:

(1) The Lender should refund Mr and Mrs M'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:

i. The annual management charges Mr and Mrs M paid as a result of Fractional Club membership.
ii. The difference between the trade-in value given to Mr and Mrs M's trial membership and the capital sum refinanced from the loan taken to pay for the trial membership into the Credit Agreement.

(3) The Lender can deduct:

iii. The value of any promotional giveaways that Mr and Mrs M used or took advantage of*; and
iv. The market value of the holidays** Mr and Mrs M took using their Fractional Points.

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

(6) If Mr and Mrs M'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.

*This should not include the value of any holidays or breaks which were promotional in the sense they were holidays on which the Supplier would hope to sell Mr and Mrs M a product at a presentation or meeting that it was compulsory they attend.

**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 M 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'm currently minded to uphold Mr and Mrs M's complaint and direct Shawbrook Bank Limited to take the actions outlined above.

I now invite the parties to the complaint to provide any further submissions they would like me to consider. They should ensure these reach me by **9 May 2025**.

Will Culley
Ombudsman

Appendix: The Legal and Regulatory Context

The Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) (the 'CCA')

The timeshare(s) at the centre of the complaint in question was/were paid for using restricted-use credit that was regulated by the Consumer Credit Act 1974. As a result, the purchase(s) was/were covered by certain protections afforded to consumers by the CCA provided the necessary conditions were and are met. The most relevant sections as at the relevant time(s) are below.

Section 56: Antecedent Negotiations
Section 75: Liability of Creditor for Breaches by a Supplier
Sections 140A: Unfair Relationships Between Creditors and Debtors
Section 140B: Powers of Court in Relation to Unfair Relationships
Section 140C: Interpretation of Sections 140A and 140B

Case Law on Section 140A

Of particular relevance to the complaint in question are:

1. The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') remains the leading case.
2. The judgment of the Court of Appeal in the case of *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')* sets out a helpful interpretation of the deemed agency and unfair relationship provisions of the CCA.
3. *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*') – in which the High Court held 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 relationship or otherwise the date the relationship ended.
4. The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*') – which approved the High Court's judgment in *Patel*.
5. *Deutsche Bank (Suisse) SA v Khan and others* [2013] EWHC 482 (Comm) – in Hamblen J summarised – at paragraph 346 – some of the general principles that apply to the application of the unfair relationship test.
6. *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
7. *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
8. *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*').

My Understanding of the Law on the Unfair Relationship Provisions

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.”*

So, the negotiations conducted by the Supplier during the sale of the timeshare(s) in question was/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.140A(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.

<u>The Law on Misrepresentation</u>

The law relating to **misrepresentation** is a combination of the common law, equity and statute – though, as I understand it, the Misrepresentation Act 1967 didn't alter the rules as to what constitutes an effective misrepresentation. It isn't practical to cover the law on misrepresentation in full in this decision – nor is it necessary. But, summarising the relevant pages in *Chitty on Contracts (33rd Edition)*, a material and actionable misrepresentation is an untrue statement of existing fact or law made by one party (or his agent for the purposes of passing on the representation, acting within the scope of his authority) to another party that induced that party to enter into a contract.

The misrepresentation doesn't need to be the only matter that induced the representee to enter into the contract. But the representee must have been materially influenced by the misrepresentation and (unless the misrepresentation was fraudulent or was known to be likely to influence the person to whom it was made) the misrepresentation must be such that it would affect the judgement of a reasonable person when deciding whether to enter into the contract and on what terms.

However, a mere statement of opinion, rather than fact or law, which proves to be unfounded, isn't a misrepresentation unless the opinion amounts to a statement of fact and it can be proved that the person who gave it, did not hold it, or could not reasonably have held it. It also needs to be shown that the other party understood and relied on the implied factual misrepresentation.

Silence, subject to some exceptions, doesn't usually amount to a misrepresentation on its own as there is generally no duty to disclose facts which, if known, would affect a party's

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

decision to enter a contract. And the courts aren't too ready to find an implied representation given the challenges acknowledged throughout case law.

The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations')

The relevant rules and regulations that the Supplier in this complaint had to follow were set out in the Timeshare Regulations. I'm not deciding – nor is it my role to decide – whether the Supplier (which isn't a respondent to this complaint) is liable for any breaches of these Regulations. But they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair. After all, they signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

The Regulations have been amended in places since the Time of Sale. So, I refer below to the most relevant regulations as they were at the time(s) in question:

- Regulation 12: Key Information
- Regulation 13: Completing the Standard Information Form
- Regulation 14: Marketing and Sales
- Regulation 15: Form of Contract
- Regulation 16: Obligations of Trader

The Timeshare Regulations were introduced to implement EC legislation, Directive 122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts (the '2008 Timeshare Directive'), with the purpose of achieving 'a high level of consumer protection' (Article 1 of the 2008 Timeshare Directive). The EC had deemed the 2008 Timeshare Directive necessary because the nature of timeshare products and the commercial practices that had grown up around their sale made it appropriate to pass specific and detailed legislation, going further than the existing and more general unfair trading practices legislation.[3]

The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations')

The CPUT Regulations put in place a regulatory framework to prevent business practices that were and are unfair to consumers. They have been amended in places since they were first introduced. And it's only since 1 October 2014 that they imposed civil liability for certain breaches – though not misleading omissions. But, again, I'm not deciding – nor is it my role to decide – whether the Supplier is liable for any breaches of these regulations. Instead, they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair as they also signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

Below are the most relevant regulations as they were at the relevant time(s):

- Regulation 3: Prohibition of Unfair Commercial Practices
- Regulation 5: Misleading Actions
- Regulation 6: Misleading Omissions
- Regulation 7: Aggressive Commercial Practices
- Schedule 1: Paragraphs 7 and 24

The Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR')

[3] See Recital 9 in the Preamble to the 2008 Timeshare Directive.

The UTCCR protected consumers against unfair standard terms in standard term contracts. They applied and apply to contracts entered into until and including 30 September 2015 when they were replaced by the Consumer Rights Act 2015.

Below are the most relevant regulations as they were at the relevant time(s):

- Regulation 5: Unfair Terms
- Regulation 6: Assessment of Unfair Terms
- Regulation 7: Written Contracts
- Schedule 2: Indicative and Non-Exhaustive List of Possible Unfair Terms

The Consumer Rights Act 2015 (the 'CRA')

The CRA, amongst other things, protects consumers against unfair terms in contracts. It applies to contracts entered into on or after 1 October 2015 – replacing the Unfair Terms in Consumer Contracts Regulations 1999.

Part 2 of the CRA is the most relevant section as at the relevant time(s).

Relevant Publications

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').

Will Culley
Ombudsman