DRN-5651826

The complaint

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

What happened

Since 1991 Mr and Mrs H had been members of a timeshare arrangement, the European Collection (the 'EC') from a timeshare provider (the 'Supplier'). Over the course of this membership, they bought a total of 17,000 EC points.

As EC members, every year they could use their points in exchange for holidays at the Supplier's holiday resorts. Different accommodation had different points values, depending on factors such as location, size, and time of year. So, for example, a larger apartment in peak season would cost more to a member in their points than a smaller apartment outside of school holiday periods.

On 19 August 2013 (the 'Time of Sale') Mr and Mrs H purchased membership of a different type of timeshare (the 'Fractional Club') from the Supplier. They entered into an agreement with the Supplier to buy 17,000 fractional points at a cost of £28,560 (the 'Purchase Agreement'), but after trading in their 17,000 EC points (for which they were given a conversion rate of £1 per point), they ended up paying £11,560 for Fractional Club membership.

Fractional Club membership differed from their EC membership. The two significant differences were that it had a shorter membership term (15 years compared to an end date of 2054 for the EC membership), and it was also asset backed – which meant the membership gave Mr and Mrs H 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 H paid for their Fractional Club membership by taking finance of £11,560 from the Lender in their joint names (the 'Credit Agreement').

Mr and Mrs H – using a professional representative (the 'PR') – wrote to the Lender on 24 April 2022 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving him a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.

2. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

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

Mr and Mrs H say that the Supplier made a number of pre-contractual misrepresentations at

the Time of Sale – namely that the Supplier:

- Told them that Fractional Club membership had a guaranteed end date, upon which they would automatically exit the membership, when that was not true.
- Told them that Fractional Club membership was an "investment" and a share in property when that was not true.
- Told them that Fractional Club would offer exclusive resorts with a higher standard of accommodation, when that was untrue.

Mr and Mrs H 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 H.

(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 H 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:

- Fractional Club membership was marketed and sold to them as an investment in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
- The contractual terms were unclear, inaccurate and not comprehensive, contrary to the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
- They were pressured into purchasing Fractional Club membership by the Supplier.
- The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment, and no choice of finance options was given.
- The Supplier failed to provide sufficient information to allow Mr and Mrs H to make an informed decision.
- Commission was paid by the Lender to the Supplier as a result of brokering the Credit Agreement, and this commission was not disclosed to Mr and Mrs H.

The Lender initially dealt with Mr H's concerns as a claim, which it rejected. It said it had a defence under the Limitation Act 1980 as the claim was made more than six years after the event complained about. Mr and Mrs H were unhappy with this outcome and complained to the Lender. It sent its final response to their complaint on 24 June 2022, rejecting it on all grounds.

Mr and Mrs H 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 H 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 H was rendered unfair to them for the purposes of section 140A of the CCA.

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

The provisional decision

Having considered everything that had been submitted, I agreed with the outcome reached by the Investigator, but had expanded somewhat on the reasons for doing so. As such I set out my initial thoughts in a provisional decision (the 'PD') and invited both sides to submit any new evidence or arguments they wished me to consider before making my final decision. In my PD I began by setting out the legal and regulatory context that I thought was relevant. I then said:

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

And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr and Mrs H 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 H's complaint, it isn't necessary to make formal findings on all of them. This includes the allegation that the Supplier made misrepresentations at the Time of Sale and the Lender ought to have accepted and paid the claim under Section 75 of the CCA, because, even if that aspect of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs H in the same or a better position than they would be if the redress was limited to misrepresentation.

Mr and Mrs H's testimony

As part of Mr and Mrs H's submissions to this service, the PR has submitted a statement dated 4 September 2019. So, I have considered how much weight I can place on this statement when assessing the merits of Mr and Mrs H's complaint.

The statement was compiled three years prior to the Letter of Complaint being sent to the Lender, and the statement was probably prepared as part of the PR's case preparation. Indeed, the Letter of Complaint is generally consistent with the contents of the statement, which leads me to think that the statement was used to inform the Letter of Complaint.

But the statement was, in my view, clearly prepared and written by the PR. For example, I can see what appears to be a note from the PR as part of the statement which says:

"Client to source finance information."

This would appear to be a note from the PR serving as a reminder of what needed to be done after the conversation which informed the contents of the statement.

So, I am mindful of the risk that Mr and Mrs H may have been guided through the process, and the associated risk that what has been written may not be their own specific recollections. But it does contain personal information about the Time of Sale that only Mr and/or Mrs H would have known, such as their personal experiences whilst on the holidays, so I have no doubt that Mr and Mrs H had a significant input into its contents. It is also not unusual for statements to be prepared on complainants' behalf by professional representatives. Taking everything into account I am satisfied that it is a record of Mr and Mrs H's recollections of the Time of Sale.

When considering how much weight I can place on Mr and Mrs H's statement, I am assisted by the judgement in the case of Smith v Secretary of State for Transport [2020] EWHC 1954 (QB).

At paragraph 40 of the judgment, Mrs Justice Thornton helpfully summarised the case law on how a court should approach the assessment of oral evidence. Although in this case I have not heard direct oral evidence, I think this does set out a useful way to look at the evidence Mr and Mrs H have provided. Paragraph 40 reads as follows:

> *"At the start of the hearing, I raised with Counsel the issue of how the Court should assess his oral evidence in light of his communication difficulties. Overnight, Counsel agreed a helpful note setting out relevant case law, in particular the commercial case of Gestmin SPGS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) (Leggatt J as he then was at paragraphs 16-22) placed in context by the Court of Appeal in Kogan v Martin [2019] EWCA Civ 1645 (per Floyd LJ at paragraphs 88-89). In the context of language difficulties, Counsel pointed me to the observations of Stuart- Smith J in Arroyo v Equion Energia Ltd (formerly BP Exploration Co (Colombia) Ltd) [2016] EWHC 1699 (TCC) (paragraphs 250-251). Counsel were agreed that I should approach Mr Smith's evidence with the following in mind:*
>
> a. *In assessing oral evidence based on recollection of events which occurred many years ago, the Court must be alive to the unreliability of human memory. Research has shown that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts (Gestin and Kogan).*
> b. *A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence (Kogan).*
> c. *The task of the Court is always to go on looking for a kernel of truth even if a witness is in some respects unreliable (Arroyo).*
> d. *Exaggeration or even fabrication of parts of a witness' testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony (Arroyo).*
> e. *The mere fact that there are inconsistencies or unreliability in parts of a witness' evidence is normal in the Court's experience, which must be taken into account when assessing the evidence as a whole and whether some parts can be accepted as reliable (Arroyo).*
> f. *Wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, may be neither reliable nor even truthful, the difficulty of discerning where the truth actually lies, what findings he can properly make, is often one of almost excruciating difficulty yet it is a task which judges are paid to perform to the best of their ability (Arroyo, citing Re A (a child) [2011] EWCA Civ 12 at para 20)."*

From this, and from my own experience, I find that inconsistencies in evidence are a normal part of someone trying to remember what happened in the past. So, I'm not surprised that there are some inconsistencies between what Mr and Mrs H have said happened, and what other evidence shows. For example, in response to the Investigator's view, the Lender highlighted that the statement had errors within it relating to the dates Mr and Mrs H say they made purchases in 1991 and 2002. The Lender has also highlighted that there is little detail about what was specifically said at the sales presentation, and it said the contemporaneous sales notes indicate that the conversion to Fractional Club membership was so that Mr and Mrs H could get out of their previous membership, and not for the investment element.

The question to consider, therefore, is whether there is a core of acceptable evidence from Mr and Mrs H, such that the inconsistencies have little to no bearing on whether their testimony can be relied on, or whether such inconsistencies are fundamental enough to undermine, if not contradict, what they say about what the Supplier said and did to market and sell Fractional Club membership as an investment.

And having considered their testimony, I don't find it in any way material that Mr and Mrs H have mistakenly said they made an EC points purchase in August 1991, when the evidence shows that they made a purchase in December 1991 and August 1992, and also that Mr and Mrs H said they made a purchase in 2002 when this also appears to be an error. Misremembering the dates of purchases which occurred about 18 years and 11 years before the sale being considered here is not, in my view, material to whether the Fractional Club membership was sold as an investment or not, or whether their testimony can be relied on. Whilst these are mistakes, I don't think they fundamentally undermine the crux of the statement, which sets out how Mr and Mrs H say the Supplier sold and/or marketed the Fractional Club to them as an investment.

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 H 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;*
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; and*
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 H 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 H'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 H say that the Supplier did exactly that at the Time of Sale – saying the following during the course of this complaint:

> *"The representatives advised that the only way [to exit the EC membership] was to exchange all points into fractional points. This would give us an investment in property that would be sold in 2028. We were advised that property would increase in value and at the sale all the investors would have their money plus a profit. This would also give a guaranteed exit from the contract."*

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

(1) *There were two aspects to their Fractional Club membership: holiday rights and a profit on the sale of the Allocated Property; and*

(2) *They were told by the Supplier that they would get their money back or more during the sale of Fractional Club membership.*

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 H'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 H 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.

Although not provided by the Lender in this particular complaint, there is evidence that I have seen in other very similar complaints involving this particular type of membership, 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 H, 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 standard contemporaneous paperwork that state that Fractional Club membership was not sold as an investment. Unless either the Lender or Mr and Mrs H can show otherwise in response to this provisional decision, I think it likely that the following disclaimers were included in the paperwork given to and signed by Mr and Mrs H:

On the second page of the Purchase Agreement, titled "Terms and Conditions", the first read:

> *"You should not purchase Your […] Fractional Points as an investment in real estate. The Purchase Price paid by You relates primarily to the provision of memorable holidays for the duration of Your ownership. You are at liberty to dispose of Your […] Fractional Points at any time prior to the Sale Date in accordance with Rule 7 of the Rules of the Owners Club."*

Further, there was likely to have been a document titled "Key Information", an extract of which would have read:

> *"**Exact nature and content of the right(s):***
>
> ***…***
>
> *Between six to nine months before the Proposed Sale Date, [the Trustee] will appoint two independent valuers to value the Property and will then take steps to sell the Property at the best achievable market price. You must bear in mind that your […] Fractional Points (and the purchase price paid by you for those points) relates primarily to the acquisition by you of many years of wonderful holidays. We are sure that you will get a great deal of pleasure from your holidays. Your decision to purchase […] Fractional Points should not be viewed by you as a financial investment."*

Finally, there would have been another document titled "Customer Compliance Statement/Declaration to Treating Customers Fairly", which included the following:

> *"5. We understand that the purchase of our […] Fractional Points is an investment in our future holidays, and that it should not be regarded as a property or financial investment. We recognize that the sale price achieved on the sale of the Property in the Owners Club (and to which our […] Fractional Points have been attributed) will depend on market conditions at that time, that property prices can go down as well as up and that there is no guarantee as to the eventual sale price of the Property.*
>
> *6. We understand that the Property referenced on our Purchase Agreement will be sold as soon as possible on or after the Proposed Sale Date. However, we realise that it may not be possible to source a buyer immediately, and that in the event that the sale is affected on or after the Proposed Sale Date, we will be required to pay our Dues each year until the Property is sold."*

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And there are a number of strands to Mr and Mrs H's allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that membership of the Fractional Club was expressly described as an "investment" and (2) that membership of the Fractional Club could make them a financial gain and/or would retain or increase in value.

So, I have considered:

(1) *whether it is more likely than not that the Supplier, at the Time of Sale, sold or marketed membership of the Fractional Club as an investment, i.e. told Mr and Mrs H 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 its dealing with complaints of a similar nature, this Service has seen some training material and some internal documents relating to the sale of Fractional Club by the Supplier. The Lender has also provided, in relation to other fractional timeshare complaints, witness statements from both previous and (at the time) existing employees of the Supplier setting out how its sales staff were trained to sell its products – all of which I have considered.

I recognise the amount of witness evidence that's been provided in support of the disclaimers in the paperwork I've referred to above. Indeed, I acknowledge what the witness statements say about the Supplier not referring to Fractional Club membership as an 'investment', not making any reference to the value of the Allocated Property and making every effort not to give customers, such as Mr and Mrs H, the impression that they were investing in something that would make them a profit.

However, I think the argument by the Lender on this issue runs the risk of taking too narrow a view of the prohibition against marketing and selling timeshares as an investment. 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)).' 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, in my view, 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 100 of Shawbrook & BPF v FOS, Mrs Justice Collins Rice said the following:

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

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

"[...] 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." (emphasis my own)*

So, I'm not persuaded that the prohibition in Regulation 14(3) was confined to, for example, using the word 'investment' when promoting or selling a timeshare contract. I think that the prohibition may capture the promotion of investment features incorporated into a timeshare to persuade consumers to purchase, including leading a consumer to expect a financial gain from the timeshare. After all, Mrs Justice Collins Rice said in Shawbrook & BPF v FOS, at 76 (when discussing an ombudsman's approach to Regulation 14(3)):

"[…] He was entitled in other words to be highly sensitive to the ***overt and covert*** *messaging – that is, the fine calibration of the encouragement given – by the seller in a case like this. There was nothing wrong with an approach which had the absolute prohibition in Reg.14(3) within the ombudsman's field of vision from the outset as he looked at the evidence for the true nature of the transaction that was done here. Indeed, he was required as a matter of law to do so." (emphasis my own)*

Mr and Mrs H say in their testimony that the Supplier sold and/or marketed Fractional Club membership to them as an investment. So, I've thought about how the membership would likely have been presented to Mr and Mrs H. Alongside the information I have about the sales, and what this Service has been told about how the Supplier trained its staff, I've considered the inherent probability of the allegation when assessing whether I find that thing did or did not happen.

And I am satisfied I am able to do that. After all, in Onassis v. Vergottis [1968] 10 WLUK 101, Lord Pearce referred to the need to look at "probabilities", as well as contemporaneous documents and admitted or incontrovertible facts, when weighing the credibility of a witness's evidence (at p.431). In Armagas Ltd v. Mundogas SA (The Ocean Frost) [1986] 2 W.L.R. 1063, Goff LJ also referred to looking at "the overall probabilities" when ascertaining the truth (at p.57). And in Gestmin SGPS S.A. v. Credit Suisse (UK) Limited [2013] EWHC 3560, Leggatt J suggested (at para.22) that factual findings should be based on "inferences drawn from the documentary evidence and known or ***probable*** *facts" (my emphasis). Here, I think it is inherently more probable that a timeshare product with an investment element is sold in a way promoting that element, and therefore risking a breach of Regulation14(3), compared with the sale of a product without the possibility of a monetary return.*[1]

[1] This is different to saying that it is more likely than not that a product with an investment element is sold as an investment, simply due to that investment element. For the avoidance of doubt, I make no such finding.

As I've already set out, as regards what happened at the Time of Sale, Mr and Mrs H have submitted testimony which they say sets out their recollections of events. And as I've said, I am currently satisfied that I am able to place weight on what they have said occurred at the Time of Sale.

The testimony sets out their entire relationship with the Supplier, from their initial purchase of EC points in 1991, up to and including their purchase of Fractional Club membership in 2014. And from their testimony it is clear that in the run up to the Time of Sale, Mr and Mrs H were becoming dissatisfied with their EC membership. They have set out that they were having problems with availability, the quality of the accommodation, and the maintenance fees they were being required to pay.

In relation to the Time of Sale, Mr and Mrs H said in their testimony:

> *"On holiday in Brighton and invited by representatives to introduce us to Diamond Resorts. They advised that Diamond was expanding into other resorts. We were wanting [out] as the maintenance was huge and all the new resorts were all in America and the availability was poort [sic].*
>
> *The representatives advised that the only way was to exchange all points into fractional points. This would give us an investment in property that would be sold in 2028. We were advised that property would increase in value and at the sale all the investors would have their money plus a profit. This would also give a guaranteed exit from the contract."*

Here Mr and Mrs H are saying that they were told they would make a profit on their Fractional Club membership when the Allocated Property came to be sold. So, the Allocated Property was plainly a major part of the product's features and, in this instance, is a justification for the price of Mr and Mrs H's Fractional Club membership. After all, they exchanged their EC points for the exact same number of fractional points and paid an additional £11,560 to do so. So given there was no increase in holiday rights with the purchase, it seems likely that the additional cost was reflective of the Allocated Property element of the membership.

The Lender may say in response to this provisional decision, that it is not a breach of Regulation 14(3) to merely describe the nature of the product and how it worked, and I agree. But in the circumstances of this complaint, it wouldn't have made much sense if the Supplier included this feature in the product without relying on it to promote the sale, given Mr and Mrs H paid a large sum for no increase in holiday rights.

The Lender has, in response to the Investigator's view, said that the Supplier included specific disclaimers to show that it didn't present Fractional Club Ownership as an investment – and I have set these out above. But, it's ultimately difficult to explain why it was necessary to include such disclaimers if there wasn't a very real risk of the Supplier marketing and selling membership as an investment, given the difficulty of articulating the benefit of fractional ownership in a way that distinguishes it from other timeshares from the viewpoint of prospective members, especially when customers, such as Mr and Mrs H who were existing members, made the purchase and did not increase their holiday rights. And Mr and Mrs H had already held non-fractional timeshare memberships for several years and had increased their holiday rights by buying further non-fractional points on a number of occasions. So, I think it's reasonable to assume there was likely some discussion at the Time of Sale as to why they should purchase this new type of membership in particular. In other words, some discussion of why Mr and Mrs H ought to purchase the Fractional Club in the way that they did.

The investment elements of membership were plainly major parts of its rationale and justification for its cost. And as it was designed to offer its members a way of making a

financial return from the money they invested – whether or not, like every investment, the return was more, less or the same as the sum invested - it would not have made much sense if the Supplier included the features in the product without relying on them to promote sales, especially when the reality was that the principal benefits of the move to Fractional Club were its investment elements i.e., the share in the net sale proceeds of the Allocated Property and the potential financial returns from the Fractional Wish to Rent Programme. And the Lender has shown that Mr and Mrs H took advantage of the Wish to Rent Programme on several occasions, so received some money back for weeks that they did not use.

Further, I find it fanciful that the Supplier would not have highlighted the possible returns available to Mr and Mrs H when selling Fractional Membership to them given that they already had a substantial number of EC points. And as Mr and Mrs H were laying out a considerable sum to make the purchase, I think it's clear that they expected to get a significant sum back – after all they weren't buying any additional points and therefore not getting any extra holiday entitlement - so it seems common sense that the return was an important factor in the sale. Further, Mr and Mrs H have said from the outset of their complaint that they were led to believe they would get their money back plus some more (i.e., a profit) at the end of the agreement. I think that belief fits with what they did at the Time of Sale – make a significant purchase for the same holiday rights plus an interest in the sale proceeds of the Allocated Property.

Mr and Mrs H, in both their statement and in their Letter of Complaint, have been specific in what they say about how the Fractional Club was sold to them. They have said that it was positioned as an investment in property from which they would get their money back plus some more upon the sale of the Allocated Property. And given their circumstances, I am persuaded it is more likely than not that the Supplier's salesperson positioned Fractional Club membership as an investment that may lead to a financial gain (i.e., a profit) in the future, whether explicitly or implicitly. So, I am currently satisfied that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale.

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 H 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 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 H 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.

The Lender has pointed to Mr and Mrs H's usage of their memberships and has suggested that this means that access to holidays was a significant driver in their purchasing decision. I am not saying here they were not interested in holidays. Their own testimony and their purchasing and reservation history demonstrates that they quite clearly were, which is unsurprising given the nature of the product at the centre of this complaint. But Mr and Mrs H say 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, and I am persuaded by this. After all, Mr and Mrs H had increased their holding of EC points on several occasions prior to their purchase of Fractional Club, resulting in the improved benefits of the increased points holding. So, if it was improved holiday rights they were looking to achieve I cannot see why they wouldn't have just increased their holding of European Collection points as they had done previously. After all, the change from EC to Fractional Club did not provide access to a different portfolio of resorts, nor improved access to the accommodation. So the holidays they took as Fractional Club members would likely have been available to them if they'd remained as EC members.

So, in my view, there had to be some other benefit which motivated their purchase which was specific to fractional membership. As I've said, it is clear that Mr and Mrs H were unhappy with the way their EC membership was working in practice. They had been members for a long time and it seems they had found what it was providing them was becoming less appealing.

So, it seems that Mr and Mrs H were attracted to the Fractional Club by the reduced membership term, and the potential profit upon the sale of the Allocated Property. And this is supported by what the Lender says is included in the sales notes from the Supplier. The sales note says:

> *"very nice couple buying for the option to get out and get something back…"*

But, contrary to what the Lender says this suggests - that Mr and Mrs H's motivation to purchase Fractional Club was just so that they could exit their EC membership - I think the Lender has ignored the last four words of this sentence. I think it shows that they wanted to exit in order to "get something back" (i.e. the return on the sale of the Allocated Property).

So, I agree that the reduced membership term was likely to have been attractive to Mr and Mrs H. But, I don't think the reduced term was the reason for their purchase, so I don't think they would have pressed ahead for this reason alone.

I think this because at the Time of Sale Mr H was 63 years old and Mrs H was 62. Under the terms of the Supplier's exceptional circumstances policy[2] Mr and Mrs H would have been able to relinquish their EC membership when Mr H turned 75, which was in 12 years' time. And importantly, they would have been able to do so without having to pay anything. So given the Fractional Club had a membership term which was longer than the point where they would have been able to relinquish their existing EC membership for no financial outlay, I do not think this would have been a significant motivation for them, especially as they had to pay over £11,000 to achieve this. I've also not seen anything which suggests there was any reduction in the annual management charge for Fractional Club when compared to what they were having to pay for the EC membership, especially when considering the additional £11,560 cost of it. Indeed, this Service has previously been told that the Supplier made a point of telling consumers that the annual management charges were the same if they carried over and purchased the same number of points.

So, I think the prospect of a financial gain at the end of their membership term was likely to have been a significant and important factor in Mr and Mrs H's purchasing decision. And Mr and Mrs H have said as much (plausibly in my view) in their statement. Therefore, 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 their existing membership. Mr and Mrs H have not said or suggested, for example, that they would have pressed ahead with the purchase in

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[2] Set out in the EC Relinquishment Fact Sheet.

question had the Supplier not led them to believe that Fractional Club membership was an appealing investment opportunity. And as they faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I have not seen enough to persuade me that they would have pressed ahead with their purchase regardless.

And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

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 H 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.

My proposed 'Fair Compensation'

In the PD I then set out what I considered to be a fair and reasonable way for the Lender to calculate and pay fair compensation to Mr and Mrs H. I said:

Fair Compensation

Having found that Mr and Mrs H would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and Mr and Mrs H 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 H agree to assign to the Lender their 17,000 Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs H were existing European Collection members, and their membership was traded in against the purchase price of Fractional Club membership. Under their European Collection membership, they had17,000 European Collection Points. And, like Fractional Club membership, they had to pay annual management charges as European Collection members. So, had Mr and Mrs H not purchased Fractional Club membership, they would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr and Mrs H from the Time of Sale as part of their Fractional Club membership should amount only to the difference between those charges and the annual management charges they would have paid as ongoing European Collection members.

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

(1) The Lender should refund Mr and Mrs H's repayments to it under the Credit Agreement, including any sums paid to settle the debt.

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

(3) The Lender can deduct:

i. *The value of any promotional giveaways that Mr and Mrs H used or took advantage of; and*

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

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

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

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

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

(6) If Mr and Mrs H'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 H 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."*

The responses to the provisional decision

Mr and Mrs H accepted the PD with no further comment.

The Lender also responded, disagreeing with my provisional findings. In addition to Mr and Mrs H's holiday reservation history, it provided witness statements from both previous and (at the time) existing employees of the Supplier setting out how its sales staff were trained to sell all its products, and how Fractional Membership in particular was sold to both new and existing members. It also cited three court judgements (*Gallagher v Diamond Resorts, Brown and Brown v Shawbrook Bank Limited* and *Armiger v Shawbrook Bank Limited*) that it wished me to consider.

In the Lender's response to the PD, it continually referred to the product sold as being

'FPOC2', which was a fractional product sold by a different timeshare provider. However, this is clearly an error, so I will address its response as if it is referring to the correct Supplier[3] and the correct fractional membership.

In addition to submitting the statements, the Lender began by addressing the witness testimony from Mr and Mrs H that I had relied upon. It said the testimony was unsigned, undated[4], vague, brief, inconsistent and contains factual inaccuracies which distort the events surrounding the sales. It said the reliability of the testimony is questioned because:

- The testimony is unsigned and undated, and it is unclear why the Ombudsman has relied on it, but won't rely on the contemporaneous sales documentation, some of which has been signed by Mr and Mrs H.
- There is no evidence that Mr and Mrs H enquired with the Supplier about what would have happened with their fractional ownership and any potential profit when their claim was submitted. This casts doubt on their motivation for the sale.
- The claims made are generic and lack detail. They have failed to provide any clarity on how the product was sold as an investment, and this is because the recollection is incorrect.
- It is incorrect for the Ombudsman to conclude that the investment element was an important and motivating factor for the purchase. The real motivation was the holidays it offered.
- Mr and Mrs H had been members of the Supplier since 1991 and had made 6 purchases and/or trade ins which indicates the motivations behind their purchases were in respect of the holidays provided by each product.
- The interpretation by the Ombudsman of the sales note stating *"very nice couple buying for the option to get out and get something back…"* means it was an *"investment"* is misguided. The Supplier has stated that this relates to the fact that Mr and Mrs H will receive a share of the Allocated Property rather than an *"investment".*
- The witness testimony and the Letter of Complaint contain a number of factual inaccuracies and inconsistencies that are not acknowledged in the PD. These must be considered, along with how they impact the veracity and reliability of the witness testimony. These factual inaccuracies include:
    - The Letter of Complaint alleges Mr and Mrs H *"were pressured into entering the agreement".* This has not been included in the testimony and is factually inaccurate.
    - In the Letter of Complaint, the PR says the Fractional Club was presented as being able to secure *"exclusive resorts and a higher standard of accommodation".* This is again not in the witness testimony and is inaccurate. Mr and Mrs H would have been aware that the resorts are not exclusively available to points members.
- These incorrect allegations contained within the Letter of Complaint, and which are not supported by Mr and Mrs H in the testimony, are designed to distort the relationship between the Supplier and Mr and Mrs H to paint a picture that they endured hardship during the presentations and were mis-sold the purchases.
- Mr and Mrs H were clearly presented with leading questions when the recording of the testimony was completed. This leads to the conclusion that Mr and Mrs H were likely

[3] For the avoidance of doubt, the Supplier of the fractional timeshare membership which is the subject of this complaint was Diamond Resorts.
[4] This again seems to be an error on the Lenders part because, as has been set out, the testimony is dated 4 September 2019.

presented with an opportunity to obtain some redress or recoup some monies by the PR.

- These factual inaccuracies suggest that the PR has manufactured the testimony by using a templated format, which is not specific to the actual facts of the matter.
- The Ombudsman must give further consideration to the issues of the veracity and reliability of the witness testimony, as the volume of inaccuracies shifts the balance of credibility to one where the allegation of 'sold and marketed as an investment' is under considerable doubt.
- The Ombudsman's application of the case of *Smith v Secretary of State for Transport* is incorrect.
- If the Ombudsman is prepared to rely on Mr and Mrs H's testimony, the Ombudsman needs to equally rely on the contemporaneous documentation from the point of sale.
- The allegations made are generic and hold no merit.

Against the above information, the Lender said it is not credible that Mr and Mrs H were assured that they would make *"money"* or *"profit",* nor is it credible that their motivation was the investment element, as opposed to their future holiday needs. The Ombudsman has to take into account the significant inaccuracies/inconsistencies in Mr and Mrs H's recollections when assessing its overall reliability.

The Lender then went on to consider how the PD dealt with the breach of Regulation 14(3) of the Timeshare Regulations. It said, in summary:

- The PD errs in conflating the two meanings of the word 'return' – a 'return' on investment (the measure of profit) and being told some money would be 'returned' upon the sale (no connotation of investment or profit). The customer being told that some money would be 'returned' upon sale of the Allocated Property does not breach Regulation 14(3).
- Selling an investment requires a finding of a representation by the seller that the reason, or significant reason for the purchase is the prospect of a financial gain/profit, and the corresponding motive on the part of the consumer. Referring to the prospect of a residual return does not satisfy this test. If this was an investment, then Mr and Mrs H would have been informed of the return. This has not been alleged in either the Letter of Complaint or the testimony.
- The documentation (including the training material) in relation to the Fractional Club sale is unobjectionable and does not breach Regulation 14(3). The sales documentation includes disclaimers which evidences compliance with Regulation 14(3).
- The question the Ombudsman should have considered is whether there is sufficiently clear, compelling evidence that the timeshare product was marketed and sold as an investment (i.e., for intended financial profit or gain as against the initial outlay). The reasonable answer is that the sales documentation provides no reason to consider there was any such marketing or sale.

It then made submissions regarding the legal test applied in the PD when assessing if the relationship is unfair:

- The test to be applied, as stated in *Carney v NM Rothschild and Sons Ltd,* was whether there was a "*material impact on the debtor when deciding whether or not to enter the agreement*".
- The Ombudsman has erred in the PD and applied a different test – reversing the burden of proof. It is necessary to assess whether there is sufficient evidence of a material impact on the decision to enter the agreement.

- Mr and Mrs H's circumstances and their motivations for the purchase meant the actual sale process did not have a material impact on their decision to purchase. Therefore, the credit relationship was fair.

And finally, the Lender addressed the proposed 'fair compensation' set out in the PD. It said:

- The Ombudsman has failed to consider that the position Mr and Mrs H would have been in had they not purchased the Fractional Club membership, would be that they would have remained in the agreement with the Supplier and [their previous lender]. It must be understood that that if it wasn't for the points they traded in (17,000 EC points) they wouldn't have been able to purchase the Fractional Club membership.

The Lender concluded by saying that there is no clear, compelling evidence that the Fractional Club membership was sold to Mr and Mrs H with the intention of financial gain.

As the deadline for responses to my PD has now passed, the complaint has come back to me to reconsider.

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 below:

<u>The Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) (the 'CCA')</u>

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

<u>Case Law on Section 140A</u>

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."[5]

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

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

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

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

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

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

The Law on Misrepresentation

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 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.[6]

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')

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

County Court Cases on the Sale of Timeshares

1. *Hitachi v Topping* (20 June 2018, Country Court at Nottingham) – claim withdrawn following cross-examination of the claimant.
2. *Brown v Shawbrook Bank Limited* (18 June 2020, County Court at Wrexham)
3. *Wilson v Clydesdale Financial Services Limited* (19 July 2021, County Court at Portsmouth)
4. *Gallagher v Diamond Resorts (Europe) Limited* (9 February 2021, County Court at Preston)
5. *Prankard v Shawbrook Bank Limited* (8 October 2021, County Court at Cardiff)

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

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').

What I've decided – and why

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

And having considered everything again, and having read and considered all of the statements and sales documentation, along with the reasons the Lender gave for why it disagreed with my PD, I remain satisfied that this complaint should be upheld for the reasons set out above in the extract of my PD. I think it is more likely than not that the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr and Mrs H as an investment at the Time of Sale. And, in the circumstances of this complaint, that breach rendered the credit relationship between them and the Lender unfair to them for the purposes of Section 140A of the CCA.

I will also deal with the matters raised by the Lender in response, but in doing so, I note again that my role as an Ombudsman is not to address every single point that has been made in response. Instead, it is to decide what is fair and reasonable, on the balance of probabilities, in the circumstances of this complaint. So, while I have read the Lender's response in full, I will confine my findings to what I believe are the salient points.

I have considered the three court judgements cited by the Lender. Whilst being cognisant of what was found in these cases, they were each decided by Judges on their own merits, and they do not alter my opinion in this case.

<u>Mr and Mrs H's testimony</u>

Much of the Lender's response to the PD set out reasons why it didn't think Mr and Mrs H's testimony was reliable. The Lender says that the statement is unsigned and undated, and the claims made are generic and lack detail. But I am not persuaded that this means the testimony is unreliable.

I am aware that the testimony provided is not signed, but contrary to what the Lender says, it is dated. And, as I said in the PD, I can't see why I shouldn't rely on what has been said here. The substance of the testimony is consistent with what has been set out in the Letter of Complaint, and it seems to be written in Mr and Mrs H's own words.

Given that the statement would have been written some years after the events being considered, it is unsurprising that there are some things that are recalled which lack detail. What I need to consider, is whether there is a core of acceptable evidence from Mr and Mrs H such that the gaps or vague recollections have little to no bearing on whether their testimony can be relied on, or whether such gaps are fundamental enough to undermine, if not contradict, what they say about what the Supplier said and did to market and sell the Fractional Club membership as an investment.

The Lender has highlighted that there are allegations contained in the Letter of Complaint which are not mentioned at all in the witness statement. It says this is evidence that the PR has made generic allegations, and that the statement is unreliable.

But the Lender has not identified anything in the testimony that it can point to as being factually incorrect. It is simply disagreeing with what is being alleged. The factual inaccuracies that it says it has identified are contained within the Letter of Complaint, not the testimony. And this letter, whilst it is information as to what the PR says may have gone wrong, is not evidence. And I have not treated it as evidence, nor have I used it to inform my decision, other than it set out the points of complaint.

So, whilst being mindful of the fact that the testimony was compiled some time after the events, and having considered what the Lender has had to say on this issue, I remain satisfied, in this particular case, that I am able to place weight on what Mr and Mrs H have said.

How the Supplier sold and/or marketed the Fractional Club

The Lender has said that in my PD I have erred in conflating the two meanings of the word 'return', and that if a customer was told that some money would be 'returned' upon the sale of the Allocated Property, that would not be a breach of Regulation 14(3). And I agree. I recognise that it was possible to market and sell Fractional Club membership without breaching the relevant prohibition in Regulation 14(3). For instance, simply telling a prospective customer very factually that a fractional membership included a share in an allocated property, and that they could expect to receive some money back on the sale of that property, but less than what they put in, would not breach Regulation 14(3).

However, as I said above, I think the argument by the Lender on this issue runs the risk of taking too narrow a view of the prohibition against marketing and selling timeshares as an investment. As I said in my PD, and I maintain now, 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)).'"

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.

But I acknowledge again that the Supplier, within the standard sales documentation, made efforts to avoid specifically describing Fractional Club membership as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs H, 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.

I do recognise the amount of witness evidence that's been provided in support of the disclaimers in the paperwork I've referred to above, both previously and in response to the PD. Indeed, I acknowledge what the witness statements say about the Supplier' sales representatives being trained to not refer to Fractional Club membership as an 'investment', to not make any reference to the value of the Allocated Property and making every effort to not give customers, such as Mr and Mrs H, the impression that they were investing in something that would make them a profit.

However, as I said before, deciding what happened in practice is often not as simple as looking at the contemporaneous paperwork. Especially when such paperwork was produced and signed *after* potential customers, such as Mr and Mrs H, had already been through a lengthy sales presentation, and had already decided to make the purchase. So, it is important to balance it with what I think it is likely that Mr and Mrs H were told at the Time of Sale about Fractional Club membership.

Mr and Mrs H's statement is regarding their specific sale, and what they say they remember being told by their particular salesperson. So, whilst I can see the training the Supplier's staff were given set out that Fractional Club membership should not be referred to as an 'investment', and that no reference as to the value of the Allocated Property should be made, the statements from the Lender don't assist me greatly when thinking about what happened on this particular Time of Sale.

Mr and Mrs H say, as regards the Time of Sale:

> *"The representatives advised that the only way [to exit the EC membership] was to exchange all points into fractional points. This would give us an investment in property that would be sold in 2028. We were advised that property would increase in value and at the sale all the investors would have their money plus a profit. This would also give a guaranteed exit from the contract."*

It seems clear to me that Mr and Mrs H are saying that the Supplier, at the Time of Sale, sold the Fractional Club memberships to them as an investment. And it also seems clear that they are saying that this investment would *"…increase in value and at the sale all the investors would have their money plus a profit."*

As a result of all of the above, and having considered all of the Lender's submissions in this regard, I remain satisfied that the Supplier, at the Time of Sale, sold the Fractional Club membership to Mr and Mrs H as an investment in breach of Regulation 14(3) of the Timeshare Regulations.

Was the credit relationship between the Lender and Mr and Mrs H rendered unfair?

The Lender says that it disagrees that Mr and Mrs H were motivated to make the Fractional Club purchase for the investment element. It says their motivation was the reduced membership term and the holidays it could provide.

But as I said in the PD, and I maintain now, I do not think that is the case. I think the evidence suggests that Mr and Mrs H were motivated to make the purchase because of the profit they were told they could make. And the Lender has not produced any new evidence in this regard, they have just disagreed with my assessment of the evidence.

As I set out, Mr and Mrs H were existing EC members, and converted their 17,000 EC points into the Fractional Club membership, which did not provide any new or improved holiday rights, and Mr and Mrs H paid £11,560 for this transfer. So it follows that there had to be some reason to make this switch.

As I've said, it is clear that Mr and Mrs H were unhappy with the way their EC membership was working in practice. They had been members for a long time and it seems they had found what it was providing them was becoming less appealing. So, it seems that they were attracted to the Fractional Club by the reduced membership term, and the potential profit upon the sale of the Allocated Property. And as I've said, I think this is supported by what the Lender says is included in the sales notes from the Supplier. The sales note says:

"very nice couple buying for the option to get out and get something back…"

In response to the PD the Lender says this does not indicate the membership was an 'investment', but was simply that they would receive a share of the Allocated Property at the end of the membership term. But I don't agree. It seems, in my view, that this note is describing *why* Mr and Mrs H say they bought the membership. I've already found that it was likely that the membership was sold to them as an investment (i.e. with the potential for a profit) so *"…get something back"* is likely to be referencing the potential profit.

But whilst I agree that the reduced membership term was likely to have been attractive to Mr and Mrs H, for the reasons I set out in the PD, I don't think the reduced term was the reason for their purchase. I remain unpersuaded that they would have pressed ahead for this reason alone.

I think this because Mr and Mrs H would have been able to relinquish their EC membership when Mr H turned 75, which was in 12 years' time. And importantly, they would have been able to do so without having to pay anything. So given the Fractional Club had a membership term which was longer than the point where they would have been able to relinquish their existing EC membership for no financial outlay, I do not think this would have been why they bought the Fractional Club membership, especially as they had to pay over £11,000 for it.

So, I remain persuaded that the prospect of a financial gain at the end of their membership term was likely to have been a significant and important factor in Mr and Mrs H's purchasing decision. And Mr and Mrs H have said as much (plausibly in my view) in their statement.

Therefore, 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 their existing membership. And I do not think they would have made the purchase had it not been for that share and the possibility of a profit.

And with that being the case, I am satisfied that the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

Putting things right

In response to the PD the Lender says that Mr and Mrs H's previous EC points holding and loan from another Lender should be taken into account in the redress calculation. But their previous loan is not in any way connected to this Fractional Club purchase so is not something that should be considered here. And my proposed redress already takes into account their previous points holdings, so I remain satisfied that to fairly compensate Mr and Mrs H, the following is a fair and reasonable direction to the Lender.

Having found that Mr and Mrs H would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and Mr and Mrs H 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 H agree to assign to the Lender their 17,000 Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs H were existing European Collection members, and their membership was traded in against the purchase price of Fractional Club membership. Under their European Collection membership, they had 17,000 European Collection Points. And, like Fractional Club membership, they had to pay annual management charges as European Collection members. So, had Mr and Mrs H not purchased Fractional Club membership, they would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr and Mrs H from the Time of Sale as part of their Fractional Club membership should amount only to the difference between those charges and the annual management charges they would have paid as ongoing European Collection members.

So, here's what the Lender must do to compensate Mr and Mrs H with that being the case – whether or not a court would award such compensation:

(1) The Lender should refund Mr and Mrs H's repayments to it under the Credit Agreement, including any sums paid to settle the debt.

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

(3) The Lender can deduct:

   i. The value of any promotional giveaways that Mr and Mrs H used or took advantage of; and

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

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

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

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

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

(6) If Mr and Mrs H'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 H 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

I uphold this complaint and direct Shawbrook Bank Limited to calculate and pay Mr and Mrs H fair compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H and Mr H to accept or reject my decision before 19 August 2025.

Chris Riggs
Ombudsman