DRN-5704026

The complaint

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

What happened

On 20 July 2016 Mr and Mrs S purchased a trial membership of a timeshare from a timeshare provider (the 'Supplier') at a cost of £3,995. They paid for this membership by taking a 12-month interest-free loan for the full amount from the Lender.

This trial membership allowed them to book five weeks of accommodation from the Supplier's portfolio of resorts over the following three years. As part of the trial membership, the Supplier also gave Mr and Mrs S a free 'prelude' week, which they took in early April 2017.

While on this 'prelude' week, Mr and Mrs S purchased full membership of a timeshare (the 'Fractional Club') from the Supplier on 4 April 2017 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,590 fractional points at a cost of £22,330 (the 'Purchase Agreement'). But after trading in their existing trial membership, they ended up paying £18,335 for membership of the Fractional Club.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs S 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 S paid for their Fractional Club membership by taking finance of £20,000 from the Lender in their joint names (the 'Credit Agreement'). This was an interest-free loan repayable over 12 months, which consolidated the outstanding balance from the previous lending.

Mr and Mrs S – using a professional representative (the 'PR') – wrote to the Lender on 7 December 2021 (the 'Letter of Complaint') to complain about:

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

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

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

the Time of Sale – namely that the Supplier:

- Told them that the purchase of Fractional Club would mean they would own a "fraction" of property, when this was not true.
- Told them that the purchase was an excellent investment, and the product was a highly valuable asset which would be ever appreciating in price and would attract a large resale value when this was not true.
- Told them the Fractional Club was different to a timeshare as they were acquiring a real asset because property, unlike a timeshare, had an intrinsic value, which is untrue.
- Told them the resorts were exclusive to owners and not open to the general public, when that is not true.
- Told them that their Fractional Club membership could be sold at any time at a healthy profit. If they chose not to sell, it would be guaranteed to sell after 15 years with the profits shared amongst the owners when this was not true.
- Told them that the price being offered was only available on the day which was not true.

Mr and Mrs S 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 S.

(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 S 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:

- They were induced to make the purchase as a result of the misrepresentations set out above.
- The contractual documentation was not provided until after the agreement to purchase.
- There were unfair contractual terms which allowed the foreclosure of the membership upon non-payment of the annual management fees[1].
- Fractional Club membership was marketed and sold to them in a manner which breached the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations') because:
    - The Supplier failed to provide Mr and Mrs S with key information, and the information provided needed to be in a clear, comprehensive and accurate manner.
    - This was an invitation to a sales event – the nature of the event should have been disclosed.
    - There was no transparency as to what the maintenance fees are and how they are calculated.
    - No indication was given about the additional costs for joining exchange schemes.
    - No contract-termination information was given.
    - No resale information was given.

[1] Although not set out as such in the Letter of Complaint, this can be considered as a breach of the Consumer Rights Act 2015 ('CRA').

- The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment and the loan was unaffordable.

The Lender initially dealt with Mr and Mrs S's concerns as a dispute, but when no agreement could be reached it considered the matter as a complaint and issued its final response letter on 6 July 2017, rejecting it on every ground.

Mr and Mrs S did not accept this and asked for their complaint to be considered by the Financial Ombudsman Service, where it was assessed by an Investigator. And having done so, the Investigator 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 S 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 S 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.

Having considered everything that had been submitted, I agreed with the outcome reached by the Investigator, but I expanded somewhat on the reasons for upholding the complaint. 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 that they wished me to consider before I made my final decision.

The provisional decision

The PD first set out what I considered to be the legal and regulatory context relevant to this complaint. I then went on to address its merits. I 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 S 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 S's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the Supplier made misrepresentations at the Time of Sale, failed to provide Mr and Mrs S with the necessary information, and that the lending was irresponsible. I say this because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs S in the same or a better position than they would be if the redress was limited to those other aspects.

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 S 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;*
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 S and the Lender.

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

As part of their submission to this Service, the PR has submitted a statement, dated 10 November 2021, and signed by both Mr and Mrs S. So, I have considered how much weight I can place on this statement when assessing the merits of Mr and Mrs S's complaint.

The statement date is 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. Indeed, on the first line Mrs S's first name was wrong, and this was corrected by hand. So, I am mindful of the risk that Mr and Mrs S 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 S would have known, such as their personal details, so I have no doubt that Mr and Mrs S 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 S's recollections of the Time of Sale.

When considering how much weight I can place on Mr and Mrs S'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 S 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 S have said happened, and what other evidence shows. The question to consider, therefore, is whether there is a core of acceptable evidence from Mr and Mrs S, 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.

I don't for example, find it in any way material that Mrs B has mistakenly said the Fractional Club had a 17-year membership term, when in fact it is 19. Misremembering the duration by two years is not, in my view, material to whether the membership was sold as an investment or not or whether their testimony can be relied on. Whilst this is clearly a mistake, I don't think it fundamentally undermines the crux of the statement, which sets out how the Supplier sold and/or marketed the Fractional Club to them as an investment.

So overall, I am satisfied that I can place weight on Mr and Mrs S's testimony when considering what most likely happened at the Time of Sale.

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

> *"We were also told that there was a market to sell our timeshare if we decided at any point that we did not want to retain it. Alternatively, if we retained the Fractional Membership for the duration, it would be resold and at the very least, we would get our money back. It was sold to us as an investment for the future and it would benefit our children, hence it could be transferred, like one would do with your family home."*

Mr and Mrs S 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.*

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

For example, in the Member's Declaration document it states:

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

And in the Information Statement, it states:

> *"Fractional Rights have been designed to be used and enjoyed and not bought with the expectation or necessity of future financial gain." And: "The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for the direct purposes of a trade in nor as an investment in real estate. [The Supplier] makes no representation as to the future price or value of the Allocated Property or any Fractional Rights."*

When read on their own and together, these disclaimers go some way to making the point that the purchase of Fractional Rights shouldn't be viewed as an investment. But they weren't to be read on their own. They had to be read in conjunction with what else the Standard Information Form had to say, which included the following disclaimer:

> *"The Vendor, any sales or marketing agent and the Manager and their related businesses (a) are not licensed investment advisers authorized by the Financial Conduct Authority to provide investment or financial advice; (b) all information has been obtained solely from their own experiences as investors and is provided as general information only and as such it is not intended for use as a source of investment advice and (c) all purchasers are advised to obtain competent advice from legal, accounting and investment advisers to determine their own specific investment needs; (D) no warranty is given as to any future values or returns in respect of an Allocated Property."*

This disclaimer seems to have been aimed at distancing the Supplier from any investment advice that was given by its sales agents, telling customers to take their own investment advice, and repeating the point that the returns from the sale of the Allocated Property weren't guaranteed.

Yet I think it would be fair to say that, while a prospective member who read the disclaimer in question might well have thought that they would be wise to seek professional investment advice in relation to membership of the Fractional Club, rather than rely on anything they might have been told by the Supplier, it wouldn't have done much to dissuade them from regarding membership as an investment. In fact, I think it would have achieved rather the opposite.

It's also difficult to explain why it was necessary to include such a disclaimer if there wasn't a very real risk of the Supplier marketing and selling membership of the Fractional Club as an investment given the difficulty of articulating the benefit of fractional ownership in a way that distinguishes it from other timeshares from the viewpoint of prospective members.

However, weighing up what happened in practice is, in my view, rarely as simple as looking

at the contemporaneous paperwork. And there are a number of strands to Mr and Mrs S'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 S 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'.

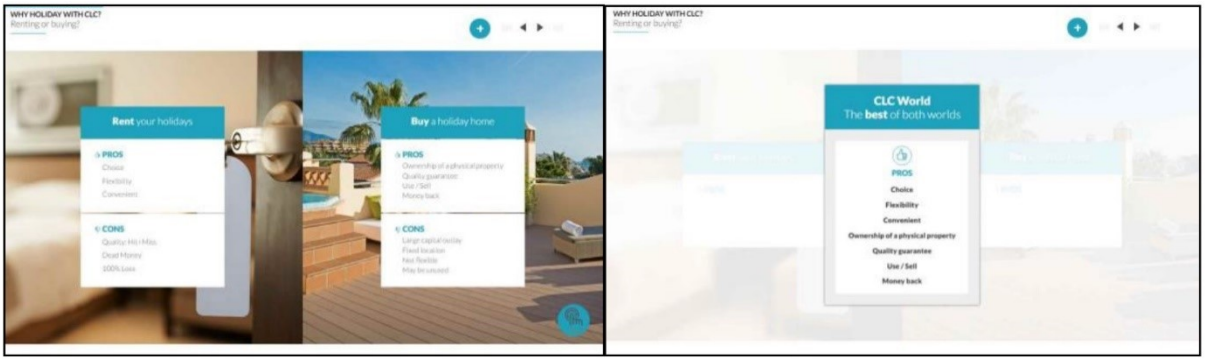
<u>How the Supplier marketed and sold the Fractional Club membership</u>

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier provided information on how it sold membership of timeshares like Mr and Mrs S's – which includes a document called the "Fractional Property Owners Club Fly Buy Manual 2017" (the '2017 Fractional Training Manual')

As I understand it, the 2017 Fractional Training Manual was used from November 2016 onwards during the sale of the Supplier's second version of the Fractional Property Owners Club (which I will continue to refer to as simply the Fractional Club) – which was the version Mr and Mrs S appear to have purchased. It is not entirely clear whether Mr and Mrs S would have been shown the slides included in the Manual. But it seems to me to be reasonably indicative of:

1. *the training the Supplier's sales representatives would have got before selling Mr and Mrs S their Fractional Club membership; and*
2. *how the sales representatives would have framed the sale of Fractional Club membership to Mr and Mrs S.*

Having looked through the Manual, my attention is drawn first to page 19 (of 74) – which includes two slides called "Why holiday with [the Supplier]? Renting or buying?".



They were the first slides in the Manual that seems to me to set out any information about Fractional Club membership, albeit without expressly referring to the Fractional Club, because they suggest that sales representatives were likely to have made the point to Mr and Mrs S that holidaying with the Supplier combined the best of (1) and (2), including, amongst other things, ownership of a physical property and money back – which were benefits that were only front and centre of Fractional Club membership.

From the off, therefore, it seems likely that sales representatives would have demonstrated that there were financial advantages to Fractional Club membership rather than being a member of a 'standard' timeshare.

Indeed, the slides above presented a very similar prospect to that presented in a slide used in one of the Supplier's earlier training manuals that was used to help it sell the first version of Fractional Property Owners Club:

All three indicate that sales representatives would have taken prospective members through three holidaying options along with their positives and negatives:

1. *"Rent Your Holidays"*
2. *"Buy a Holiday Home"*
3. *The "Best of Both Worlds"*

I acknowledge that the slides incorporated into the 2017 Fractional Training Manual don't include express reference to the 'investment' benefit of Fractional Club membership. But they allude to much the same concept.

One of those advantages referred to in the slides on page 19 of the 2017 Fractional Training Manual is the "ownership of a physical 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 any mortgage secured against it, this particular advantage of Fractional Club membership was portrayed in terms that played on the opportunity ownership gave prospective members of the Fractional Club to accumulate wealth in a similar way.

When the Manual moved on to describe how membership of the Fractional Club worked between pages 26 and 36, one of the major benefits of Fractional Club membership was described on page 35 as:

"A major benefit is that after 19 years of fantastic holidays, the property in which you own a fraction is sold and you will receive your share of the sale proceeds according to the number of fractions owned."

And on page 36 there were notes that encouraged sales representatives to summarise this benefit in the following way:

"So really 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?".

After discussing some of the other aspects of membership, such as the different resorts available to members, page 53 of the Manual indicates that sales representatives would have moved onto a cost comparison between "renting" holidays and "owning" them. Sales representatives were encouraged to tell prospective members how much they would spend over 19 years (i.e., the length of Fractional Club membership) on holidays with "no return" in contrast to spending the same amount of money as Fractional Club members – thus demonstrating the financial advantages of membership.

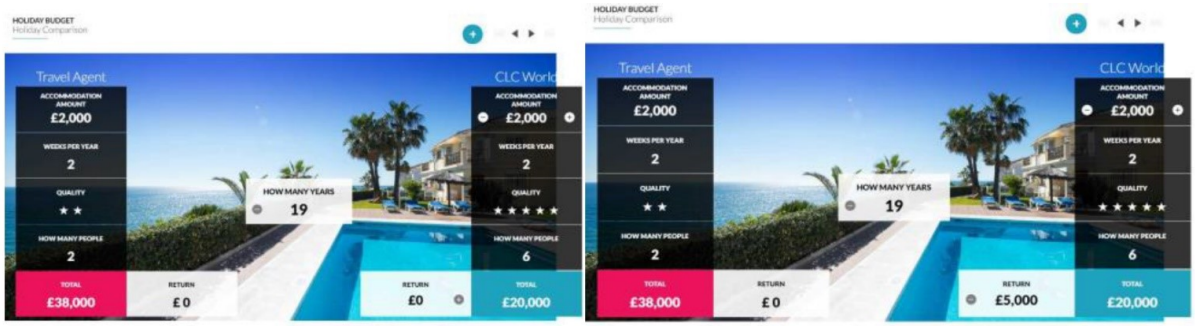
And this seems to be reflected in what Mr and Mrs S say in their statement. They said the Supplier positioned Fractional Club membership in the following way:

"We would therefore get cheap holidays and at the end of 17[2] years we would get a return on our investment, which would be the equivalent of property prices in 17 years' time. It was pointed out that this was a far better product than timeshare which had no resale value or traditional holiday bookings which involved "dead money"."

Page 53 included the following slides and accompanying notes:

"We aren't only talking about 10 years, we are talking about 19 years. So in actual fact, with the travel agent over 19 years you would have spend over £… with no return.

However, with [the Supplier] you would still have spent the same £… because once your fraction is paid for, the remaining years of holiday accommodation is taken care of.



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 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

[2] This appears to be an error by Mr and Mrs S here, as the membership term was 19 years.

was positioned in the 2017 Fractional 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 S) 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.

What's more, I think the Supplier's sales representatives were encouraged to make prospective Fractional Club members (like Mr and Mrs S) consider the advantages of owning something and view membership as a way of generating a return, rather than simply paying for holidays in the usual way. That was likely to have been reinforced throughout the Supplier's sales presentations by describing membership as a form of property ownership referring to the prospect of a "return". And with that being the case, 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.

I acknowledge that there may not have been a 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 S 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))."[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.

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 Shawbrook & 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.***

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[3] 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

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."*

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 and training material 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 S 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 this is supported by what Mr and Mrs S have said in their statement.

And for those reasons, I think it more likely than not that the Supplier breached Regulation 14(3) of the Timeshare Regulations.

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

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

On my reading of Mr and Mrs S'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. That doesn't mean they were not interested in holidays - their own testimony demonstrates that they quite clearly were, which is not surprising given the nature of the product at the centre of this complaint. But Mr and Mrs S 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. They say it was positioned as something different:

> *"It was pointed out that this was a far better product than timeshare which had no resale value or traditional holiday bookings which involved "dead money"."*

This makes me think that it was the potential to sell the membership during its term for a profit, or the resale value of the Allocated Property at the end of the membership term, which was what motivated them to make the purchase.

So, on the balance of probabilities, I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit, as that share was one of the defining features of membership that marked it apart from the more 'standard' type of timeshare it was compared to by the Supplier.

Mr and Mrs S 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 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 S 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."

The PD then went on to set out how I thought the Lender should calculate and pay fair compensation to Mr and Mrs S:

"Fair Compensation

Having found that Mr and Mrs S 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 S 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 S were trial members before purchasing the 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 S'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 S – whether or not a court would award such compensation:

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

i. The annual management charges Mr and Mrs S paid as a result of Fractional Club membership.

ii. The difference between the trade-in value given to Mr and Mrs S'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 S used or took advantage of; and*

ii. *The market value of the holidays* Mr and Mrs S 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 S's credit files in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr and Mrs S'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 S 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. If the Lender proposes to deduct more than the annual management charge, it should explain why and how it has calculated the amount in response to this provisional decision.*

***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 PD

The PR, on Mr and Mrs S's behalf, accepted the provisional decision with no further comment.

The Lender did not accept it and sent a lengthy response setting out why it disagreed.

It began by addressing the witness testimony from Mr and Mrs S that I had relied upon. It said the testimony was vague, brief, inconsistent and contains factual inaccuracies which distort the events surrounding the sales. It said the reliability of the testimony is questioned because:

- There is no evidence that Mr and Mrs S 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 Ombudsman has highlighted that the statement was prepared and written by the PR. Yet having identified that the testimony might not be in the words of Mr and Mrs S and that it has been heavily persuaded by the PR, it is not understood how the Ombudsman continues to place so much reliance on the veracity of the statement.
- 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, and this is supported by the sales notes taken at the time: *"perfect for them and their kids"* and they *"also like the idea that their kids can take some holidays".* Mr and Mrs S also wrote to the Supplier in 2021 saying *"…our primary objective was to travel outside of UK/Europe and to go on cruises as we had already travelled extensively."*
- The testimony and Letter of Complaint contain factual inaccuracies and were prepared by the PR rather than being customer recollection. The following inaccuracies have not been considered:
    - Mr and Mrs S allege they were pressured into the purchase and were not given a chance to properly consider it. This is contradicted by the sales notes and is not elaborated on at all.
    - Mr and Mrs S attended 3 presentations, and purchased at 2 of them. This shows they were experienced with the timeshare products and knew how to say no if they didn't want to purchase.

    - If they were pressured, they could have used the 14-day cooling off period, and have not explained why they did not do so.
    - The Letter of Complaint and the statement assert that Mr and Mrs S weren't financially stable at the Time of Sale. However Mrs S was employed with a salary, and they passed the affordability checks.
    - Mr and Mrs S say they were not made aware of what the management charges would be, but this is set out in the Members Declaration which was initialled and signed by both of them.
    - Contrary to what Mr and Mrs S claim, the Supplier says they never enquired about a cruise.
    - The Supplier states that Mr and Mrs S were introduced to the concept of purchasing a holiday home from it for £200,000. This shows that Mr and Mrs S were able to distinguish between a holiday home purchase and holiday ownership, and were aware that by purchasing Fractional Club membership they weren't buying a property and/or *"bricks and mortar".*
- These factual inaccuracies suggest that the PR has manufactured the testimony by using a templates format, which is not specific to the actual facts of the matter.
- If the Ombudsman is prepared to rely on Mr and Mrs S's testimony, the Ombudsman needs to equally rely on the contemporaneous documentation provided which includes information recorded from the point of sale, which is more reliable.
- The witness testimony is based on recollections which contain a voluminous number of inaccuracies and has been prepared by the PR. There is clearly a lack of a *"core of acceptable evidence"* from Mr and Mrs S.

Against the above information, the Lender said it is not credible that Mr and Mrs S were assured that they would *"get a return on [their] investment",* nor is it credible that their motivation was the investment element, as opposed to their future holiday needs.

The Lender then went on to consider how the PD dealt with the breach(es) 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 S would have been informed of the return. This has not been alleged in either the Letter of Complaint or the testimony.
- The documentation in relation to the Fractional Club sale is unobjectionable and does not breach 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 S'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, it made submissions regarding the redress award suggested in the PD.

- The trial membership is a standalone product which can be reinstated. To put Mr and Mrs S back in the position they would have been means reverting them back to the trial membership, not refunding the cost of that trial.
- As regards the holiday deductions, it applies a methodology of annual management charges plus an additional payment for holidays taken in high season (May to October)

The Lender concluded by saying that there is no clear, compelling evidence that the Fractional Club was sold to Mr and Mrs S 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

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."[4]

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*

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

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.

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.[5]

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 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).

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.

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

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)

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, including everything the Lender has submitted following my PD, I still uphold Mr and Mrs S's complaint for the reasons set out in the extract of my PD above. I will also deal with the matters that the Lender raised 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. Instead, it is to decide what is fair and reasonable 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 find are the salient points.

Mr and Mrs S's testimony

As part of Mr and Mrs S's submissions to this service, the PR has submitted a statement that it says represents Mr and Mrs S's recollections of the Time of Sale. The Lender has said that it is not safe to place much weight on the statement, for the reasons set out above. So, I have again considered how much weight I think I can place on this statement when assessing the merits of Mr and Mrs S's complaint.

As I said in the PD, it is clear that the statement has been prepared by the PR. It is set out in a legalistic framework and in a way that makes it appear prepared for legal action. But I repeat, it is not unusual for statements to be written on behalf of consumers – it is part of the PR's role to submit claims and complaints on behalf of their clients. Having read this statement again in light of the Lenders arguments, I remain of the opinion that it likely represents Mr and Mrs S's recollections of the Time of Sale and I am able to rely on it. I do not think that the inconsistencies identified by the Lender in its response to the PD, nor that which I have previously mentioned, are fundamental enough to undermine or contradict what they say about what the Supplier said and did to market and sell Fractional Club membership as an investment.

So overall, I remain satisfied that I can place weight on Mr and Mrs S's testimony when considering what most likely happened at the Time of Sale.

How the Supplier sold and/or marketed Fractional Club

The Lender has said that if I am prepared to rely on Mr and Mrs S's testimony, I need to equally rely on the contemporaneous documentation provided which includes information

recorded from the point of sale, which is more reliable, and it points to some sales notes which do not reference the products being sold as an investment. But I cannot see that this actually supports the argument that they were *not* sold in that way. This is a note by the sales agent, compiled post sale, to record how the sale went. Given that the sales agent would likely have known that they were not allowed to sell Fractional Club to customers as an investment, I would be very surprised to see it recorded on the sales notes that it was sold in that way, and that Mr and Mrs S had bought it as an investment. And a record that Mr and Mrs S said at the time Fractional Club was *"perfect for them and their kids"* and they *"also like the idea that their kids can take some holidays"* does not provide any insight into how the product was sold, or that was their only motivation to purchase, only that they were happy with it.

But in addition, the Lender seems to have overlooked the section of the PD where I deal with the contemporaneous documentation of both sales, which, as the Lender states, Mr and Mrs S signed at the Time(s) of Sale.

In the PD I said:

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

For example, in the Member's Declaration document it states:

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

And in the Information Statement, it states:

> *"Fractional Rights have been designed to be used and enjoyed and not bought with the expectation or necessity of future financial gain." And: "The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for the direct purposes of a trade in nor as an investment in real estate. [The Supplier] makes no representation as to the future price or value of the Allocated Property or any Fractional Rights."*

When read on their own and together, these disclaimers go some way to making the point that the purchase of Fractional Rights shouldn't be viewed as an investment. But they weren't to be read on their own. They had to be read in conjunction with what else the Standard Information Form had to say, which included the following disclaimer:

> *"The Vendor, any sales or marketing agent and the Manager and their related businesses (a) are not licensed investment advisers authorized by the Financial Conduct Authority to provide investment or financial advice; (b) all information has been obtained solely from their own experiences as investors and is provided as general information only and as such it is not intended for use as a source of investment advice and (c) all purchasers are advised to obtain competent advice from legal, accounting and investment advisers to determine their own specific investment needs; (D) no warranty is given as to any future values or returns in respect of an Allocated Property."*

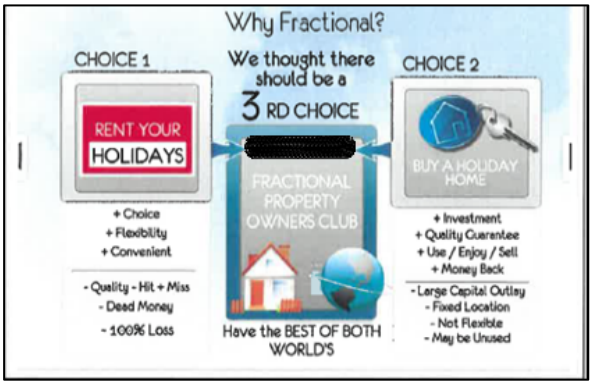
This disclaimer seems to have been aimed at distancing the Supplier from any investment

advice that was given by its sales agents, telling customers to take their own investment advice, and repeating the point that the returns from the sale of the Allocated Property weren't guaranteed.

Yet I think it would be fair to say that, while a prospective member who read the disclaimer in question might well have thought that they would be wise to seek professional investment advice in relation to membership of the Fractional Club, rather than rely on anything they might have been told by the Supplier, it wouldn't have done much to dissuade them from regarding membership as an investment. In fact, I think it would have achieved rather the opposite.

It's also difficult to explain why it was necessary to include such a disclaimer if there wasn't a very real risk of the Supplier marketing and selling membership of the Fractional Club as an investment given the difficulty of articulating the benefit of fractional ownership in a way that distinguishes it from other timeshares from the viewpoint of prospective members."

I remain of the opinion that the contemporaneous documentation, whilst requiring Mr and Mrs S to sign to say specifically that Fractional Club was *not* sold as an investment, would have done little to dissuade them from thinking that it was, especially after a sales process for which the sales staff were trained using the following slide:



Again, this slide titled "Why Fractional?" indicates that sales representatives would have taken Mr and Mrs S through three holidaying options along with their positives and negatives:

(1) "Rent Your Holidays"

(2) "Buy a Holiday Home"

(3) The "Best of Both Worlds"

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

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 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, 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. And I acknowledge again that the Supplier, within the sales documentation, made efforts to avoid specifically describing Fractional Club membership as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs S, 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. But, as I set out in my PD, I thought the Supplier, during the sales presentation, most likely did position Fractional Club as an investment, and I've seen nothing to dissuade me that this was the case.

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

The Lender says that it disagrees that Mr and Mrs S were motivated to make the Fractional Club purchase for the investment element. It says the reason they made the purchase was for the holidays that the membership offered, and it has pointed to a letter apparently written by Mr and Mrs S to the Supplier in 2021 which says *"…our primary objective was to travel outside of UK/Europe and to go on cruises as we had already travelled extensively."* But I don't think the Lender has sufficiently taken account of what I said in my PD about this. I said:

"On my reading of Mr and Mrs S'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. That doesn't mean they were not interested in holidays - their own testimony demonstrates that they quite clearly were, which is not surprising given the nature of the product at the centre of this complaint. But Mr and Mrs S 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. They say it was positioned as something different:

> *"It was pointed out that this was a far better product than timeshare which had no resale value or traditional holiday bookings which involved "dead money"."*

This makes me think that it was the potential to sell the membership during its term for a profit, or the resale value of the Allocated Property at the end of the membership term which was what motivated them to make the purchase."

So, on the balance of probabilities, I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit, as that share was one of the defining features of membership that marked it apart from the more 'standard' type of timeshare it was compared to by the Supplier.

Mr and Mrs S 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 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."

To make it clear, it is likely that Mr and Mrs S were attracted to the prospect of the holidays that Fractional Club could bring them. So, whilst I accept it is *possible* that Mr and Mrs S would have purchased their Fractional Club membership even if the Supplier hadn't led them to believe that there was the prospect of a financial gain from it, I don't think that's *probable* based on what I've seen. And as Mr and Mrs S say (plausibly in my view) that the 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 remain persuaded that their purchase of Fractional Club was motivated by their share in the Allocated Property when it was sold, as that share and profit was one of the defining features of membership that marked it apart from the more 'standard' type of timeshare it was compared to by the Supplier.

And with that being the case, I remain satisfied that the Supplier's breach of Regulation 14(3) at the Time of Sale was material to their decision to purchase the Fractional Club membership that they ultimately made.

Conclusion

Given the facts and circumstances of this complaint, I still think the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs S under the Credit Agreement and the 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.

The Lender's submissions regarding the proposed redress

The Lender has disputed that it is fair that the cost of the trial membership bought by Mr and Mrs S on 26 July 2016 ought to be refunded as part of the compensation calculation. It says this trial membership can be reinstated, and to do so would put Mr and Mrs S back in the position they would have been in had there not been a breach of Regulation 14(3) at the Time of Sale.

But, having considered what the Lender has said here, I don't agree. I'll explain.

The trial membership cost £3,995 and was paid for by Mr and Mrs S by taking finance from the Lender. This trial membership allowed them to take five weeks of accommodation from the Supplier's portfolio of resorts over the following three years. But Mr and Mrs S never actually used this trial membership. They were also given a free 'prelude' week, and it was during this 'prelude' week that they bought the Fractional Club membership.

Whilst the Lender says that the trial membership can be reinstated, the reason for taking a trial membership was to enable the customer to experience the type of holiday and accommodation the Supplier could provide, and as I've said, according to an extract from the Supplier's business plan, roughly half of trial members went on to become timeshare

members. Further, the Supplier is no longer open to new members. So the reasons for taking the trial membership no longer exist, so I do not think it is right to say that reinstatement puts them back in the same position they would have been in.

Further, part of the basis for taking a trial membership was that any 'unused' part of the trial membership could be used to reduce the cost of a full membership. Here, the purchase price of Mr and Mrs S's 1,550 fractional points was set by the Supplier as £22,330. But Mr and Mrs S traded in their unused trial membership and ended up paying £18,335 for membership of the Fractional Club. So the trial membership acted as a deposit against their purchase, and they would likely have had to pay the full purchase price of £22,330 had they not had the trial membership to trade in. In other words, the trial membership worked exactly as designed and fulfilled its purpose. So it is right that everything they paid, both as a deposit and the remaining balance is refunded as set out in the PD.

Putting things right

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

As I've said, the trade-in value of the trial membership 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 the Lender must do to compensate Mr and Mrs S – whether or not a court would award such compensation:

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

i. The annual management charges Mr and Mrs S paid as a result of Fractional Club membership.

ii. The difference between the trade-in value given to Mr and Mrs S'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 S used or took advantage of; and

iv. The market value of the holidays* Mr and Mrs S 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 S's credit files in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr and Mrs S'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 S 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 fair compensation to Mr and Mrs S as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S and Mr S to accept or reject my decision before 18 August 2025.

Chris Riggs
Ombudsman