DRN-5740629

The complaint

Ms S's complaint is, in essence, that Oplo PL Ltd[1] (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with her under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying claims under Section 75 of the CCA.

What happened

Ms S purchased a trial membership of a timeshare from a timeshare provider (the 'Supplier') on 23 September 2017. This cost her £4,595 and was paid for with a loan from a different lender. This purchase, and the associated finance agreement was the subject of a separate complaint[2] and is included here for information only.

Whilst on a complimentary holiday as part of her trial, Ms S purchased full membership of a timeshare (the 'Fractional Club') from the Supplier on 25 June 2018 (the 'Time of Sale'). She entered into an agreement with the Supplier to buy 910 fractional points at a cost of £13,829 (the 'Purchase Agreement').

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

Ms S paid for her Fractional Club membership by taking finance of £17,616 from the Lender (the 'Credit Agreement'). This consolidated the outstanding balance of the loan taken out to buy the trial membership.

Ms S – using a professional representative (the 'PR') – wrote to the Lender on 25 November 2021 (the 'Letter of Complaint') to raise a number of different concerns. As those concerns haven't changed since they were first raised, and as both sides are familiar with them, it isn't necessary to repeat them in detail here beyond the summary above.

The Lender dealt with Ms S's concerns as a complaint and issued its final response letter on 18 December 2021, rejecting it on every ground.

The PR, on behalf of Ms S, then referred the complaint to the Financial Ombudsman Service. As part of the submissions, the PR provided a written testimony from Ms S dated 28 January 2020 which set out her recollections of her entire relationship with the Supplier. As far as is relevant to this complaint, she said:

> *"I went to Spain on the free week in 2018. It was a must that we attended a meeting and they came and collect me and took me to another resort. I was fully reliant on the reps taking me back to the resort.*

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[1] The finance to which this complaint relates was originally provided by Honeycomb Finance Ltd. It is now the responsibility of Oplo PL Ltd and as such Oplo is the respondent in this complaint

[2] This complaint was not upheld by this Service.

Ther meeting was very long high-pressured and we were advised that there was a product called fractional points.

The representatives advise that I would be purchasing property that would be sold in a date in the future. We would make a profit on the sale and be able to end our contract on the sale.

The reps said I had to take it on the day, you could not leave and this price was only available there and then. This was a lot of pressure.

[…]

On the advice of the representatives and thinking I was investing in property that I would make a profit from in the future I purchased 910 fractions on the 25/06/18 for £13829 with a consolidation loan for £17616 with [the Lender]."

The Investigator's view

Ms S's complaint 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 Ms S at the Time of Sale in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'). And given the impact of that breach on her purchasing decision, the Investigator concluded that the credit relationship between the Lender and Ms S was rendered unfair to her for the purposes of section 140A of the CCA.

The Investigator said:

"I've read and thought about all the available evidence and arguments to come to what I think is fair and reasonable outcome given the facts and circumstances of this complaint. When doing that, I've also taken into account the relevant regulatory and legal context along with what I think was good industry practice – which includes, amongst other things:

- *The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations')*
- *The Resort Development Organisation Code of Conduct (the 'RDO Code')*
- *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] ('Shawbrook & BPF v FOS')*

And having done that, I think the following:

1. *The Supplier is more likely than not to have marketed and sold Fractional Club membership to [Ms S] as an investment contrary to Regulation 14(3) of the Timeshare Regulations.*
2. *Doing so rendered the relationship between [Ms S] and the Business unfair under section 140A of the CCA.*
3. *Ther complaint should be upheld as a result.*

I say this because [Ms S] has been clear and consistent in saying that membership of the Fractional Club was marketed to her at the Time of Sale as an investment.

I acknowledge that there were disclaimers in some of the paperwork she was given that say membership wasn't an investment. And I accept that it was possible to sell membership of the Fractional Club without breaching Regulation 14(3). But the investment element was clearly a major part of its rationale and the Supplier's justification for its cost. So, I find it hard to argue that the Supplier would have included the feature without relying on it to promote sales – which is what [Ms S] says happened at the Time of Sale. And as I haven't seen enough evidence to persuade me that I should doubt or disbelieve her when she says and explains why membership of the Fractional Club was sold to her as an investment by the Supplier, I think the Supplier is likely to have found it difficult to articulate what was a significant feature of Fractional Club membership from her perspective – which was a challenge recognised by the High Court in Shawbrook & BPF v FOS when it said that "it [was] 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."

What's more, as I haven't seen anything in this complaint to persuade me that the Supplier was likely to have done enough to mitigate that difficulty when it relied on the Fractional Club's potential to provide an investment return as a significant feature and selling point of such membership, I think [Ms S]'s allegation is plausible and persuasive, such that, given the facts and circumstances of this complaint, the Supplier's conduct was likely to have breached Regulation 14(3).

Overall, therefore, I think the Supplier's conduct at the Time of Sale knocked away important consumer protection. And in the absence of evidence to suggest that [Ms S] wasn't prejudiced by the Supplier's failings, I think the relationship between her and the Business was rendered unfair as a result. After all, she ended up borrowing and repaying a substantial sum of money that the Business benefited from when she probably would not have done had membership of the Fractional Club not been marketed and sold as an investment. And with that being the case, I don't think the Business handled her Section 140A claim fairly or reasonably.

The Investigator then set out how she thought the Lender should calculate and pay fair compensation to Ms S.

The responses to the Investigator's view

Ms S agreed with what the Investigator had said but the Lender did not. It provided a lengthy response from the Supplier, and in summary said that the testimony from Ms S is unsupported, whereas the contractual documentation from the Supplier includes several disclaimers setting out that the membership wasn't an investment. The Lender thought it was fair and reasonable to rely on hard evidence (the contractual documentation) as an indicator as to what was discussed as opposed to unsupported and unreliable customer testimony which cannot be proven and has been shown from evidence provided by [the Supplier], to be untrue.

The Lender asked for an Ombudsman's decision.

The second Investigator's view

Ms S's complaint, and the Lender's and the Supplier's response to the first Investigator's view was considered afresh by a different Investigator. And having looked at everything again, the second Investigator also thought the complaint ought to be upheld. He said:

"…having considered what the Business has said in response, I still think that her complaint should be upheld because the Supplier breached Regulation 14(3) by marketing and/or selling the Membership to [Ms S] as an investment, which, in the circumstances of this complaint, rendered the credit relationship between her and the Lender unfair to her for the purposes of Section 140A of the CCA.

My Reasons

The legal and regulatory background to this complaint is well known to both parties, so I won't set it out again here. When considering this complaint, I have looked at the entirety of the credit relationship between [Ms S] and the Business along with all of the circumstances of the complaint before coming to my view.

As noted above, my colleague thought that the Supplier breached Regulation 14(3) during the sale and that led to an unfair credit relationship. In response, the Business said the following: The Supplier didn't breach Regulation 14(3) because:

- *They did not consider that the customer testimony was reliable*
- *The contractual documentation included several disclaimers that it was not marketed as an investment.*

I've thought about these responses and set out my findings below.

<u>Did the Supplier breach Regulation 14(3) of the Timeshare Regulations?</u>

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives. A large number of ombudsman decisions have been issued concerning the material the Supplier used at the time of [Ms S]'s sale, so I won't set out the detail of the training material here. However, in summary, I think the following matters can be drawn out from the material:

- *the Supplier's sales staff were instructed to highlight the idea of ownership in the Allocated Property and that being an advantage over 'renting' your holiday accommodation (e.g. booking a hotel through a travel agent), and…*
- *It was highlighted to prospective customers that they would get a return when the Allocated Property was sold at the end of their membership term.*

I don't think the Supplier explicitly set out the likely return that a customer might expect to get, but it was implied that the return was likely to lead to an overall profit or financial gain and that was a good reason to purchase a membership, which is likely to have breached the prohibition in Regulation 14(3).

Here, [Ms S] said:

> *"The representatives advise that I would be purchasing property that would be sold in a date in the future. We would make a profit on the sale and be able to end our contract on the sale."*

I have also thought about the disclaimers that there were in the Supplier's sales documents, however I don't think they are enough to make me think the Supplier didn't breach Regulation 14(3) during the sale. That is because they were only shown to [Ms S] after they'd been through the oral sales process and after she'd decided to take the

Membership out. And I don't think they were drawn to [Ms S]'s attention, nor are they sufficiently strong to overcome the problems in the sales presentation.

I've also noted the response from the Business that the customer testimony cannot be relied on. I've no reason to doubt the testimony and I've considered that the claims made about the sale have been consistent, that being the Fractional Timeshare was marketed as an investment since the claim was originally made on 25 November 2021.

On balance, given the evidence I've seen, including the training material and [Ms S]'s own memories of the sale, I think it's likely that the Supplier did lead them to believe that the Membership was an investment that might lead to a financial gain. So, I think the Supplier did breach Regulation 14(3) of the Timeshare Regulations.

<u>Did the breach of the Timeshare Regulations mean the credit relationship was unfair?</u>

I think that for me to conclude that a breach of Regulation 14(3) led to a credit relationship between [Ms S] and the Business 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 Membership and the Credit Agreement is an important consideration.

Here, [Ms S] has said the following when explaining why she took out the Membership:

> *"On the advice of the representatives and thinking I was investing in property that I would make a profit from in the future I purchased 910 fractions on the 25/06/18 for £13829 with a consolidation loan for £17616 with Honeycomb Finance."*

So, it seems to me that the prospect of a profit or financial gain from the Membership was an important and motivating factor when she decided to take it out. That doesn't mean that [Ms S] wasn't also interested in the holidays she could've taken using their membership, which isn't surprising given its nature. But based on everything I've seen, I don't think she would've gone ahead with their purchase if Regulation 14(3) hadn't been breached.

Conclusion

Given everything, I think the Business was a party to an unfair credit relationship with [Ms S], so I think her complaint should be upheld."

The second Investigator then set out how he thought the Lender should calculate and pay fair compensation to Ms S.

Ms S accepted this second view with no further comment, but the Lender did not respond. As no agreement could be reached the matter was passed to me for a decision.

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 as follows:

<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 herself 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 her 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."[3]

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

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

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

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

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

<u>The Law on Misrepresentation</u>

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

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

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.[4]

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

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

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.
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 done that, I agree with the findings of the two Investigators, for broadly the same reasons. I 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 Ms S as an investment, which, in the circumstances of this complaint, rendered the credit relationship between her and the Lender unfair to her 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 this complaint, it is not necessary to make formal findings on all of them because, even if one or more of those aspects ought to succeed, the redress I am currently proposing puts Ms S in the same or a better position than she would otherwise be in.

The witness testimony

I have considered everything that has been said by the Lender and the Supplier in relation to the testimony submitted in this case. And having done so, I feel able to place weight on, and rely on what Ms S has said. I acknowledge that there are some inconsistencies in the testimony, but I do not think these fundamentally undermine the core of acceptable evidence it contains.

So, whilst being cognisant of the fact that memories can fade over time, I am satisfied that it is a reliable reflection of her memories of the Time of Sale.

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

Having considered the entirety of the credit relationship between Ms 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 Ms S and the Lender.

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

The Lender does not dispute, and I am satisfied, that Ms 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 as has been set out, Ms S says that the Supplier did exactly that at the Time of Sale.

Ms S alleges, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because:

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

(2) She was told by the Supplier that she would get her 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.

Ms S's share in the Allocated Property clearly constituted an investment as it offered her the prospect of a financial return – whether or not, like all investments, that was more than what she 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 Ms 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 her as an investment, i.e. told her or led her to believe that Fractional Club membership offered her the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

And, for broadly the same reasons as set out by the Investigators in this case, and having considered everything that has been said and submitted, I am satisfied that the Supplier breached Regulation 14(3) at the Time of Sale. I'll explain.

How the Supplier marketed and sold the Fractional Club membership

As has been set out, Ms S went through a sales presentation from one of the Supplier's sales staff. The type of membership being sold here was the Supplier's second version of what it called the 'Fractional Property Owners Club' (FPOC2 - I shall continue to refer to it as the Fractional Club).

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives to sell FPOC2. The contents of this training material is well known to both sides, so I do not intend to repeat it here, but I am satisfied the Supplier's sales representatives were likely to have been 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 this seems to be reflected in what Ms S says in her statement:

> *"The representatives advise that I would be purchasing property that would be sold in a date in the future. We would make a profit on the sale and be able to end our contract on the sale."*

And indeed, 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 presentation was likely to have been consistent with the idea that Fractional Club membership was an investment.

Overall, therefore, as the training slides 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 Ms 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 with that being the case, I don't find Ms S either implausible or hard to believe when she says that was how the Supplier led her to view Fractional Club membership.

On the contrary, on the balance of probabilities, I think that's likely to be what Ms S was led by the Supplier to believe at the relevant time.

I do acknowledge, as did both Investigators, that 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 Ms S, the financial value of her 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 Ms S as an investment.

However, the relevant sales paperwork was not given to and signed by Ms S until after the sales presentation and after she had agreed to make the purchase. And in any event, they do not seem to have been focussed on by Ms S at the Time of Sale.

So, for all of these reasons, I think 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 Ms 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 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 Ms S and the Lender that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led her to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On my reading of the testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when Ms S decided to go ahead with her purchase. That doesn't mean she was not interested in holidays – the testimony demonstrates that she quite clearly was, which is not surprising given the nature of the product at the centre of this complaint.

But as Ms S says (plausibly in my view) that Fractional Club membership was marketed and sold to her at the Time of Sale as something that offered her more than just holiday rights, on the balance of probabilities, I think Ms S's purchase was motivated by her 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 trial membership and the more traditional points-based timeshare memberships available.

And Ms S says as much when she concludes her statement:

"On the advice of the representatives and thinking I was investing in property that I would make a profit from in the future I purchased 910 fractions on the 25/06/18…"

What's more, based on all the evidence available, I do not think that Ms S would have pressed ahead with the purchase in question had the Supplier not led her to believe that Fractional Club membership was an appealing investment opportunity. After all, Ms S faced the prospect of borrowing and repaying a substantial sum of money while subjecting herself to long-term financial commitments, so had she not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I'm not persuaded that she would have pressed ahead with her purchase regardless.

And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision she ultimately made, and so the associated credit relationship was rendered unfair to Ms S as a result.

Conclusion

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

Putting things right

Having found that Ms 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 Ms S back in, as closely as possible, the position she would have been in had she not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Ms S agrees to assign to the Lender her Fractional Points or hold them on trust for the Lender if that can be achieved.

So, given all of the above, here's what the Lender must do to compensate Ms S – whether or not a court would award such compensation:

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

(2) In addition to (1), the Lender should also refund the annual management charges Ms S paid as a result of Fractional Club membership.

(3) The Lender can deduct:

i. The value of any promotional giveaways that Ms S used or took advantage of;

ii. The market value of the holidays* Ms S took using her Fractional Points.

iii. The outstanding balance, as at the Time of Sale, of the original loan for the trial membership which was consolidated into the Credit Agreement.

(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 Ms S's credit files in

connection with the Credit Agreement reported within six years of this decision.

(6) If Ms S's Fractional Club membership is still in place at the time of this decision, as long as she agrees to hold the benefit of her interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify her against all ongoing liabilities as a result of her 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 Ms S took using her 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 her usage.

**HM Revenue & Customs may require the Lender to take off tax from this interest. If that's the case, the Lender must give Ms S a certificate showing how much tax it's taken off if she asks for one.

My final decision

I uphold Ms S's complaint and direct Oplo PL Ltd to calculate and pay fair compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms S to accept or reject my decision before 4 September 2025.

Chris Riggs
Ombudsman