DRN-5900680

The complaint

Mr J's complaint is, in essence, that Clydesdale Financial Services Limited (trading as Barclays Partner Finance) (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

What happened

I issued a provisional decision on Mr J's complaint on 9 October 2025, in which I set out the background to the matter and my provisional findings on it. A copy of the provisional decision, and an appendix referenced in it, are appended to and form part of this final decision, so it's not necessary for me to go over the details again.

In short however, the complaint related to a purchase of a timeshare Mr J made in July 2017 from a timeshare provider – the 'Supplier' – which was financed by the Lender. Mr J considered the timeshare had been mis-sold to him and sought to hold the Lender responsible under Sections 75 and 140A of the CCA.

In my provisional decision, I said I thought the complaint ought to be upheld. This was because I'd considered the Supplier had breached the relevant regulations on selling timeshares by marketing and/or selling the timeshare in July 2017 to Mr J as an investment. This had been prohibited. I explained that the Supplier's wrongdoing had led to Mr J entering the agreement to purchase the timeshare, along with the loan from the Lender, and this had rendered the credit relationship between Mr J and the Lender, unfair to him, within the meaning of Section 140A of the CCA.

As a result of this mis-selling leading to an unfair credit relationship, I considered the Lender should compensate Mr J. What I thought constituted fair compensation is set out in detail in the appended provisional decision (and below), but broadly speaking it involved Mr J having his loan repayments refunded along with a partial refund of his timeshare management fees, and compensatory interest. I considered any benefit he had received from entering the contract to buy the timeshare, such as the value of holidays or promotional giveaways, needed to be deducted from the compensation.

I asked the parties to the complaint to respond to my provisional decision. Both Mr J and the Lender have now responded, accepting my provisional decision with no further submissions.

The case has been returned to me to issue a final decision.

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.

I note that both parties to the complaint have accepted the appended provisional decision, and have not provided any further information for me to consider. In light of this, and having

reviewed the case again, I see no reason to depart from the findings I made in the provisional decision, summarised very briefly above and explained in detail in the appended documents.

It follows that I am upholding Mr J's complaint and will be making directions to the Lender in line with those set out in the provisional decision which I reproduce below.

Putting things right

The following text is copied from the provisional decision:

Having found that Mr J 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 him back in the position he would have been in had he not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr J and any joint party[1] to the Purchase Agreement agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr J was an existing Vacation Club member and his membership was traded in against the purchase price of Fractional Club membership. Under the Vacation Club membership, he had an unknown number of Vacation Club Points. And, like Fractional Club membership, he had to pay annual management charges as a Vacation Club member. So, had Mr J not purchased Fractional Club membership, he would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr J from the Time of Sale as part of the Fractional Club membership should amount only to the difference between those charges and the annual management charges he would have paid as an ongoing Vacation Club member.

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

(1) The Lender should refund Mr J'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 difference between Mr J's Fractional Club annual management charges paid after the Time of Sale and what his Vacation Club annual management charges would have been had they not purchased Fractional Club membership.

(3) The Lender can deduct:

   i. The value of any promotional giveaways that Mr J used or took advantage of; and
   ii. The market value of the holidays* Mr J took using his Fractional Points *if* the Points value of the holiday(s) taken amounted to more than the total number of Vacation Club Points he would have been entitled to use at the time of the holiday(s) as an ongoing Vacation Club member. However, this deduction should be proportionate and relate only to the additional Fractional Points that were

[1] It appears the Purchase Agreement was also entered into by a Mrs J, who would need to agree to any assignment of the Fractional Points if the redress is to be able to implemented properly.

required to take the holiday(s) in question.

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

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

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

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

(6) If Mr J's Fractional Club membership is still in place at the time of this decision, as long as he and any joint purchaser agrees to hold the benefit of his interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify him against all ongoing liabilities as a result of his 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 J took using his 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 his usage.

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

My final decision

For the reasons explained above, and in the appended provisional decision, I uphold Mr J's complaint and direct Clydesdale Financial Services Limited to take the actions set out in the "putting things right" section above.

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

Will Culley
Ombudsman

COPY OF PROVISIONAL DECISION

I've considered the relevant information about this complaint.

Having done so, I'm minded to arrive at a different set of conclusions to our Investigator, so I'm issuing a provisional decision to give the parties to the complaint an opportunity to provide further submissions before I make my decision final.

The deadline for both parties to provide any further comments or evidence for me to consider is **23 October 2025**. Unless the information changes my mind, my final decision is likely to be along the following lines.

If Clydesdale Financial Services Limited trading as Barclays Partner Finance accepts my provisional decision, it should let me know. If Mr J also accepts, I may arrange for the complaint to be closed as resolved at this stage without a final decision.

The complaint

Mr J's complaint is, in essence, that Clydesdale Financial Services Limited (trading as Barclays Partner Finance) (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him 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

Mr J purchased several timeshare products from a timeshare provider (the 'Supplier') from 2009 to 2017. This complaint concerns his final purchase, made on 3 July 2017 (the 'Time of Sale'). At this time, Mr J was a member of the Supplier's "Vacation Club", in which he had a number of points which could be exchanged annually for holiday accommodation.

At the Time of Sale he entered into an agreement with the Supplier to trade in his Vacation Club membership and buy 3,600 fractional points in a different timeshare club run by the Supplier (the 'Purchase Agreement'). This club was the "Signature" variation of a product I'll refer to as the 'Fractional Club'. The Fractional Club worked in a similar way to the Vacation Club, giving members the ability to exchange their points annually for holiday accommodation. The Signature variation gave members the right to stay in a specific luxury apartment each year, or to use their points in the usual way.

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

The price of the Fractional Club membership was £56,088. A trade-in value of £32,513 was assigned to Mr J's Vacation Club membership, leaving a balance of £24,074 to pay.

Mr J paid for this balance by taking a loan of £24,074 from the Lender in his name (the 'Credit Agreement'). The loan was arranged by and paid to the Supplier. It was repayable over 180 months at £278.05 per month.

Mr J – using a professional representative (the 'PR') – wrote to the Lender on 8 November 2021 (the 'Letter of Complaint') to complain about:

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

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

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

Mr J says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. Told him the Fractional Club membership was an investment that would "considerably appreciate in value", when this was not true.
2. Told him that there would be a considerable return on investment because the purchase involved a share in property, when this was not true.
3. Told him the Fractional Club membership could be sold back to the Supplier or easily sold to third parties at a profit, when this wasn't true either.
4. Told him that he would have access to the "holiday apartment" at any time all year round.

Mr J says that he has 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, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr J.

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

The Letter of Complaint and a subsequent witness statement set out several matters which I've interpreted to be reasons why Mr J thinks that the credit relationship between him and the Lender was unfair to him under Section 140A of the CCA. In summary, they include the following:

1. Fractional Club membership was marketed and sold to him as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. He was pressured into purchasing Fractional Club membership by the Supplier.
3. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
4. There were unfair terms in the Purchase Agreement.
5. The Credit Agreement was arranged by self-employed individuals who didn't hold the relevant regulatory authorisations, meaning it was unenforceable.

The Lender failed to respond to the complaint. Mr J then referred the matter to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, didn't think it should be upheld.

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

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii)

regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

The legal and regulatory context that I think is relevant to this complaint is set out in an appendix (the 'Appendix') which is attached to and forms part of this provisional decision.

What I've provisionally 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 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 J as an investment, which, in the circumstances of this complaint, rendered the credit relationship between him and the Lender unfair to him 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 J's complaint, it isn't necessary to make formal findings on all of them. And that's because, even if those other aspects of of the complaint ought to succeed, the redress I'm currently proposing puts Mr J in the same or a better position than he would be if the redress was limited to what he'd have been entitled to were any of those other parts of his complaint to be upheld.

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

Having considered the entirety of the credit relationship between Mr J and the Lender along with all of the circumstances of the complaint, I think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale; and
2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;
3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;
4. The inherent probabilities of the sale given its circumstances.

I have then considered the impact of these on the fairness of the credit relationship between Mr J and the Lender.

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

The Lender does not dispute, and I am satisfied, that Mr J'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 J says that the Supplier did exactly that at the Time of Sale – saying the following in a witness statement supplied by PR and said to have been taken in October 2020[2]:

"During the following hours (at least 5) we had presentations and discussions with a manager, a business development manager and the [Supplier] representative. While we can not recall all of the discussions they culminated in the manager advising that due to our profile we would be better suited to a Fractional membership which was a level of interim membership before going for the full purchase of an apartment or house. We took this to mean that we would have some equity in the apartment purchased, therefore an investment."

He went on to say that later *"…Research shows that we do not have any equity in the apartment and no influence on the final sale or level of financial return, if any."*

Mr J alleges, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because it led him to believe the Fractional Club membership was a property investment.

The term "investment" is not defined in the Timeshare Regulations. In *Shawbrook & BPF v FOS*, the parties agreed that, by reference to the decided authorities, "*an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit*" at [56]. I will use the same definition.

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

[2] While the Financial Ombudsman Service did not receive a copy of this statement until August 2023, I have seen an audit trail which appears to show it was uploaded to the case management system of either PR or another claims manager in October 2020, and its associated document metadata also appears to date it to that time. Based on the limited evidence available, I think it's likely to represent Mr J's authentic recollections of the Time of Sale as of October 2020.

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 J, 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 for the primary purpose of holidays and that the Supplier made no representations as to the future value of the share in the Allocated Property. On the other hand, one of the Supplier's disclaimers may have left prospective purchasers with mixed messages on the topic of investment – specifically a disclaimer that warned that the Supplier's representatives were not licensed investment advisors and that *"…all information has been obtained solely from their own experiences as investors…"* This suggests the Supplier expected its representatives would speak about Fractional Club membership as part of a conversation covering the topic of investment, else it would not have been necessary to include such a disclaimer.

In any event, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork.

So, I have considered:

(1) whether it is more likely than not that the Supplier, at the Time of Sale, sold or marketed membership of the Fractional Club as an investment, i.e. told Mr J or led him to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered him the prospect of a financial gain (i.e., a profit); and, in turn
(2) whether the Supplier's actions constitute a breach of Regulation 14(3).

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

How the Supplier marketed and sold the Fractional Club membership

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives. This includes a document titled *"2015 Spain Fractionals at Signature Suite Collection Sales Training Manual for [Fractional Club] and Vacation Club Owners".*

It's my understanding that this document (the "Signature Training Manual") was used to train sales representatives in how to sell the Signature variation of the Fractional Club membership, so I think it's likely to be relevant to Mr J's purchase. Based on my reading of the Signature Training Manual, it seems representatives were trained to pitch the product in different ways depending on whether a prospective purchaser was already a Fractional Club member, or a member of the Vacation Club (like Mr J).

Considering the content of the Signature Training Manual which appears to have been part of the sales pitch to all prospective purchasers, I note the following words appeared on page 11, focused on the Supplier's 30th anniversary:

> *"When our members asked if they could buy a [Supplier] property in its entirety, we developed [Supplier] Estates which has been tremendously successful and has now sold over 2000 properties on our resorts all around the world.*
>
> *In recent years our members requested shorter term products so to fulfil that demand we created our Fractional Property Owners Club which is a shorter term product with a fixed asset attached providing an exit in 19 years and money back."*

This is consistent with Mr J's recollection of how the Supplier positioned the product to him – as an interest in property which was somewhere between his existing membership and the purchase of an apartment or house.

Moving to page 15 of the Signature Training Manual, it seems the next part of the pitch involved the Supplier introducing members to its "Estates" arm mentioned above, which is again consistent with Mr J's recollection of his discussions at the Time of Sale. After this, there were a series of general updates and reminders of the various services available through the Supplier, and then members would be taken to a show apartment and go through a process the Supplier called "price conditioning".

After this point it appears the sales pitches diverged, and Vacation Club members were given an explanation of the Fractional Club concept, of which the Signature product was a variation. Prospective purchasers were taken through the development of the Supplier's products, from fixed week timeshares, floating week timeshares, the Vacation Club, and then the "Fractional Property Owners Club".

On page 106 a set of slides compared the Vacation Club product to the Supplier's "Estates" product, which involved the purchase of a holiday home. Positive attributes of the Estates product as compared to the Vacation Club product included "Investment", "Use/sell" and "Money back". Drawbacks included "Large capital outlay" and "Fixed location". Notably, a drawback attributed to the Vacation Club product was "Investment in *Holidays*".

The next slide went on to compare both the previous options with the Fractional Club product, which was described as the "BEST OF BOTH WORLDS". Positive attributes of the product on this slide included those attributed to the Estates product: "Investment", "Use/sell", and "Money back", as well as some of those attributed to the Vacation Club product, such as "Choice/flexibility".

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.

The slides I've discussed appear *explicitly* to frame the Fractional Club product as an investment in property – as opposed to just an investment in holidays. I can't be sure that Mr J would have been shown or seen these specific slides, but I think they are indicative of how the Supplier trained its staff to position the Fractional Club product to existing Vacation Club members – as something which allowed them the flexibility to holiday in the same way as they could as existing members, with the added benefit of an investment in a property owned and managed by the Supplier. Whether or not the Supplier would have been so emphatic about the product as to have given assurances that Mr J would have made a

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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

financial gain from such a venture, I think it's likely it either expressly or impliedly framed the product to Mr J as an investment in the sense that it was something that *could* lead to a financial gain or profit.

Indeed, that appears to be how Mr J understood the product that was pitched to him. And given what I've said above, I think that understanding is more likely than not to have come about because the Supplier's representatives stated or implied that a good reason to buy Fractional Club membership was because it was an investment. In light of this, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations 2010 at the Time of Sale.

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

Having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr J 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 J and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led him to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

In this case, I think it's likely that the Supplier breach did have a material impact on Mr J's purchasing decision. While he does not specifically say in his witness statement that this was a key factor in his decision to enter into the Purchase Agreement, I think it is implied. He notes that the Supplier's manager had advised him that the Fractional Club product, being somewhere between his existing membership and a property purchase, would be more suitable for him. He does not mention any other factor or feature of the product which the Supplier promoted to him at the Time of Sale or which he had in his mind when making his decision.

On my reading of Mr J's testimony then, the prospect of a financial gain from Fractional Club membership was a motivating factor when he decided to go ahead with his purchase. That doesn't mean he was not interested in holidays. His own testimony in relation to previous purchases from the Supplier demonstrates that he clearly was. And that is not surprising given the nature of the products at the centre of this complaint. But as Mr J says (plausibly in my view) that Fractional Club membership was marketed and sold to him at the Time of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I think his purchase was motivated by his 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 Vacation Club membership he already had. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision he ultimately made.

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

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr J under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint.

Fair Compensation

Having found that Mr J 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 him back in the position he would have been in had he not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr J and any joint party[4] to the Purchase Agreement agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr J was an existing Vacation Club member and his membership was traded in against the purchase price of Fractional Club membership. Under the Vacation Club membership, he had an unknown number of Vacation Club Points. And, like Fractional Club membership, he had to pay annual management charges as a Vacation Club member. So, had Mr J not purchased Fractional Club membership, he would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr J from the Time of Sale as part of the Fractional Club membership should amount only to the difference between those charges and the annual management charges he would have paid as an ongoing Vacation Club member.

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

(1) The Lender should refund Mr J'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 difference between Mr J's Fractional Club annual management charges paid after the Time of Sale and what his Vacation Club annual management charges would have been had they not purchased Fractional Club membership.

(3) The Lender can deduct:

iii. The value of any promotional giveaways that Mr J used or took advantage of; and

[4] It appears the Purchase Agreement was also entered into by a Mrs J, who would need to agree to any assignment of the Fractional Points if the redress is to be able to implemented properly.

iv. The market value of the holidays* Mr J took using his Fractional Points *if* the Points value of the holiday(s) taken amounted to more than the total number of Vacation Club Points he would have been entitled to use at the time of the holiday(s) as an ongoing Vacation Club member. However, this deduction should be proportionate and relate only to the additional Fractional Points that were required to take the holiday(s) in question.

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

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

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

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

(6) If Mr J's Fractional Club membership is still in place at the time of this decision, as long as he and any joint purchaser agrees to hold the benefit of his interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify him against all ongoing liabilities as a result of his 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 J took using his 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 his usage.

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

My provisional decision

For the reasons explained above, I am currently minded to uphold Mr J's complaint and direct Clydesdale Financial Services Limited to take the actions set out in the "Fair Compensation" section of this provisional decision.

Will Culley
Ombudsman

Appendix: The Legal and Regulatory Context

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

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

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

Case Law on Section 140A

Of particular relevance to the complaint in question are:

1. The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') remains the leading case.
2. The judgment of the Court of Appeal in the case of *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')* sets out a helpful interpretation of the deemed agency and unfair relationship provisions of the CCA.
3. *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*') – in which the High Court held that determining whether or not the relationship complained of was unfair had to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"*, which was the date of the trial in the case of an existing relationship or otherwise the date the relationship ended.
4. The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*') – which approved the High Court's judgment in *Patel*.
5. *Deutsche Bank (Suisse) SA v Khan and others* [2013] EWHC 482 (Comm) – in Hamblen J summarised – at paragraph 346 – some of the general principles that apply to the application of the unfair relationship test.
6. *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
7. *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
8. *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').

My Understanding of the Law on the Unfair Relationship Provisions

Under Section 140A of the CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms “antecedent negotiations” and “negotiator”. As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as *“a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]”*. And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to *“finance a transaction between the debtor and a person (the ‘supplier’) other than the creditor […] and “restricted-use credit” shall be construed accordingly.”*

So, the negotiations conducted by the Supplier during the sale of the timeshare(s) in question was/were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were “any other thing done (or not done) by, or on behalf of, the creditor” under s.140A(1)(c) CCA.

Antecedent negotiations under Section 56 cover both the acts and omissions of the Supplier, as Lord Sumption made clear in *Plevin*, at paragraph 31:

“[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are “deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity”. The result is that the debtor’s statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor’s agent.’ […] *Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor’s responsibility would be engaged only by its own acts or omissions or those of its agents.”*

And this was recognised by Mrs Justice Collins Rice in *Shawbrook & BPF v FOS* at paragraph 135:

“*By virtue of the deemed agency provision of s.56, therefore, acts or omissions ‘by or on behalf of’ the bank within s.140A(1)(c) may include acts or omissions of the timeshare company in ‘antecedent negotiations’ with the consumer*”.

In the case of *Scotland & Reast*, the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that “*negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law”* before going on to say the following in paragraph 74:

“[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate,

they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[5]

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

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

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

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

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

<u>The Law on Misrepresentation</u>

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

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

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

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

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

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

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

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

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

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

The Timeshare Regulations were introduced to implement EC legislation, Directive 122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts (the '2008 Timeshare Directive'), with the purpose of achieving 'a high level of consumer protection' (Article 1 of the 2008 Timeshare Directive). The EC had deemed the 2008 Timeshare Directive necessary because the nature of timeshare products and the commercial practices that had grown up around their sale made it appropriate to pass specific and detailed legislation, going further than the existing and more general unfair trading practices legislation.[6]

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

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

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

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

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

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

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

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

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

The Consumer Rights Act 2015 (the 'CRA')

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

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

Relevant Publications

The Timeshare Regulations provided a regulatory framework. But as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time – which, in this complaint, includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code').

Will Culley
Ombudsman