

The complaint

Mrs K'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 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

Mrs K purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 17 July 2014 (the 'Time of Sale'). Mrs K and her husband entered into an agreement with the Supplier to purchase 5,000 fractional points in addition to exchanging their existing European Collection timeshare points, for 11,000 fractional points. The cost of this purchase was £14,877 (the 'Purchase Agreement').

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

Mrs K paid for their Fractional Club membership by taking finance of £29,754 from the Lender in her sole name (the 'Credit Agreement').

Mrs K – using a professional representative (the 'PR') – wrote to the Lender on 29 November 2021 (the 'Letter of Complaint') to complain about:

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

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

Mrs K says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – in particular that the Supplier:

1. told her that Fractional Club membership had a guaranteed end date when that was not true.
2. told her that the purchase of Fractional Club membership was required to enable her to exit from her existing Timeshare when that was not true.

Mrs K says that she 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, she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mrs K.

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

Mrs K says that the Supplier breached the Purchase Agreement because there is no guarantee that she will receive her share of the net sale proceeds of the Allocated Property.

Mrs K also says that she found it difficult to book the holidays she wanted, when she wanted.

As a result of the above, Mrs K says that she has a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mrs K.

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

The Letter of Complaint set out several reasons why Mrs K says that the credit relationship between her and the Lender was unfair to her under Section 140A of the CCA. In summary, they include the following:

1. Fractional Club membership was marketed and sold to her as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. The money lent to her under the Credit Agreement was unaffordable for her.
3. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
4. The Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs.

The Lender didn't provide Mrs K with a response to the complaint. Her PR then referred the complaint to the Financial Ombudsman Service. The Lender told this service that as the complaint was about a fractional purchase which was the subject of a judicial review, it was unable to provide any comments on the case. And it only provided copies of the information the PR had provided to it. The complaint was assessed by an Investigator who, having considered the information on file, didn't uphold the complaint on its merits.

The PR disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. I issued a provisional decision explaining why I thought the complaint should be upheld. The PR said it had no comments to make but reserved the right to respond if any significant submissions were made by the Lender. The Lender said it accepted the decision to uphold the case and had nothing further to add.

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

The legal and regulatory context that I think is relevant to this complaint is set out below.

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.”¹

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

¹ The Court of Appeal’s decision in *Scotland* was recently followed in *Smith*.

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.

The Law on Misrepresentation

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

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

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

Silence, subject to some exceptions, doesn't usually amount to a misrepresentation on its own as there is generally no duty to disclose facts which, if known, would affect a party's decision to enter a contract. And the courts aren't too ready to find an implied representation given the challenges acknowledged throughout case law.

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

The relevant rules and regulations that the Supplier in this complaint had to follow were set out in the Timeshare Regulations. I'm not deciding – nor is it my role to decide – whether the

Supplier (which isn't a respondent to this complaint) is liable for any breaches of these Regulations. But they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair. After all, they signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

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

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

The Timeshare Regulations were introduced to implement EC legislation, Directive 122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts (the '2008 Timeshare Directive'), with the purpose of achieving 'a high level of consumer protection' (Article 1 of the 2008 Timeshare Directive). The EC had deemed the 2008 Timeshare Directive necessary because the nature of timeshare products and the commercial practices that had grown up around their sale made it appropriate to pass specific and detailed legislation, going further than the existing and more general unfair trading practices legislation.²

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

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

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

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

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

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

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

² See Recital 9 in the Preamble to the 2008 Timeshare Directive.

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

County Court Cases on the Sale of Timeshares

1. *Hitachi v Topping* (20 June 2018, County 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 as I have received no further submissions from either party, I remain of the opinion 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 Mrs K 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 Mrs K’s complaint, it isn’t necessary to make formal findings on all of them. This includes the allegations that:

The Supplier misrepresented the Fractional Club membership/breached the Purchase Agreement and the Lender ought to have accepted and paid the claim under Section 75 of the CCA.

I say this because, even if those aspects of the complaint ought to succeed, the redress I’m currently proposing puts Mrs K in the same or a better position than she would be if the redress was limited to misrepresentation/breach of contract.

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

Having considered the entirety of the credit relationship between Mrs K 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. The commission arrangements between the Lender and the Supplier at the Time of Sale and the disclosure of those arrangements;
4. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;
5. The inherent probabilities of the sale given its circumstances; and when relevant
6. Any existing unfairness from a related credit agreement

I have then considered the impact of these on the fairness of the credit relationship between Mrs K 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 Mrs K'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 Mrs K says that the Supplier did exactly that at the Time of Sale – saying the following during the course of this complaint. When discussing Fractional Club membership with the Supplier's representative, she says she was told:

"He told us it would be an investment as it was not just points but was an actual property which would be sold at which time our contract with (the supplier) would have ended.....He said we would likely get not just our money back, but an increase in profit as well and that in the meantime we would have fantastic holidays. At the time we had one son at home and this did seem appealing.

....We were told it would be resold in the future and that we would receive re-sale value from this which would likely be more than the money we had invested to start with.

...when it was sold we would receive profit from the sale which would likely equate to our money back that we had invested plus an additional profit"

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

- (1) There were two main 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.
- (3) She was told by the Supplier that Fractional Club membership was the type of investment that would only increase in value.

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

Mrs K’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 Mrs K 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.

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 Mrs K, 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 Mrs K as an investment.

On the reverse of the front page of the Purchase Agreement signed by Mrs K, for example, the first point stated that the product should not be *purchased ‘as an investment in real estate’* and that the price paid was ‘*primarily*’ so Mrs K could go on holidays. Mrs K was also required to sign a ‘Compliance Statement’ which said, among other things, that ‘*the purchase...is an investment in...future holidays, and...should not be regarded as a property or financial investment*’. A disclaimer followed which noted that the sale price of the Allocated Property would depend on market conditions at the relevant time.

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

So, I have considered:

- (1) whether it is more likely than not that the Supplier, at the Time of Sale, sold or marketed membership of the Fractional Club as an investment, i.e. told Mrs K or led her to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered her 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

I've seen a variety of internal materials produced by the Supplier and dating to around the time it began selling Fractional Club membership. I think, in general, these materials indicate that the Supplier was concerned to avoid breaching Regulation 14(3). I've seen a copy of a Sales Policy, for example, which warned staff that promoting the Fractional Club product as an investment, or discussing resale values with potential purchasers, was considered unacceptable. I've also seen evidence that the Supplier did not consider it a part of its strategy for the sale of the product to promote the residual value of the share in the Allocated Property as a reason to purchase it. Rather, it considered that its strategy should be to market the product as something which could be used to go on holiday, but it also acknowledged that for existing holiday club members, the shorter term associated with Fractional Club membership was a selling point.

On the other hand, it's apparent from the materials I've considered that the Supplier was aware that the sale of the fractional asset at the end of the term was a benefit to a potential purchaser. I've also seen presentation slides dating to September 2012 which, in my view, implied that the Supplier's brand and other positive attributes would contribute to enhancing the value of the fractional asset at the end of the membership term. I understand the Supplier denies that these slides were used to promote the product to potential customers.

It seems to me that there's not much in the way of conclusive evidence, either way, as to how the Supplier's sales representatives are likely to have marketed the product. But I don't think the Supplier would have needed to have deviated very far from a simple description of how the Fractional Club product worked in terms of the sale of the fractional asset at the end of the term, to have fallen foul of Regulation 14(3). When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that "[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3))." 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. In Mrs K's case, it's difficult to see how the Supplier could have marketed the Fractional Club membership to her on the basis of holiday use. She already had a number of points in the Supplier's holiday clubs, which she could exchange for holiday accommodation. And as far as I can see, Fractional Club ownership offered her nothing more, in terms of holidays, than she already had access to. She was making a "like for like" exchange of her points. She did purchase an additional 5,000 points, and the total cost of the upgrade was £14,877. And it seems to me that she could have purchased additional points through her existing membership, which she had done on a number of occasions, the last of which was in July

2012. Given this set of facts, I think it's more likely the Supplier would have focused on other benefits of Mrs K converting to Fractional Club membership. And indeed, Mrs K describes there having been three main selling points on the day:

- She was told it was a way for her to exit her contract with the Supplier sooner; and
- She was told that, at the end of this shorter term, she would get back the money paid with the potential for a profit.
- Buying additional points would provide her with greater flexibility.

Was the credit relationship between the Lender and Mrs K 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 Mrs K 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 Mrs K 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.

As I've already said above, I don't think Mrs K was likely to have seen the holiday related benefits of Fractional Club Membership as a compelling reason to purchase it, taking into account that other than additional points she purchased, she wasn't getting any added benefits, compared to the existing rights she had as part of the Supplier's holiday club offering.

As a result, I think that left two main features of the Fractional Club membership which Mrs K mentioned in her testimony, that appear to have been attractive to her. These were the shorter membership term compared to her existing Timeshare membership, which meant she wouldn't have to pay maintenance fees in perpetuity, and the prospect of making a profit from the Allocated property when it was sold.

Having carefully considered everything in the round, it seems to me that both of these reasons were arguably of equal importance to Mrs K. And I think therefore, that it's unlikely that she would have moved forward with the purchase had either of them not been advocated to her as reasons to purchase the Fractional Club membership at the Time of Sale.

It's very evident to me from Mrs K's testimony, that she was attracted to the possibility of leaving her existing Timeshare membership with the Supplier. When Mrs K purchased her Fractional Club membership, she converted her existing Timeshare points on a like for like basis. But she also purchased an additional 5,000 points. And if the shorter membership term had been the sole reason for purchasing Fractional Club membership, I find it difficult to understand why Mrs K would have purchased additional points.

As I've said above, I'm satisfied that what Mrs K has said about a shorter membership term compared to her existing Timeshare membership, which meant she wouldn't have to pay maintenance fees in perpetuity, and the prospect of making a profit from the Allocated

property when it was sold, were equally motivating factors for her when she purchased the Fractional Club membership. And I've noted that on several occasions she has referenced in her statement, about what she was told about the prospect of making a profit from Fractional Club membership and the importance of that to her. And in the context of her direct testimony which I find to be authentic, and which is important for me to be able to understand what she was told and her motivations, I find what she has said to be compelling and persuasive.

All of this leads me to conclude that the prospect of a financial gain from the investment aspect of the Fractional Club product was likely just as important to Mrs K, if not more so, than the shorter membership term. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision she ultimately made.

That doesn't mean she wasn't interested in holidays. Her own testimony demonstrates that she quite clearly was. And that is not surprising given the nature of the product at the centre of this complaint. But as Mrs K 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 her 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 her existing membership. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision she ultimately made.

Mrs K has not said or suggested, for example, that she 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. And as she faced the prospect of borrowing and repaying a substantial sum of money while subjecting herself to long-term financial commitments, 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.

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mrs K 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 Mrs K 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 Mrs K was unfair under section 140A of the CCA,

I think it would be fair and reasonable to put her back in 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 Mrs K and Mr K agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Mrs K was an existing European Collection member, and her membership was traded in against the purchase price of Fractional Club membership. Under her European Collection membership, she had 11,000 European Collection Points. In addition to that she purchased an additional 5,000 Fractional Club membership points.

And, like Fractional Club membership, she had to pay annual management charges as a European Collection member. So, had Mrs K not purchased Fractional Club membership, she 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 Mrs K from the Time of Sale as part of her Fractional Club membership should amount only to the difference between those charges and the annual management charges she would have paid as an ongoing European Collection member.

What's more, Mrs K paid for her existing European Collection membership using finance ('Loan 1'), with the Lender. It seems that as the Credit Agreement was more than the purchase price of the Fractional Club membership, Loan 1 was refinanced using the Credit Agreement. So, part of what she borrowed at the Time of Sale was it seems, used to repay the earlier borrowing under Loan 1 that always had to be repaid.

I recognise that the credit agreement entered into as part of Loan 1 is a related agreement (under Section 140C(4)(a)) for the purposes of an assessment of unfairness under the Credit Agreement. But I can't see that any complaint has been made about there being an unfair credit relationship under Loan 1. As a result, I don't think it would be fair or reasonable to direct the Lender to refund everything that was paid and, if relevant, due to be repaid under the Credit Agreement, otherwise Mrs K would be in a better position than she would have been if she hadn't purchased Fractional Club membership. In light of that, I think this ought to be reflected in my redress when remedying the unfairness I have found.

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

- (1) The Lender should refund the difference between Mrs K's repayments to it under the Credit Agreement and what she would have paid under Loan 1, including the difference between any sums paid to settle the debt owing under the Credit Agreement and what would have needed to have been paid to settle Loan 1.
- (2) In addition to (1), the Lender should also refund the difference between Mrs K's Fractional Club annual management charges paid after the Time of Sale and what her European Collection annual management charges would have been had she not purchased Fractional Club membership.
- (3) The Lender can deduct:
 - i. The value of any promotional giveaways that Mrs K used or took advantage of; and
 - ii. The market value of the holidays* Mrs K took using her Fractional Points *if* the Points value of the holiday(s) taken amounted to more than the total number of European Collection Points she would have been entitled to use at the time of the holiday(s) as an ongoing European Collection 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 Mrs K took a holiday worth 2,550 Fractional Points and she would have been entitled to use a total of 2,500 European Collection Points at the

relevant time, any deduction for the market value of that holiday should relate only to the 50 additional Fractional Points that were required to take it. But if she would have been entitled to use 2,600 European Collection Points, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

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

- (4) Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.
- (5) The Lender should remove any adverse information recorded on Mrs K's credit file in connection with the Credit Agreement reported within six years of this decision.
- (6) If Mrs K's Fractional Club membership is still in place at the time of this decision, as long as she and Mr K agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.

*I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Mrs K 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 Mrs K a certificate showing how much tax it's taken off if they ask for one.

My final decision

I've decided to uphold Mrs K's complaint. Clydesdale Financial Services Limited, trading as Barclays Partner Finance, needs to calculate and pay Mrs K compensation, using the methodology set out above. Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs K to accept or reject my decision before 5 February 2026.

Simon Dibble
Ombudsman