DRN-6266482

The complaint

Mr S complains Mitsubishi HC Capital UK Plc (the "Lender") has failed to honour a claim under Section 75 of the Consumer Credit Act 1974 (the "CCA") and has participated in an unfair credit relationship with him under Section 140A of the CCA.

Mr S was originally represented by a professional representative I'll call "PR1", but he has more lately been represented by another representative I'll call "PR2".

What happened

I issued a provisional decision on Mr S's complaint on 16 January 2026, in which I set out the background to the case and my provisional findings on it. A copy of that provisional decision is appended to, and forms a part of, this final decision, so it's not necessary to go over the details again. However, in very brief summary:

- Mr S bought a timeshare from a timeshare provider (the "Supplier") on 17 February 2013 (the "Time of Sale"), for £29,613 (the "Purchase Agreement"). The balance to pay after trading in his existing timeshare from the Supplier for £21,014, was £8,599. This balance was financed by a loan of the same amount from the Lender (the "Credit Agreement").

- The timeshare was a type of asset-backed timeshare (a "Fractional Club" membership) which entitled Mr S to more than holiday rights. It also entitled him to a share in the proceeds of a property named on his purchase agreement (the "Allocated Property") after his contract came to an end. This was unlike his previous timeshare, which didn't include this feature.

- Mr S later complained, via PR1, to the Lender about a number of concerns which included misrepresentations by the Supplier giving Mr S a claim against the Lender under Section 75 of the CCA, and matters giving rise to an unfair credit relationship between Mr S and the Lender.

- The Lender rejected the complaint and it was then referred to the Financial Ombudsman Service for an independent assessment. PR2 took over as Mr S's representative while the case was waiting for review.

In my provisional decision I said I thought the complaint should be upheld because the credit relationship between Mr S and the Lender had been rendered unfair to him within the meaning of Section 140A of the CCA. The full reasoning can be found in the appended provisional decision, so again it's not necessary for me to set all of that out here. But to summarise:

- I considered it was probable that the Supplier had breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, by marketing or selling the Fractional Club membership to Mr S as an investment, in the sense that he could expect or hope for a financial gain or profit from it. This was because:

- Mr S had referred, in witness statements taken in 2017 and 2023, to the Supplier having sold the product to him in this way.

- My analysis of the Supplier's sales and training materials for the Fractional Club product which were in use at the Time of Sale, indicated that the Supplier's sales representatives were trained to frame the product as an investment. Indeed, one of the benefits of the product was expressly described as such on one of the Supplier's presentation slides.

- I considered the Supplier's improper selling or marketing of the product as an investment was likely to have been material to Mr S's purchasing decision, causing his credit relationship with the Lender to be rendered unfair to him, because:

    - Mr S had said in a statement taken in 2017 that he had relied on the Supplier's representation that the product was an investment, when making his purchase. He had also said in a statement taken in 2023 that his existing timeshare had *"worked well*" but *"…this new venture was expressed as being better as we own part of the freehold with others"* and *"…we bought what was being sold as this timeshare was explained as being far superior."*

    - Mr S appeared to have been happy with his existing timeshare, had used it to take many holidays, and had not made any purchases from the Supplier since 2004, until it had marketed the Fractional Club product to him at the Time of Sale. The key difference between his existing timeshare and the Fractional Club product was the investment aspect of it, suggesting this feature was likely to have been a material factor in his purchasing decision.

I thought the Lender should pay fair compensation to Mr S as a result of it having participated in a credit relationship with him that was unfair to him. I considered fair compensation would essentially involve unwinding the purchase as far as was practically possible. Broadly speaking, this involved refunds of payments made towards the Credit Agreement along with annual management fees, and the indemnification of Mr S and any joint purchaser against ongoing liability for the Fractional Club membership. I considered that any benefits derived from the membership needed to be offset against any compensation.

I asked the parties to let me have any further submissions they wanted me to consider. PR2 said Mr S accepted the provisional decision. The Lender said it strongly disagreed, setting out submissions in which – chiefly – it attacked Mr S's witness testimony. I think the Lender's arguments could fairly be summarised in the following way:

- It considered the witness statement from 2017 was identical in structure and content to others produced by PR1, and that I had acknowledged that the questionnaire which may have led to this witness statement's production was leading in nature.

- The witness statement's reliability as evidence was strongly cast into doubt by these matters and it wasn't reasonable to rely on it as a result. It's unlikely to reflect Mr S's true recollection of events and lacked detail and context.

- While it wasn't incorrect to say that both witness statements contained a common theme, that the product was presented as an investment, this isn't surprising given the allegation formed a core part of the complaint.

- If the 2017 statement couldn't stand up by itself, it wasn't reasonable to use it to support the 2023 statement, which had its own problems. These problems were recognised in the provisional decision – that the timing of the statement meant it may

have been influenced by recent highly-publicised legal developments and/or our Investigator's assessment. The Lender considered it notable the second statement was provided just two days after an unfavourable assessment from our Investigator.

- The risk of external influence was so high in the 2023 statement that – without the 2017 statement to back it up – it was not safe to rely on it.

- Mr S had contacted CLC prior to PR1 submitting the complaint, saying he was speaking to someone about "getting rid of the membership". He doesn't seem to have questioned the loss of a potential investment at this point, which is not consistent with this having been an important part of the product to him.

The case has since been returned to me to review once more.

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, in many ways. no different to that shared in several hundred published ombudsman decisions on very similar complaints – which can be found on the Financial Ombudsman Service's website. And with that being the case, it is not necessary to set out that context in detail here.

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.

Following the responses from both parties, I've considered the case afresh and having done so, I've reached the same decision as that which I outlined in my provisional findings, for broadly the same reasons.

Again, my role as an Ombudsman isn't to address every single point which has been made to date, but to decide what is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, this doesn't mean I haven't considered it.

Rather, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision.

The focus of disagreement following my provisional decision has been on the matter of whether the evidence adequately supports a conclusion that the Supplier breached Regulation 14(3) of the Timeshare Regulations and, if it did, that this was material to Mr S's purchasing decision at the Time of Sale. It doesn't appear to be disputed that – if the evidence does support these conclusions – then the credit relationship between Mr S and the Lender will have been rendered unfair to Mr S, warranting the compensation I set out in the appended provisional decision.

I said in the provisional decision that I didn't think the potentially leading nature of the questionnaire that was likely used to produce the PR1 statement, was fatal to the statement's credibility, where other evidence lent some support to it.

The Lender doesn't dispute my analysis of the Supplier's sales and training materials relating to the Fractional Club product. The sales and training materials are evidence of how the Supplier's representatives were trained to frame the Fractional Club product to potential purchasers during a period which included the Time of Sale. As explained in the provisional decision, I think the representatives were trained to frame the product as an investment at that point in time. As I put it in the provisional decision: *"…the slides clearly indicate that the Supplier's sales representative was likely to have led [Mr S] to believe that membership of the Fractional Club was an investment that may lead to a financial gain..."*

So even if there were weaknesses in the process which led to the drafting of the 2017 statement, Mr S's recollection from 2017 is consistent with my analysis of how the product was likely to have been sold by the Supplier in the period that included the Time of Sale. I acknowledge the weaknesses of the statement, but I still don't find Mr S's recollections difficult to believe in light of the other information available about how the Supplier sold the Fractional Club product.

This means I remain of the view that it's not unreasonable to take the 2017 statement into account and to conclude it also lends some support to the later 2023 statement in the sense that there is nothing *new* about the allegation in the 2023 statement that the Fractional Club membership was sold as an investment, even if the timing of the 2023 statement calls into question how it may have been influenced by recent events. I will add here that while I understand the Lender's concerns about reliance being placed on the 2023 statement, it would not be reasonable simply to dismiss it out of hand.

I will also add that when Mr S was given a trade-in value by the Supplier for his existing timeshare, this was significantly more than what he'd paid for it. I understand he paid £17,616 for it and was given £21,014 for it, which is about 19% more. While this was a different product which had no specific investment features, and nothing turns on this point, I think it's not unlikely that this aspect of the factual matrix surrounding the purchase would have contributed to the overall perception that the Supplier was offering products that would or could increase in value over time, reinforcing the messages which I think were likely conveyed during the sales process.

So I think, considering all the available evidence, that it is more likely than not that the Fractional Club product *was* sold to Mr S by the Supplier as an investment at the Time of Sale. My views about that have not changed.

The Lender has also argued that any such improper selling of the product as an investment wasn't material to Mr S's purchasing decision on the day. It observes that Mr S contacted the Supplier early in 2017, and the nature of this contact was inconsistent with someone who thought that any investment aspect of the product was of material importance. This is what the Supplier's note of the conversation said:

"MobileOwn# Mr confirms they are out of town right now, they are talking to someone about staying or getting rid of the membership. He did not want to say anything else. He promised to give 'them' a call today and then decide. I adv[ised] he is still responsible for his M[aintenance] F[ee]s"

The context of this conversation is unclear. The Lender says it thinks it unusual that Mr S would be talking about getting rid of the membership if he thought it was an investment, or that he wouldn't question the loss of the investment aspect of the product if this had been important to him. But it seems Mr S was reluctant to provide any information to the Supplier on this phone call, so it's difficult to draw anything of substance from this note.

Regarding whether the Supplier's breach of Regulation 14(3) was material to Mr S's decision to go ahead with the purchase, I concluded in my provisional decision that, on balance, it was material. This was for the reasons summarised above and articulated in the appended provisional decision, but to repeat them once more:

- In the 2017 witness statement Mr S had said he had relied on the Supplier's representation that the product was an investment, and in the 2023 witness statement he had said his existing timeshare worked well but the Supplier had told him the new product was better because *"we owned part of the freehold with others",* had also told him it *"would not only secure future holidays but equally delivery [sic] an investment profit when we decided we no longer wanted to use it"* and that "*…we bought what was being sold as this timeshare was explained as being far superior."*

- Mr S had been using his existing timeshare from the Supplier since 2004 without having made further purchases, and had taken 27 holidays. He seemed to be content with the state of affairs. It was only when the Supplier had marketed the Fractional Club product to him that he'd been persuaded to make another purchase. And the feature which set apart the Fractional Club membership from his existing timeshare was the investment element of it – the share in the net sale proceeds of the Allocated Property – suggesting this was likely to have been important to him.

I also noted that Mr S had not said or suggested he would have gone ahead regardless with the purchase, had it not been for the Supplier having represented that it was an investment.

The Lender hasn't advanced any specific arguments in relation to materiality apart from the concerns it has expressed about the witness statements and the Supplier's note, which I've addressed above.

Having considered all the available evidence again, I remain of the view that the Supplier's breach of Regulation 14(3) of the Timeshare Regulations was likely to have been material to Mr S's purchasing decision at the Time of Sale, rendering his credit relationship with the Lender unfair to him.

Fair Compensation

Having found that Mr S would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable to put 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 S and any joint purchaser agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr S 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 1,501 Vacation Club Points. And, like Fractional Club membership, he had to pay annual management charges as a Vacation Club member. So, had Mr S 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 S from the Time of Sale as part of his 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 S with that being the case – whether or not a court would award such compensation:

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

(2) In addition to (1), the Lender should also refund the difference between Mr S's Fractional Club annual management charges paid after the Time of Sale and what his Vacation Club annual management charges would have been had he not purchased Fractional Club membership.

(3) The Lender can deduct:

   i. The value of any promotional giveaways that Mr S used or took advantage of; and
   ii. The market value of the holidays* Mr S 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 S 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 S's credit file in connection with the Credit Agreement reported within six years of this decision.

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

*I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Mr S 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 below, I uphold this complaint and direct Mitsubishi HC Capital UK Plc to take the actions set out in the Fair Compensation section of this decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 28 April 2026.

Will Culley
Ombudsman

COPY OF PROVISIONAL DECISION

I've considered the relevant information about this complaint.

Having done so, I've arrived at a different set of conclusions to our case handlers, so I'm issuing this provisional decision to allow the parties a further opportunity to comment before I make my decision final.

The deadline for both parties to provide any further comments or evidence for me to consider is **30 January 2026**. Unless the information changes my mind, my final decision is likely to be along the following lines.

If Mitsubishi HC Capital UK Plc accepts my provisional decision, it should let me know. If Mr S also accepts, I may arrange for the complaint to be closed as resolved at this stage without a final decision.

The complaint

Mr S's complaint is, in essence, that Mitsubishi HC Capital UK Plc (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

This complaint has rather a protracted history during which Mr S has been represented by different professional representatives. He was initially represented by one firm ("PR1"), which made the initial complaint to the Lender, but has been represented by a different firm ("PR2") since at least as early as March 2022. What follows will necessarily be a brief summary of key events.

Mr S was a long-time customer of a timeshare provider (the "Supplier"), having made two purchases in the Supplier's "Vacation Club" in 2004. Based on the information available, it seems that by October 2004 Mr S had amassed 1,501 "points" in the Vacation Club for a cost of £17,616. These points could be exchanged annually for holiday accommodation within the Supplier's portfolio.

The present complaint doesn't relate to Mr S's early purchases from the Supplier. Rather, it relates to a purchase he made on 17 February 2013. This was the purchase of a different kind of timeshare – a product I will refer to as the "Fractional Club". Mr S entered an agreement to purchase 1,740 points in the Fractional Club for £29,613 (the "Purchase Agreement"), trading in his existing Vacation Club membership for £21,014, leaving him with a balance of £8,599 to pay.

This balance was financed by a loan from the Lender (the "Credit Agreement") which was arranged by and paid to the Supplier. Under the terms of the loan, Mr S was expected to make 180 monthly repayments of £135.01.

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

Mr S appears to have first complained to the Lender, through PR1, in April or May 2017. I confess that I found PR1's submissions difficult to follow, but it seems that the initial complaint related to misrepresentations by the Supplier at the Time of Sale giving Mr S a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay. These alleged misrepresentations appeared in a witness statement signed by Mr S, which I could summarise as:

1. He was told the Fractional Club membership was an investment which was valuable and would be worth a lot on resale, when this wasn't true.
2. He was told the Fractional Club membership would provide accommodation of a certain level of quality and long-term availability, when this wasn't true.

The Lender rejected the complaint in full in a letter sent on 31 July 2017. PR1 referred the complaint to the Financial Ombudsman Service in October 2017. At this point it provided further submissions which were lengthy and, while repeating that the Fractional Club membership had been misrepresented, made various other allegations about the Supplier and Lender, some of which were more general in nature and not necessarily relevant to Mr S's specific complaint. Again, the submissions were not straightforward to follow but I've interpreted the *additional* concerns raised at this point to fall into the following categories:

1. The Lender had been a party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA (more detail below).[1]
2. The Purchase Agreement had been illegal under Spanish law.

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

PR1's submissions set out several matters which I've interpreted as potential reasons he considers 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. The Purchase Agreement contained unfair terms which allowed the Supplier to forfeit Mr S's timeshare in its entirety for small breaches of the agreement such as not paying annual management fees.
2. The Supplier had put Mr S under excessive pressure to make the purchase.
3. The Lender had paid an undisclosed commission to the Supplier for arranging the Credit Agreement.
4. Fractional Club membership was marketed and sold to Mr M as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
5. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the "CPUT Regulations").

One of our case handlers issued an assessment on the complaint in 2020. They didn't think it should be upheld. PR1 said it disagreed with this assessment and sent in further submissions. These submissions, while bearing Mr S's name at the top, appeared to relate to a different complainant to Mr S, so I've not gone into what they said in this decision. There was then little activity until March 2022, when we were informed PR2 was now representing Mr S.

Another case handler took over the case in late 2023. She issued her own assessment, in

[1] PR1 didn't specifically mention Section 140A of the CCA but made several references to there being an "unfair relationship", and I believe this is likely what was meant.

which she also didn't think the complaint should be upheld. PR2 disagreed, setting out further arguments and providing a second witness statement from Mr S.

As no agreement could be reached, the complaint has now been passed to me to decide.

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, in many ways. no different to that shared in several hundred published ombudsman decisions on very similar complaints – which can be found on the Financial Ombudsman Service's website. And with that being the case, it is not necessary to set out that context in detail here.

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 S 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 S'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 to Mr S. And that's because, even if other aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr S in the same or a better position than he'd be entitled to be in, were his complaint to have been upheld for any of those other reasons.

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

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

1. The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale; 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 S 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 S's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling Fractional Club membership as an investment. This is what the provision said at the Time of Sale:

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

But Mr S says that the Supplier did exactly that at the Time of Sale. In his original witness statement from April 2017, he says the Supplier represented that the Fractional Club membership was an investment. In a further witness statement in November 2023, Mr S said the following:

"After the sales meeting, we agreed to pay £8,599 for the membership and it was Hitachi Capital who assisted us by way of finance to buy into the Timeshare investment. I say investment as that was the term used entire – which has resonated with me over the many years."

"…the overarching sales pitch was we were buying a part of a holiday property which was domiciled in in the confines of what was a prestige holiday resort we were familiar with. By buying a part of this property we were told the investment would not only secure future holidays but equally deliver an investment profit when we decided we no longer wanted to use it."

"At the time…we had bought a timeshare in the [Supplier's] Vacation Club on 12 October 2004, and this worked however, this venture was expressed as being better as we own part of the freehold with others."

Mr S alleges therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because he was told that the Fractional Club product was an investment (as well as being a means of taking holidays), and that he could make a profit from its sale in the future.

Before I continue, I think it's important to look at Mr S's testimony more closely and consider how credible it is in the circumstances. Clearly, our case handlers were not convinced by Mr S's testimony, and I note the Supplier has also been critical of it (in particular, the signed April 2017 statement, which the Supplier suggested was identical to other statements it had seen from PR1).

It's my understanding that PR1's practice was to provide potential complainants with a questionnaire, and their answers were used to populate a witness statement which the complainant would then be asked to sign. Complainants were given the opportunity to provide free text comments for incorporation in their witness statements. I have not seen a copy of the questionnaire completed by Mr S – and I am told that it is not available. Given PR1 ceased trading some years ago, I think it's plausible that the questionnaire cannot be recovered. Examples of questionnaires I have seen from PR1 could, I think, be described as leading, in that potential complainants appear to have been presented with a "menu" of representations that PR1 considered the Supplier was likely to have made to them, and asked to tick next to any that they recalled the Supplier saying.

While I acknowledge the weaknesses introduced into testimony produced in this way, and think it would be appropriate to attach a little less weight to it, I don't necessarily think it is fatal to its credibility where other evidence lends support to it.

Mr S's November 2023 statement was clearly drafted in a different way. It appears to be much more personalised. He acknowledges that given the number of years that have passed (more than ten) his recollections may be blurred, but suggests that he recalls the Supplier calling the Fractional Club membership an investment because the Supplier had used that term throughout the sales process.

I think it's important to acknowledge that the November 2023 statement came *after* two important events which could potentially have influenced Mr S's recollections. The first is the case of *Shawbrook & BPF v FOS*, in which the High Court found that the sale of fractional timeshares as an investment was a breach of the Timeshare Regulations that could give rise to an unfair credit relationship within the meaning of Section 140A of the CCA. The second is the assessment of our second case handler, who had explained why she had not upheld Mr S's complaint.

There's clearly a risk that a witness statement drafted after these events (and so long after the Time of Sale) could have been influenced by them. That said, a common thread links Mr S's November 2023 statement and his April 2017 statement, which is that he makes the allegation that the Supplier represented the Fractional Club product was an investment. This is not a new memory or argument which emerged following the events I've mentioned. If there is support for Mr S's allegations in any other evidence, then I am inclined to accept his recollections as being largely accurate.

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 S'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 him 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.

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 S, the financial value of his 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…[Supplier] makes no representation as to the future price of value of the Fraction".*

On the other hand, another of the Supplier's disclaimers gave a somewhat different impression. Under the heading "Investment Advice" within the purchase paperwork, the Supplier said that it was not a licensed investment advisor, that any information provided by its agents had been *"obtained solely from their own experiences as investors",* and that potential customers should *"obtain competent advice…to determine their own investment needs."* To me, this disclaimer suggests the Supplier *expected* its representatives to speak about the concept of investment when marketing the Fractional Club product.

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 S 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'.

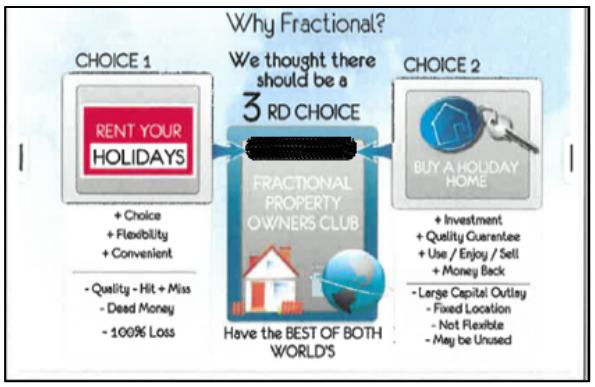
How the Supplier marketed and sold the Fractional Club membership

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 – including a document called "2011 Spain PTM FPOC 1 Practice Slides Manual" (the '2011 Fractional Training Manual').

As I understand it, the 2011 Fractional Training Manual was used throughout the sale of the Supplier's first version of a product called the Fractional Property Owners Club – which I've referred to and will continue to refer to as the Fractional Club. It isn't entirely clear whether Mr S would have been shown the slides included in the Manual. But it seems to me to be reasonably indicative of:

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

Having looked through the manual, my attention is drawn to page 6 (of 41) – which includes the following slide on it:



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

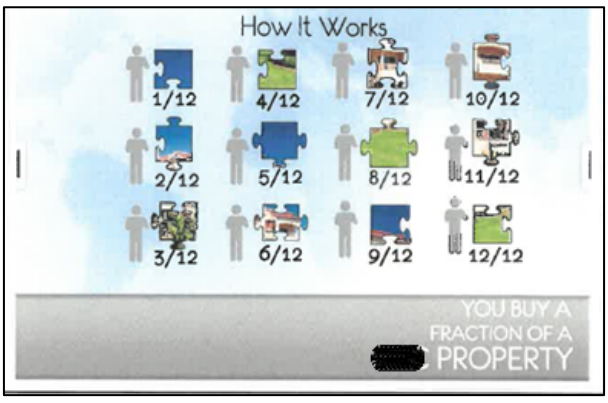
(1) *"Rent Your Holidays"*

(2) *"Buy a Holiday Home"*

(3) *The "Best of Both Worlds"*

It was the first slide in the 2011 Fractional Training Manual to set out any information about Fractional Club membership and I think it suggests that sales representatives were likely to have made the point to Mr S that membership combined the best of (1) and (2) – which included choice, flexibility, convenience and, significantly, an investment they could use, enjoy and sell before getting money back.

The manual then moved on to two slides (on pages 7 and 8) concerned with how Fractional Club membership worked:



I'm aware that the Supplier says that 90-95% of its time during its sales presentations was focused on holidays rather than the sale of an allocated property. Having looked through the 2011 Fractional Training Manual, it seems to me that there were 10 slides on how Fractional Club membership worked before the slides moved onto to sections titled "Peace of Mind", "Resort Management" and "Which Fractional". And as 5 of the 10 slides look like they focused on holidays, there seems to me to have been a fairly even split during the Supplier's sales presentations between marketing membership of the Fractional Club as a way of buying an interest in property and as a way of taking holidays.

However, even if more time was spent on marketing membership of Fractional Club membership as a way of taking holidays rather than buying an interest in property, as the slides above suggest, in my view, that the Supplier's sales representatives would have probably led prospective members to believe that a share in an allocated property was an investment (after all, that's what the slide titled "Why Fractional" expressly described it as) , I can't see why the Supplier wouldn't have been in breach of Regulation 14(3) in those circumstances.

I acknowledge that there was no comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mr S the financial value of the proprietary interest he was offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that *'[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).'"*[2] 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.

[2] 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

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.

Mr S has said that the Supplier positioned membership of the Fractional Club as an investment to him. He recalled the Supplier making such a representation when he completed PR1's questionnaire in 2017, and again when making a second witness statement in 2023. And as I've said before, the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members – including Mr S. And as the slides clearly indicate that the Supplier's sales representative was likely to have led him to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e., a profit) in the future, I don't find him either implausible or hard to believe when he says he was told by the Supplier that the Fractional Club product was an investment and that he could make a profit when it was sold in the future. On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mr S was led by the Supplier to believe at the relevant time. I think his statements over the years are supported by what is known about how the Supplier sold Fractional Club memberships at the Time of Sale. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

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 S and the Lender under the Credit Agreement and related Purchase Agreement.

As the Supreme Court's judgment in *Plevin* makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

It also it seems to me in light of *Carney* and *Kerrigan* that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr S 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.

Mr S refers, somewhat obliquely, to the impact of the Supplier's breach of Regulation 14(3), in his testimony. In his April 2017 statement, he simply says the representation that the product was an investment was one that he had relied on, and that he had later found out that it was not true. In his November 2023 statement, he said that his existing Vacation Club membership had *"worked well"* but *"…this new venture was expressed as being better as we own part of the freehold with others"* and *"…we bought what was being sold as this timeshare was explained as being far superior."*

I think it's significant that Mr S had been a long-term Vacation Club customer of the Supplier. According to comments made by the Supplier to the Lender, he had taken 27 holidays over the course of his membership. He had also not bought any points since 2004, and it appears only to have been when the Supplier marketed its new Fractional Club product to him that he was persuaded to make another purchase. It seems that he wasn't struggling to get the

holidays he wanted, and the key difference between Vacation Club membership and Fractional Club membership was the share in the Allocated Property. This all suggests to me that the investment aspect of the Fractional Club product was likely to have been material to his purchasing decision.

So on my reading of Mr S's testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when he decided to go ahead with his purchase. That doesn't mean he was not interested in holidays. His own testimony and his holiday history, as well as the fact he purchased a small number of additional points at the Time of Sale, shows that he clearly was. And that is not surprising given the nature of the product at the centre of this complaint. But as Mr S 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 his existing membership. 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 S has not said or suggested, for example, that he would have gone ahead with the purchase in question had the Supplier not led him to believe that Fractional Club membership was an appealing investment opportunity. His purchase history isn't consistent with that of someone who simply wanted to buy more points. 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 gone 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 S under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint.

Fair Compensation

Having found that Mr S would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable to put 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 S and any joint purchaser agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr S 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 1,501 Vacation Club Points. And, like Fractional Club membership, he had to pay annual management charges as a Vacation Club member. So, had Mr S 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 S from the Time of Sale as part of his 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 S with that being the case – whether or not a court would award such compensation:

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

(8) In addition to (1), the Lender should also refund the difference between Mr S's Fractional Club annual management charges paid after the Time of Sale and what his Vacation Club annual management charges would have been had he not purchased Fractional Club membership.

(9) The Lender can deduct:

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

iv. The market value of the holidays* Mr S 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 S 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)

(10) 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.

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

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

*I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Mr S 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'm currently minded to uphold this complaint.

Will Culley
Ombudsman