DRN-4661351

The complaint

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

What happened

Since 1997 Mr and Mrs P had been members of a timeshare arrangement, the European Collection (the 'EC') from a timeshare provider (the 'Supplier'). Over the course of this membership, they bought a total of 5,000 EC points.

As EC members, every year they could use their points in exchange for holidays at the Supplier's holiday resorts. Different accommodation had different points values, depending on factors such as location, size, and time of year. So, for example, a larger apartment in peak season would cost more to a member in their points than a smaller apartment outside of school holiday periods.

On 7 April 2014 (the 'Time of Sale') Mr and Mrs P purchased membership of a different type of timeshare (the 'Fractional Club') from the Supplier. They entered into an agreement with the Supplier to convert their 5,000 EC points (for which they were given a conversion rate of £1 per EC point) into 7,000 fractional points for a final price of £7,320 (the 'Purchase Agreement').

Fractional Club membership differed from their EC membership. The two significant differences were that it had a shorter membership term (15 years compared to an end date of 2054 for the EC membership), and it was also asset backed – which meant the memberships gave Mr and Mrs P more than just holiday rights. It also included a share in the net sale proceeds of a property named on their Purchase Agreement (the 'Allocated Property') after their membership term ends.

Mr and Mrs P paid for their Fractional Club membership by taking finance of £7,320 from the Lender in their joint names (the 'Credit Agreement').

Mr and Mrs P – using a professional representative (the 'PR') – wrote to the Lender on 1 November 2018 (the 'Letter of Complaint') to raise various concerns about their Fractional Club membership and the associated Credit Agreement. As those concerns are well known to both sides, I see no reason to set them out further than the summary above.

The Lender, other than acknowledging the complaint, said it was unable to investigate it because it didn't have an up to date letter of authority from Mr and Mrs P saying that they wished the PR to represent them.

The complaint was referred to the Financial Ombudsman Service by the PR on 17 September 2020. As part of its submissions, it included a written statement from Mr P setting out his and Mrs P's recollections of the Time of Sale and their concerns. In the statement Mr P described how he remembered the Supplier selling the Fractional Club:

> *"During this presentation, the representatives told us that our previous points that we held were in perpetuity and that the only way that we could ever get out of them was to turn 80 and that would be the only way we would get out. They told us that these fractional points would be an investment because it would be purchasing property. Obviously, they explained that purchasing property is a good investment which, to be honest with you, everyone does know and that's definitely how they sold it to us. They said that they would sell it for us after the time period of the fractional ownership certificate and that we would make money back at the end of it."*

Upon being contacted by this Service, the Lender sent its final answer to their complaint on 18 December 2020 saying it did not uphold it.

Unhappy with this outcome Mr and Mrs P asked this Service to consider their complaint. It was assessed by an Investigator who, having considered the information on file, upheld the complaint on its merits.

The Investigator thought that the Supplier had marketed and sold the Fractional Club membership as an investment to Mr and Mrs P at the Time of Sale in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'). And given the impact of that breach on their purchasing decision, the Investigator concluded that the associated credit relationship between the Lender and Mr and Mrs P was rendered unfair to them for the purposes of Section 140A of the CCA.

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

The provisional decision

Having considered everything, I agreed with the outcome reached by the Investigator, in that I thought the complaint ought to be upheld. I set out my initial thoughts in a provisional decision (the 'PD') and invited both sides to submit any new evidence or arguments that they wished me to consider before I made my final decision.

In my PD I said:

"I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr and Mrs P as an investment, which, in the circumstances of this complaint, rendered the credit relationship between them and the Lender unfair to them for the purposes of Section 140A of the CCA.

However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I recognise that there are a number of aspects to this complaint, it is not necessary to make formal findings on all of them because, even if one or more of those aspects ought to succeed, the redress I am

currently proposing puts Mr and Mrs P in the same or a better position than they would otherwise be in.

Mr P's testimony

As I've said, as part of its initial submissions to this Service the Supplier has provided a written statement from Mr P, and I have set out the relevant part of it above. I have considered how much weight I can place on this statement when assessing the merits of Mr and Mrs P's complaint.

The statement was most likely compiled prior to the Letter of Complaint and was probably prepared as part of the PR's case preparation. Indeed, the Letter of Complaint is generally consistent with the contents of the statement, which leads me to think it was probably used to inform the Letter of Complaint.

The statement was, in my view, clearly prepared and written by the PR, and taken during a telephone call. And because the statement was prepared by the PR, I am mindful of the risk that Mr P may have been guided through the process, and the associated risk that what has been written may not be his and Mrs P's own specific recollections. But it does contain personal information about their circumstances and what happened at the Time of Sale that only Mr and/or Mrs P would have known, and it goes into some detail to explain why they are now unhappy with the membership and how it was sold to them. So I have no doubt that Mr and Mrs P had a significant input into the statement's contents. It is also not unusual for statements to be prepared on complainants' behalf by professional representatives.

Also, when considering how much weight I can place on Mr P's statement, I am assisted by the judgement in the case of Smith v Secretary of State for Transport [2020] EWHC 1954 (QB).

The question to consider, therefore, is whether there is a core of acceptable evidence from Mr P. And having considered his testimony, whilst being mindful that he is recalling events several years prior to the statement being written and that memories can fade over time, I am satisfied that I am able to place weight on and rely on what Mr P has said when considering the merits of his and Mrs P's complaint.

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

Having considered the entirety of the credit relationship between Mr and Mrs P 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;*
2. *The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*
3. *Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; and*
4. *The inherent probabilities of the sale given its circumstances.*

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

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs P's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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

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

But Mr and Mrs P say that the Supplier did exactly that at the Time of Sale – saying, in summary, that the Supplier told them the membership was a property investment that they would make money on at the end of the term.

Mr and Mrs P allege, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because:

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

(2) *They were told by the Supplier that they would get their money back or more during the sale of Fractional Club membership.*

The term "investment" is not defined in the Timeshare Regulations. In Shawbrook & BPF v FOS[1], the parties agreed that, by reference to the decided authorities, "an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit" at [56]. I will use the same definition.

Mr and Mrs P's share in the Allocated Property clearly constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr and Mrs P as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to

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[1] *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)

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

For example, on the second page of the Purchase Agreement, titled "Terms and Conditions", the first read:

> *"You should not purchase Your […] Fractional Points as an investment in real estate. The Purchase Price paid by You relates primarily to the provision of memorable holidays for the duration of Your ownership. You are at liberty to dispose of Your […] Fractional Points at any time prior to the Sale Date in accordance with Rule 7 of the Rules of the Owners Club."*

Further, on the document titled "Key Information", an extract of which read:

> *"Exact nature and content of the right(s):*
>
> ***...***
>
> *Between six to nine months before the Proposed Sale Date, [the Trustee] will appoint two independent valuers to value the Property and will then take steps to sell the Property at the best achievable market price. You must bear in mind that your […] Fractional Points (and the purchase price paid by you for those points) relates primarily to the acquisition by you of many years of wonderful holidays. We are sure that you will get a great deal of pleasure from your holidays. Your decision to purchase […] Fractional Points should not be viewed by you as a financial investment."*

Finally, there was a "Customer Compliance Statement/Declaration to Treating Customers Fairly", which included the following:

> *"5. We understand that the purchase of our […] Fractional Points is an investment in our future holidays, and that it should not be regarded as a property or financial investment. We recognize that the sale price achieved on the sale of the Property in the Owners Club (and to which our […] Fractional Points have been attributed) will depend on market conditions at that time, that property prices can go down as well as up and that there is no guarantee as to the eventual sale price of the Property.*
>
> *6. We understand that the Property referenced on our Purchase Agreement will be sold as soon as possible on or after the Proposed Sale Date. However, we realise that it may not be possible to source a buyer immediately, and that in the event that the sale is affected on or after the Proposed Sale Date, we will be required to pay our Dues each year until the Property is sold."*

These were signed by Mr and Mrs P.

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And for reasons I'll now come on to, given the facts and circumstances of this complaint, I think the Supplier is likely to have breached Regulation 14(3) of the Timeshare Regulations.

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

During the course of its dealing with complaints of a similar nature, this Service has seen some training material and some internal documents relating to the sale of Fractional Club

by the Supplier. The Lender has also provided, in relation to other fractional timeshare complaints, witness statements from both previous and (at the time) existing employees of the Supplier setting out how its sales staff were trained to sell its products – all of which I have considered.

I recognise the amount of witness evidence that's been provided in support of the disclaimers in the paperwork I've referred to above. Indeed, I acknowledge what the witness statements say about the Supplier not referring to Fractional Club membership as an 'investment', not making any reference to the value of the Allocated Property and making every effort not to give customers, such as Mr and Mrs P, the impression that they were investing in something that would make them a profit.

However, I think the argument by the Lender on this issue runs the risk of taking too narrow a view of the prohibition against marketing and selling timeshares as an investment. When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that '[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).'' And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.

So, in my view, if a supplier implied to consumers that future financial returns (in the sense of possible profits) from a timeshare were a good reason to purchase it, I think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment.

Indeed, if I'm wrong about that, I find it difficult to explain why, in paragraphs 77 and 78 followed by 100 of Shawbrook & BPF v FOS, Mrs Justice Collins Rice said the following:

> *"[…] I endorse the observation made by Mr Jaffey KC, Counsel for BPF, that, whatever the position in principle,* ***it is apparently a major challenge in practice for timeshare companies to market fractional ownership timeshares consistently with Reg.14(3). […] Getting the governance principles and paperwork right may not be quite enough.***
>
> ***The problem comes back to the difficulty in articulating the intrinsic benefit of fractional ownership over any other timeshare from an individual consumer perspective****. […]* ***If it is not a prospect of getting more back from the ultimate proceeds of sale than the fractional ownership cost in the first place, what exactly is the benefit?*** *[…] What the interim use or value to a consumer is of a prospective share in the proceeds of a postponed sale of a property owned by a timeshare company – one they have no right to stay in meanwhile – is persistently elusive."*
>
> *"[...] although the point is more latent in the first decision than in the second, it is clear that both ombudsmen viewed fractional ownership timeshares – simply by virtue of the interest they confer in the sale proceeds of real property unattached to any right to stay in it, and the prospect they undoubtedly hold out of at least 'something back' – as products which are inherently dangerous for consumers.* ***It is a concern that, however scrupulously a fractional ownership timeshare is marketed otherwise, its offer of a 'bonus' property right and a 'return' of (if not on) cash at the end of a moderate term of years may well taste and feel like an investment to consumers who are putting money, loyalty, hope and desire into their purchase anyway.*** *Any timeshare contract is a promise, or at the very least a prospect, of long-term delight. [...] A*

timeshare-plus contract suggests a prospect of happiness-plus. And a timeshare plus 'property rights' and 'money back' suggests adding the gold of solidity and lasting value to the silver of transient holiday joy." (emphasis my own)

So, I'm not persuaded that the prohibition in Regulation 14(3) was confined to, for example, using the word 'investment' when promoting or selling a timeshare contract. I think that the prohibition may capture the promotion of investment features incorporated into a timeshare to persuade consumers to purchase, including leading a consumer to expect a financial gain from the timeshare. After all, Mrs Justice Collins Rice said in Shawbrook & BPF v FOS, at 76 (when discussing an ombudsman's approach to Regulation 14(3)):

*"[…] He was entitled in other words to be highly sensitive to the **overt and covert** messaging – that is, the fine calibration of the encouragement given – by the seller in a case like this. There was nothing wrong with an approach which had the absolute prohibition in Reg.14(3) within the ombudsman's field of vision from the outset as he looked at the evidence for the true nature of the transaction that was done here. Indeed, he was required as a matter of law to do so." (emphasis my own)*

Mr and Mrs P say in their testimony that the Supplier sold and/or marketed Fractional Club membership to them as an investment because they were told they would be purchasing property and that they would make money back at the end when the property was sold. So, I've thought about how the membership would likely have been presented to Mr and Mrs P. Alongside the information I have about the sales, and what this Service has been told about how the Supplier trained its staff, I've considered the inherent probability of the allegation when assessing whether I find that thing did or did not happen.

*And I am satisfied I am able to do that. After all, in Onassis v. Vergottis [1968] 10 WLUK 101, Lord Pearce referred to the need to look at "probabilities", as well as contemporaneous documents and admitted or incontrovertible facts, when weighing the credibility of a witness's evidence (at p.431). In Armagas Ltd v. Mundogas SA (The Ocean Frost) [1986] 2 W.L.R. 1063, Goff LJ also referred to looking at "the overall probabilities" when ascertaining the truth (at p.57). And in Gestmin SGPS S.A. v. Credit Suisse (UK) Limited [2013] EWHC 3560, Leggatt J suggested (at para.22) that factual findings should be based on "inferences drawn from the documentary evidence and known or **probable** facts" (my emphasis). Here, I think it is inherently more probable that a timeshare product with an investment element is sold in a way promoting that element, and therefore risking a breach of Regulation14(3), compared with the sale of a product without the possibility of a monetary return.*[2]

The Lender may say in response to this provisional decision, that it is not a breach of Regulation 14(3) to merely describe the nature of the product and how it worked, and I agree. But in the circumstances of this complaint, it wouldn't have made much sense if the Supplier included this feature in the product without relying on it to promote the sale, given Mr and Mrs P paid a large sum in addition to converting their EC points.

As I've already set out, as regards what happened at the Time of Sale, Mr and Mrs P have submitted testimony which they say sets out their recollection of events. And as I've said, I am currently satisfied that I am able to place weight on what Mr P has said occurred at the Time of Sale.

The testimony sets out that they were told by the Supplier that the EC points they held were held in perpetuity, and they could only get out of the membership when they turned 80. And that they were told by the Supplier that by converting them into fractional points the points

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[2] This is different to saying that it is more likely than not that a product with an investment element is sold as an investment, simply due to that investment element. For the avoidance of doubt, I make no such finding.

would be an investment because it would be a purchase in property. So, the Allocated Property was plainly a major part of the product's features and, in this instance, is a justification for the price of Mr and Mrs P's Fractional Club membership. After all, they exchanged their 5,000 EC points (and were given £1 per point) and paid £7,320 for the additional 2,000 fractional points. So, although the additional points gave them some additional holiday rights, it seems likely that the additional cost was also reflective of the Allocated Property element of the membership.

The Lender may, in response to this provisional decision, say that the Supplier included the specific disclaimers set out above to show that it didn't present Fractional Club membership as an investment, and these sales documents actually evidence compliance with Regulation 14(3). And I agree with the Lender to the extent that the disclaimers did set out that the memberships should not be looked at as a financial investment, and Mr and Mrs P signed to say they had read and understood that. But these disclaimers were contained in documents which were given to Mr and Mrs P to sign after they had been through the sales presentations, and after they had agreed to make the purchases on the basis of the presentation and what they had been told by the Supplier. It's also ultimately difficult to explain why it was necessary to include such disclaimers if there wasn't a very real risk of the Supplier marketing and selling membership as an investment, given the difficulty of articulating the benefit of fractional ownership in a way that distinguishes it from other timeshares from the viewpoint of prospective members. And this is especially true when the customers, such as Mr and Mrs P, were existing members of the EC. After all, if it was just additional holiday rights that they wanted, Mr and Mrs P could have simply bought additional EC points and not converted to fractional. So, I think it's reasonable to assume there was likely some discussion at the Time of Sale as to why they should purchase this new type of membership in particular. In other words, some discussion of why Mr and Mrs P ought to purchase the Fractional Club in the way that they did.

The investment element of membership was plainly a major part of its rationale and justification for its cost. And as it was designed to offer its members a way of making a financial return from the money they invested – whether or not, like every investment, the return was more, less or the same as the sum invested - it would not have made much sense if the Supplier included the features in the product without relying on them to promote sales, especially when the reality was that the principal benefits of the move to Fractional Club were its investment element i.e., the share in the net sale proceeds of the Allocated Property and the shorter membership term.

Further, I find it fanciful that the Supplier would not have highlighted the possible returns available to Mr and Mrs P when selling Fractional Club membership to them given that they already had 5,000 EC points. And as both Mr P and the Lender have confirmed, in order to make the transfer to fractional they had no choice but to buy the additional 2,000 points. And as Mr and Mrs P were laying out a considerable sum to make the purchase, I think it's clear that they expected to get a significant sum back – after all there is no suggestion that they were unhappy with the availability of holidays when using their 5,000 EC points at the Time of Sale - so it seems common sense that the return was an important factor in the sale. Further, Mr and Mrs P have said from the outset of their complaint that they were led to believe the membership was different from the EC in that it had both a shorter membership term, and was an investment in property that would make them money when the property was sold. I think that belief fits with what they did at the Time of Sale.

Mr and Mrs P, in both the statement and in their Letter of Complaint, have been specific in what they say about how the Fractional Club was sold to them. They have said that it was positioned as an investment in property from which they would make money back upon the sale of the Allocated Property. And given their circumstances, and what I think happened at this particular sale, I am persuaded it is more likely than not that the Supplier's salesperson

positioned Fractional Club membership as an investment that may lead to a financial gain (i.e., a profit) in the future, whether explicitly or implicitly. So, I am currently satisfied that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale.

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

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

As the Supreme Court's judgment in Plevin[3] 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[4] and Kerrigan[5], that if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs P and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On my reading of Mr P's testimony, the prospect of a financial gain from the Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. I am not saying here they were not interested in holidays - their own testimony and their purchasing and reservation history demonstrates that they quite clearly were, which is unsurprising given the nature of the product at the centre of this complaint. But if it was just the holidays they wanted, I cannot see why they wouldn't have remained EC members.

The Lender may say in response to this PD that it was the reduced membership term that was the driver behind their decision to purchase. And I agree to an extent, in that the sale of the Allocated Property at the end of the membership, and the finality that it would bring, seems to have been attractive to Mr and Mrs P – he has said so in his statement. But I don't think the reduced term was the reason for their purchase, so I don't think they would have pressed ahead for this reason alone.

I think this because at the Time of Sale Mr H, being the elder of the two, was 64 years old. Under the terms of the Supplier's exceptional circumstances policy[6] Mr and Mrs P would have been able to relinquish their EC membership when Mr P turned 75, which was in 11 years' time. I appreciate in his statement he says he was told that he could do this at 80, but even if he was told this incorrectly, this would still only be 16 years away, and importantly, they would have been able to do so without having to pay anything. So given the Fractional Club had a membership term which was only two years shorter than the point where Mr and Mrs P thought they would have been able to relinquish their existing EC membership for no financial outlay, I do not think this would have been a significant motivation for them, especially as they had to pay over £7,000 to achieve this by buying the Fractional Club membership. I've also not seen anything which suggests there was any reduction in the annual management charge for Fractional Club when compared to what they were having to pay for the EC membership, especially when considering the additional £7,320 cost of it.

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[3] *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61
[4] *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958
[5] *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169
[6] Set out in the EC Relinquishment Fact Sheet.

Indeed, given the additional points they purchased the annual management charge may well have increased.

So, I think the prospect of a financial gain at the end of their membership term was likely to have been a significant and motivating factor in Mr and Mrs P's purchasing decision. And Mr P has said as much (plausibly in my view) in his statement. Therefore, on the balance of probabilities, I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit, as that share was one of the defining features of membership that marked it apart from their existing membership. Mr and Mrs P have not said or suggested, for example, that they would have pressed ahead with the purchase in question had the Supplier not led them to believe that Fractional Club membership was an appealing investment opportunity. And as they faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I have not seen enough to persuade me that they would have pressed ahead with their purchase regardless.

And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

Conclusion

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

I then set out what I thought was a fair and reasonable way for the Lender to calculate and pay fair compensation to Mr and Mrs P.

The responses to the provisional decision

Mr and Mrs P, via the PR, accepted the provisional decision with no further comment.

The Lender replied and said that it would not challenge the provisional findings, but had some observations on some points that it did not agree with.

As both sides have responded, the complaint has come back to me for a final decision.

The legal and regulatory context

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

The legal and regulatory context that I think is relevant to this complaint is, 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.

And having done so, and having considered everything again in light of both sides' responses to the PD, I see no reason to depart from the outcome reached in the provisional decision. I remain satisfied that this complaint ought to be upheld, but I will address the concerns raised by the Lender in its response to the PD.

The Lender thought that the PD was premised on a material error of law in its approach to the prohibition under Regulation 14(3) of the Timeshare Regulations. It said the PD had said that the mere existence of the *'prospect of a financial return'* constituted an *'investment',* and in doing so falls into error by conflating two meanings of the word 'return': (i) a 'return on investment', which is normally understood to mean the measure of profit (the return) on the original investment; and (ii) a customer being told that some money will be 'returned' upon sale, which carries no connotation of financial gain/profit. The Lender said that the former is what must not be marketed under the Timeshare Regulations; and the latter is an inherent feature of fractional products and does not breach Regulation 14(3).

But I don't think the Lender has understood the point that was being made here. In the PD I set out what Regulation 14(3) said:

> *"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."*

And then I set out the definition of the word 'investment' I was using:

> *"The term "investment" is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and 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."*

But the Fractional Club was asset-backed by an Allocated Property, and the share in this property clearly constituted an investment as it offered the member the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But there was no conflation of the word 'return' because I made it clear that the fact that the fractional 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*. So, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.

The Lender also thought that the PD had dismissed the disclaimers contained in the contractual paperwork with no proper basis or explanation, despite observing that they emphasised that the product should not be seen as an investment. It said that the disclaimers had been found to evidence compliance with Regulation 14(3).

And I agree with the Lender to the extent that the disclaimers did set out that the membership should *not* be looked at as a financial investment, and Mr and Mrs P signed to say they had read and understood that. But these disclaimers were contained in documents which were given to Mr and Mrs P to sign *after* they had been through the sales presentation, and *after* they had agreed to make the purchase on the basis of the presentation and what they had been told by the Supplier. And as I set out, that presentation suggested that the membership could lead to a financial gain (i.e. a profit) from the sale of the associated Allocated Property. So, I think it unlikely that, having made a decision to

purchase on the basis of what they had seen and heard, the disclaimers would have done much to dissuade Mr and Mrs P from thinking that the membership was an investment. It is also ultimately difficult to explain why it was necessary to include such disclaimers if there wasn't a very real risk of the Supplier marketing and selling membership as an investment, given the difficulty of articulating the benefit of fractional ownership in a way that distinguishes it from other timeshares from the viewpoint of prospective members.

The Lender said that the wrong test had been applied to determine whether the credit relationship between it and Mr and Mrs P was unfair. It then quoted the following:

> *"In the PD, at page 10, the Ombudsman appears to have adopted a different test than that of cited in Carney, he states "I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit... And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decisions they ultimately made"".*

It said that this appears to reverse the burden of proof, in that I had appeared to start from the position that the prospect of a financial gain existed, but this was not insignificant enough for it not to render the relationship unfair. It said the starting point is to assess whether there is sufficient evidence of a material impact on the decision to enter the agreement. The Lender thought that in the absence of this evidence, the relationship ought not to be found unfair.

But the Lender appears to have misunderstood what I had said. The burden of proof has not been reversed here. It is clear that it was on the basis that the Supplier's breach of Regulation 14(3) at the Time of Sale was material to their purchasing decisions that I decided that the associated credit relationships had been rendered unfair.

So, I am satisfied, as I set out in the PD, that Mr and Mrs P were motivated to make their Fractional Club purchase because of the associated share in the Allocated Property and the possibility of a profit. And because of that, the breach of Regulation 14(3) by the Supplier was material to the purchasing decision they ultimately made.

The Lender then concluded by saying that the reliance on the witness testimony was unsafe. It thought this because the testimony contained vague and brief allegations, as well as being inconsistent and generic. It said it would have expected there to have been information about what Mr and Mrs P were told about the likely return or mechanisms of how the agreement works, which has not been mentioned. The allegation's credibility, that the product was sold as an investment, has not been challenged.

But the PD considered, in some detail, both the provenance and contents of the statement, and I was satisfied that what had been recorded was Mr P's recollections of their purchase. And I was satisfied, being cognisant of the fact that memories can fade over time, that Mr P's testimony could be relied on. Having reconsidered everything again, I remain satisfied that it is safe to place weight on Mr P's testimony when considering what most likely happened at the Time of Sale. And I find that his testimony, when considered alongside all of the evidence and circumstances, persuades me that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, and that breach was material to Mr and Mrs P's purchasing decision.

Conclusion

So, although the Lender has said it would not challenge my provisional decision that this complaint ought to be upheld, I have considered everything that it has said in response. And having done so, I remain satisfied that this complaint ought to be upheld. I think the Lender

participated in and perpetuated an unfair credit relationship with Mr and Mrs P under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A.

Putting things right

In the PD I set out what I considered to be a fair and reasonable way for the Lender to calculate and pay fair compensation to Mr and Mrs P. Neither side has made any comment on my proposed redress, so I see no reason to depart from my provisional thoughts on this issue.

For the avoidance of doubt, I shall set out my directions below.

Fair Compensation

Having found that Mr and Mrs P 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 Mr and Mrs P was unfair under Section 140A of the CCA, it is fair and reasonable to put them back in the position they would have been in had they not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr and Mrs P agree to assign to the Lender their 7,000 fractional points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs P were existing European Collection members, and their membership was traded in against the purchase price of Fractional Club membership. Under their European Collection membership, they had 5,000 European Collection points. And, like Fractional Club membership, they had to pay annual management charges as European Collection members. So, had Mr and Mrs P not purchased Fractional Club membership, they would have always been responsible for paying an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr and Mrs P from the Time of Sale as part of their Fractional Club membership should amount only to the difference (if any) between those charges and the annual management charges they would have paid as ongoing European Collection members with 5,000 points.

So, here's what I direct the Lender to do to compensate Mr and Mrs P with that being the case – whether or not a court would award such compensation:

(1) The Lender should refund Mr and Mrs P's repayments to it under the Credit Agreement, including any sums paid to settle the debt.

(2) In addition to (1), the Lender should also refund the difference between Mr and Mrs P's Fractional Club annual management charges paid after the Time of Sale and what their European Collection annual management charges would have been had they not purchased Fractional Club membership.

(3) The Lender can deduct:

   i. The value of any promotional giveaways that Mr and Mrs P used or took advantage of; and

   ii. The market value of the holidays* Mr and Mrs P took using their fractional points *if* the points value of the holiday(s) taken amounted to more than the total number of European Collection points they would have been entitled to use at the time of the holiday(s) as ongoing European Collection members with 5,000 points. 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 and Mrs P took a holiday worth 2,550 fractional points and they 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 they 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 Mr and Mrs P's credit files in connection with the Credit Agreement reported within six years of this decision.

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

*I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Mr and Mrs P took using their fractional points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

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

My final decision

I uphold this complaint, and direct Shawbrook Bank Limited to calculate and pay fair compensation to Mr and Mrs P as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P and Mrs P to accept or reject my decision before 12 March 2026.

Chris Riggs
Ombudsman