DRN-5222277

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

Mr and Mrs P were existing customers of a timeshare provider (the 'Supplier') and had been since April 2000. Between April 2000 and September 2012, they had purchased 15,000 points in the Supplier's 'European Collection'. These points worked like a currency such that, every year, Mr and Mrs P could use the points to stay at the Supplier's holiday accommodation. That accommodation 'cost' different amounts of points depending on the size of the apartment, its location and the time of year.

In May 2013, Mr and Mrs P purchased a new type of membership (the 'Fractional Club') from the Supplier. They traded in 7,000 of their European Collection points towards purchasing 7,000 fractional points (leaving them with 8,000 European Collection points). They paid for this by card payment.

These previous purchases are not part of this complaint but have been included here for background information only.

On 29 September 2013 (the 'Time of Sale'), Mr and Mrs P traded in a further 5,000 of their remaining European Collection points towards the purchase of a further 5,500 fractional points from the Supplier (leaving them with 3,000 European Collection points). This was at a cost of £3,792, with a conversion price given for their European Collection points of £1 per point (the 'Purchase Agreement').

Mr and Mrs P paid for this membership by taking finance of £3,792 from the Lender in both of their names.

In February 2014, Mr and Mrs P also made another purchase. But as that purchase is entirely separate, that is being considered in a different decision.

Fractional Club membership was asset backed – which meant it 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 Agreements (the 'Allocated Property') after their membership terms end.

Mr and Mrs P – using a professional representative (the 'PR') – wrote to the Lender on 26 August 2018 (the 'Letter of Complaint') to complain about:

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

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

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

Mr and Mrs P say that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. told them that Fractional Club membership had a guaranteed end date when that was not true.
2. told them that Fractional Club membership was an "investment" when that was not true.
3. told them that the Supplier's holiday resorts were exclusive to its members when that was not true.

Mr and Mrs P say that they have a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs P.

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

Although not expressed in these exact terms, on my reading of the Letter of Complaint, Mr and Mrs P suggest they think the Supplier breached the Purchase Agreement because they found it difficult to book the holidays they wanted, when they wanted.

As a result of the above, Mr and Mrs P suggest that they have a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs P.

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

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

1. The terms of the agreement were unfair as commission was paid to the Supplier which was not disclosed to Mr and Mrs P.
2. Fractional Club membership was marketed and sold to them as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
3. They were pressured into purchasing Fractional Club membership by the Supplier.
4. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mr and Mrs P's concerns as a complaint and issued its final response letter on 29 November 2018, rejecting it on every ground.

Mr and Mrs P then referred the complaint to the Financial Ombudsman Service. 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 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 Regulations. And given the impact of that breach on their purchasing decision, the Investigator concluded that the 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.

I considered the matter and issued a provisional decision (the 'PD') on 20 November 2024. In that decision I said:

"***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.

I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:

- *The CCA (including Section 75 and Sections 140A-140C).*
- *The law on misrepresentation.*
- *The Timeshare Regulations.*
- *The Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').*
- *The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations').*
- *Case law on Section 140A of the CCA – including, in particular:*

    - *The Supreme Court's judgment in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 ('Plevin') (which remains the leading case in this area).*
    - *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
    - *Patel v Patel [2009] EWHC 3264 (QB) ('Patel').*
    - *The Supreme Court's judgment in Smith v Royal Bank of Scotland Plc [2023] UKSC 34 ('Smith').*
    - *Carney v NM Rothschild & Sons Ltd [2018] EWHC 958 ('Carney').*
    - *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm) ('Kerrigan').*
    - *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service [2023] EWHC 1069 (Admin) ('Shawbrook & BPF v FOS').*

Good industry practice – the RDO Code

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

My provisional findings

I have considered all the available evidence and arguments to decide what is 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 Mr and Mrs P'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 and breached the Purchase Agreement and the Lender ought to have accepted and paid those claims under Section 75 of the CCA.

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

What is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

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

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between Mr and Mrs P and the Lender was unfair.

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

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

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

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr and Mrs P's membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

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

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

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

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

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

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

and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[1]

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

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

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

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

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

I have considered the entirety the credit relationship between Mr and Mrs P and the Lender along with all of the circumstances of the complaint and 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 sales given their 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 breach of Regulation 14(3) of the Timeshare Regulations

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

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 the following during the course of this complaint about an earlier purchase in 2013:

> *"In 2013, we were on holiday in Spain when, once again, we were approached by the representatives. This time, the representatives said that 'they weren't trying to sell us anything', but they just wanted to tell us about this fabulous new product. The product was called the fractional property owners club. This was sold to us as a way of making a profit and also as an investment. This product was also sold to us by the representatives as an exit strategy as, according to the sales representatives, our European points were actually in perpetuity. The representatives went on to say that this property that we would be investing in and would be a fractional owner of would be sold in 2027. On that day, the property would go on the market and would be sold, and any profits made from it would be returned to us and we would exit our timeshare contract with [the Supplier] or we could reinvest. We had not realised that our timeshare was actually in perpetuity, or we hadn't considered it, and we hadn't realised that the liability for maintenance would continue after our deaths. We therefore decided that this was an excellent way to actually exit our timeshare product and potentially make a profit…".*

With respect to the purchase made at the Time of Sale, they said:

> *"We were once again approached by the representatives who advised us that we should consider exchanging more of our European points to allow us the guaranteed investment and the guaranteed exit date from our timeshare contract."*

And, the Letter of Complaint said:

> *"On this occasion your brokers representatives advised our clients that an additional purchase would only add to their portfolio of investment. Again, the property would require to be sold on a set date with according to your brokers representatives, our clients making a profit and having a guaranteed exit date from their timeshare contract. On the advice of your representatives and believing that by purchasing additional fractional points they would have an investment and guaranteed exit date, our clients decided to transfer their European points".*

And Mr and Mrs P also said:

> *"We now know that the property we have with our fractional points may not be sold on the sale dates as specified in our contracts. I have recently found out that [the Supplier] actually owns a fraction of each of the fractional properties, and are under no obligation to sell these. We now know that [the Supplier] are not registered to sell anything as an investment."*

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.*

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

I acknowledge the Lender has some concerns about the witness testimony provided, particularly since this wasn't dated or signed by Mr and Mrs P. But the statement was provided to our Service at the outset when the complaint was referred to us, and I've seen evidence that it was drafted in March 2018. And, in my view, the Letter of Complaint reflects the witness statement provided. It follows, I think that Mr and Mrs P have been clear from the outset of this complaint that (1) Fractional Club membership was sold to them as an investment and (2) that was an important part of their purchasing decision.

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 and Mrs P share in the Allocated Property clearly, in my view, 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 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, the second page of the Purchase Agreement was titled "Terms and Conditions", the first of which 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."*

And, in the Customer Compliance Statement which Mr and Mrs P had ticked and signed to say they understood, it said:

> *"We understand that the purchase of our [Supplier] Fractional Points is an investment in our future holidays, and that it should not be regarded as a property or financial investment. We recognise that the sale price achieved on the sale of the Property in the Owners Club (and to which our [Supplier] Fractional Points have been attributed) will depend on market conditions at that time, that property prices can go down as well as up and there is no guarantee as to the eventual sale price of the Property."*

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

So, I have considered:

(1) *whether it is more likely than not that the Supplier, at the Time of Sale, sold or marketed membership of the Fractional Club as an investment, i.e., told Mr and Mrs P or led them to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered them the prospect of a financial gain (i.e., a profit); and, in turn*

(2) *whether the Supplier's actions constitute a breach of Regulation 14(3).*

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

How the Supplier marketed and sold the Fractional Club membership

I've seen a variety of training and marketing materials used by the Supplier, including:

- *A set of slides produced on 14 September 2012 and used as a training tool for its sale staff and as a sales aide when selling Fractional Club membership to potential purchasers ('the September 2012 Slides') according to an email from the Supplier's Vice President of Legal Services and European General Counsel ('SC') that confirmed that was the case;*
- *A 98-page document called "Sales Representative Training Manual Europe". While the document itself is undated, it was said by the Supplier to be some basic training given to new sales representatives in 2013 (the '2013 Training Manual'); and*

The 2013 Training Manual looks like a set of instructions to and guidance for new sales representatives on how to interact with prospective members. And with that being the case, both the September 2012 Slides and 2013 Training Manual seem to me to be reasonably indicative of:

(1) *the training the Supplier's sales representatives would have got before selling Fractional Club membership; and*

(2) *how the sales representatives would have framed the sale of Fractional Club membership to prospective members – including Mr and Mrs P.*

Slides 28 to 34 of the September 2012 Slides focused on Fractional Club membership, and I think the following aspects of those slides are particularly important.

Slide 29, which was titled "What is fractional ownership?", was the first slide to set out how Fractional Club membership worked. When doing that, it read:

"Fractional ownership is the division of a ***high value asset*** *into fixed segments whereby the owner can enjoy the advantages and eventual residual value of what they own, use it for a fixed period of time and only pay management fees and upkeep costs proportionate to their share of the property.*

Differing from timeshare ownership *which affords a right to use for a fixed period of time and the ownership of the property always remains with the developer,* ***fractional ownership is tied to a piece of real estate with a clearly defined exit strategy****.* ***Purchasers actually own a piece of the property.*** *Once the term finishes at a predetermined point the real estate is sold on the open market and after sales costs and taxes are deducted the proceeds of the sale are split proportionately based on the size of the fraction owned."*

(my emphasis added)

From the off, therefore, it seems that sales representatives would have demonstrated that there were financial advantages to Fractional Club membership rather than being a member of a 'standard' timeshare.

One of the advantages referred to in the slide above is the ownership of a "high value asset" and "actually [owning] a piece of the property". And as an owner's equity in their property is built over time as the value of the asset increases relative to the size of any mortgage secured against it, this particular advantage of Fractional Club membership was portrayed in terms that played on the opportunity ownership gave prospective members of the Fractional Club to accumulate wealth in a similar way.

Slide 30 went on to set out a number of other advantages of "owning a […] property fractional", which included management by a major brand, residence size and capacity, "great locations in highly popular tourist destinations" and ongoing refurbishment – all of which were said on the slide to "enhance the residual value of the real estate at the end of the term".

Slide 31 also said that the 15-year membership term of the Fractional Club was aligned with the 'historic property growth cycle in high demand tourist destinations' while members could also hand down their membership to family.

I acknowledge that the slides don't include express reference to an "investment" benefit of Fractional Club membership. But they alluded to much the same concept. It was simply phrased in the language of building equity in property. With that being the case, it seems to me that the Supplier's approach to marketing Fractional Club membership involved implying that "owning a […] property fractional" was a way of building wealth over time, similar to home ownership. And as an allocated property was 'owned' by Fractional Members only to the extent that they participated in the net proceeds from its sale (they didn't have any preferential rights to stay in their allocated property or to use it in any other way), the notion

of property ownership promoted by the Supplier was specifically its potential investment benefit.

I also recognise that, on page 53 of the 2013 Training Manual, sales representatives were told by the Supplier not to talk to prospective members of the Fractional Club about values or returns as it wasn't an investment product – which is consistent with the fact that the September 2012 Slides don't include a 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 and Mrs P the financial value of the proprietary interest they were 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.*

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.

For, 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."*

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[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

"[...] 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)*

Given the contents of the September 2012 Slides, I think the Supplier's sales representatives were encouraged to make prospective Fractional Club members consider the advantages of owning something and view membership as a way of generating a return, rather than simply paying for holidays in the usual way. That was likely to have been reinforced throughout the Supplier's sales presentations by the use of phrases such as "high value asset". And as the September 2012 Slides suggest that much would have been made of the possibility of prospective members maximising their returns (e.g., by pointing out that one of the benefits of a 15-year membership term was that it aligned with the historic property growth cycle in high demand tourist destinations), I think the language used during the Supplier's sales presentations was likely to have been consistent with the idea that Fractional Club membership was an investment.

With that said, therefore, given what I've already said about the Supplier's training material and the way in which I think it was likely to have framed the sale of Fractional membership to prospective members (including Mr and Mrs P), I think it is more likely than not that the Supplier did, at the very least, imply that future financial returns (in the sense of possible profits) from a Fractional Membership were a good reason to purchase it – particularly in light of the circumstances of their sale.

Mr and Mrs P were already members of the Supplier's European Collection at the Time of Sale – holding 8,000 European Collection points. They had paid, on average, £1.19 for each of their European Collection points over the years. And if they simply wanted to increase their holiday rights, I don't understand why they would have paid nearly £4,000 at the Time of Sale in return for 5,500 fractional points (only 500 of which were additional), for a relatively small increase in holiday rights, unless the Supplier had relied on other aspects of Fractional Membership to promote its sale.

I acknowledge that Fractional Membership offered Mr and Mrs P a shorter term. But the investment elements of Fractional Membership were plainly major parts 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, as existing European Collection members with significantly holiday rights, the principal benefits of the move to Fractional Membership were its investment elements i.e., the share in the net sale proceeds of the Allocated Property and the potential financial returns from the Fractional Wish to Rent Programme.

Mr and Mrs P have said from the outset of their complaint that they were led to believe by the Supplier they would make a profit when the Allocated Property was sold. And I think that fits with what they did at the Time of Sale – which, as existing European Collection members

with significant holiday rights, was make a significant purchase for an interest in the sale proceeds of the Allocated Property and small number of extra holiday rights.

So, overall, when I consider all the evidence as a whole, and in combination with the particular circumstances of Mr and Mrs P's sale, I don't find them either implausible or hard to believe when they say they were told at the Time of Sale that membership was a 'guaranteed investment' and that an additional purchase would 'only add to their portfolio of investment' and that they'd be 'making a profit'. On the contrary, given what I've seen so far, I think that's likely to be what Mr and Mrs P were led by the Supplier to believe at the relevant time. So, for all of the above reasons, 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 Times 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 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.

I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in Carney and Kerrigan (respectively) on causation.

In Carney, HHJ Waksman QC said the following in paragraph 51:

"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"

And in Kerrigan, HHJ Worster said this in paragraphs 213 and 214:

*"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court **may** make an order **if** it determines that the relationship is unfair to the debtor. […]*

[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

So, it seems to me 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) (which, having taken place during its antecedent negotiations with Mr and Mrs P, is covered by Section 56 of the

CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender) lead them to enter into the Purchase Agreements and the Credit Agreements is an important consideration.

On my reading of Mr and Mrs P's evidence, the prospect of a financial gain from Fractional Membership was an important and motivating factor when they decided to go ahead with their purchase.

Again, the Lender says that because Mr and Mrs P purchased an additional 500 fractional points at the Time of Sale and gained additional holiday rights as a result, they were likely interested in holidays – which is not surprising given the nature of the product at the centre of this complaint and the fact that they had been long-standing European Collection members by the time they purchased Fractional Membership. But if increasing their holiday rights was the only or even the main reason they made the purchase, I don't understand why they would not have simply increased their European Collection points again in the same way they had done before.

I have also considered whether Mr and Mrs P wanted to purchase Fractional Membership due to the shorter membership term. I recognise that Fractional Club membership offered Mr and Mrs P a shorter membership term than the European Collection and they did point to that as being one of the reasons they went ahead with the purchase. But they also talked, at length, about the investment element and potential for profit as being a motivating factor in their purchasing decision. On balance, I'm not persuaded that a shorter membership term was the sole or primary motivation rather than their share in the Allocated Property. I say that because Mr and Mrs P could have simply continued to holiday as European Collection members knowing (in all likelihood) that Mr P was 12 years or so from turning 75 at the Time of Sale and that they were likely to have been able to surrender their European Collection membership under Diamond's policy on exceptional circumstances[3] without having to pay nearly £4,000 at the Time of Sale to benefit from a shorter membership term.

As Mr and Mrs P say (plausibly in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I think their purchases were motivated by their share in the Allocated Property and the possibility of a profit. After all, as I've said before, the reality was that, as Mr and Mrs P already had the majority of the holiday rights to which they were entitled under the Purchase Agreement the principal benefits to them of moving to Fractional Membership were its investment elements i.e., the share in the net sale proceeds of the Allocated Property. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

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 Owners 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 Owners Club, I have not seen enough to persuade me that they would have pressed ahead with their purchase regardless.

Conclusion

[3] Set out in the EC Relinquishment Fact Sheet.

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.

Fair Compensation

Having found that Mr and Mrs P would not have agreed to purchase Fractional 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 them back in the position they would have been in had they not purchased the Fractional Membership, and therefore not entered into the Credit Agreement.

This is on the proviso that Mr and Mrs P agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Here's what I think needs to be done 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 repayments to it under the Credit Agreement and cancel any outstanding balance if there is one. The Lender should refund Mr and Mrs P's repayments to it under the Credit Agreement and cancel any outstanding balance if there is one.

Had Mr and Mrs P not been sold Fractional membership, they would not have converted their 5,000 European Collection Points into Fractional Points. So, I have reconsidered what Mr and Mrs P would have done with their European Collection membership if they hadn't upgraded. As I've outlined above Mr and Mrs P could have applied to the Supplier to surrender their European Collection membership in line with its policy on exceptional circumstances when they turned 75. And I'm persuaded that had they remained European Collection members, they would have done that as soon as they turned 75 (which is roughly 12 years after the Time of Sale in 2025).

I say this because they mention in their testimony regarding their first purchase of Fractional points (where they first traded in some of their European Collection points) being concerned about the in perpetuity nature of the European Collection membership and about the liability for maintenance fees continuing after their deaths. As explained above, surrendering their European Collection membership at age 75 meant they could have simply continued to holiday as European Collection members in the meantime and still benefitted from a shorter membership term without having to pay nearly £4,000 to do so.

If an application to surrender had been granted by the Supplier, which I think would have been in light of the policy set out in the EC Relinquishment Fact Sheet, this means that Mr and Mrs P would have stopped being liable for their European Collection membership management charges from roughly May 2025 onwards. And with that being the case, it is appropriate to consider, at this point, whether it would be fair and reasonable to ask the Lender to refund any of the management charges already paid by Mr and Mrs P.

But, I don't think it would be, because they would have always paid the same or very similar annual management charges as European Collection members. So, I don't think the Lender needs to refund the annual management charges Mr and Mrs P have already paid.

(2) *The Lender can also deduct the value of any promotional giveaways that Mr and Mrs P used or took advantage of.*

(The 'Net Repayments')

*(3) 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.*

(4) The Lender should remove any adverse information recorded on Mr and Mrs P's credit files in connection with the Credit Agreement.

(5) If Mr and Mrs P's Fractional 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 Membership.

***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.*"

Responses to my provisional decision

The PR, on behalf of Mr and Mrs P, agreed with my PD and didn't add anything further.

The Lender disagreed. It argued that my PD was based on an error in my approach to the prohibition in Regulation 14(3) and my analysis of the evidence referred to in my PD. In particular, they said:

- The wording in my PD is inconsistent with the premise that there is no prohibition to the sale of fractional timeshares, only a prohibition on the way they were sold, and the definition of 'investment' that I used. It argues that I took the position that "*the mere existence of the "prospect of a financial return" constituted an "investment". In particular, the PD falls into that error by conflating two different meanings of the word 'return': (i) a 'return on investment', which is normally understood to mean the measure of profit (return) on the original investment; and (ii) a customer being told that some money will be 'returned' upon sale, which carries no connotation of investment or profit*".
- The documentation in relation to the Fractional Membership sale is unobjectionable and does not breach Regulation 14(3).
- There is no evidence that the sale involved marketing or selling the fractional points as an investment to Mr and Mrs P. The Supplier delivered extensive training to its staff to ensure that their fractional points clubs are not marketed or sold as investments to customers, none of which include language from which an investment promotion could be inferred. Further, the September 2012 slides referred to in my PD were at no time used to train sales representatives. And, the 2013 training manual doesn't refer to the presence of the Allocated Property as an investment nor does it contain any language relating to 'building equity in property' nor does it say that the purpose or benefit of the product was the opportunity to make a financial gain/profit on the initial outlay.

- I should give weight to the decision of HHJ Beech in *Gallagher v Diamond Resorts (Europe) Limited* (21 September 2021, unreported) which involved a similar sale, where it was held that the sales representative had been trained as described by the witnesses in that case. And, that that training would have included a prohibition on selling membership as an investment in property.
- I didn't adequately consider Mr and Mrs P's testimony and therefore gave it undue weight and misinterpreted some parts of it. The Lender raised the following specific points in relation to their testimony:
    (i) The testimony was created in March 2018, which is four years after the Time of Sale and referred in detail to events going back to 2012. There are inaccuracies in the testimony such as their earlier purchase in May 2013 being funded by a loan from the Lender when it was actually paid for by card payment.
    (ii) While the witness statement appears to be remembering specific details of the product features and how it was sold to Mr and Mrs P, there isn't the same level of detail when it came to specifics of the time of the sales, who exactly made the statements, and some important details were mis-remembered.
    (iii) The purchase at the Time of Sale was the exchange of more of their points. While the Lender appreciates this is in the context of previous conversations in May 2013, it's important that testimony from previous sales doesn't unduly color the assessment of this purchase that is the subject of this complaint.
    (iv) There are inconsistencies between the Letter of Complaint and the witness testimony regarding the articulation of how Mr and Mrs P were allegedly sold the points as an investment. The Lender says this calls into doubt when the witness statement was prepared and whether it's been influenced by the outcome in *Shawbrook & BPF v FOS*.
    (v) There is no evidence to support the conclusion that the fractional points were sold to Mr and Mrs P as an investment other than the Letter of Complaint and their witness statement – which states that their motivation to make a complaint was to exit the timeshare.
- The benefit relating to having an exit strategy is not considered as a significant standalone reason for the purchase. This runs contrary to Mr and Mrs P's own evidence of their motivation at the Time of Sale and is further supported by the sales notes which state they purchased because "*would like to shorten the term and get something back at the end*".
- I erred in not applying the test I had highlighted in the judgment of *Carney*, rather I said "*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*"[4].

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.

[4] This appears to be an error in the Lender's response as this isn't exactly what I said in my PD and has therefore been misquoted.

Having considered everything afresh, I still uphold Mr and Mrs P's complaint for broadly the same reasons as I gave in my PD as set out above. I will also address the matters the Lender raised in response.

Again, my role as an Ombudsman is not to address every single point that has been made in response. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I've read the Lender's further submissions in full, I will confine my findings to what I find are the key points.

In my PD, I noted that to breach Regulation 14(3), the Supplier had to market or sell Fractional Membership as an investment, and I used the following definition of 'investment' when considering whether I thought that provision had been breached: "*a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit*".

The Lender says my PD was inconsistent with the notion that there was no prohibition on the sale of fractional timeshares per se, only a prohibition on the way in which they were sold. But this, in my view, takes too narrow a view of my PD and overlooks the part of my PD that reads:

> "*Mr and Mrs P's share in the Allocated Property clearly, in my view, 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 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 Membership. They just regulated how such products were marketed and sold.*"

However, for the avoidance of doubt, I continue to recognise that it was possible to market and sell Fractional Membership without breaching the relevant prohibition in Regulation 14(3). For example, simply telling a prospective customer very factually that Fractional Membership included a share in an allocated property and that they could expect to receive some money back on the sale of that property, but less than what they put in, would not breach Regulation 14(3).

But, with that said, there seem to me to be many ways of marketing and selling a timeshare as an investment, without necessarily referring to (or even including) an allocated property. And if the Supplier said and/or did something in relation to an allocated property and/or Fractional Membership more generally that at least implied to a prospective member that membership offered them the prospect of a financial gain, that would, in my view, breach Regulation 14(3).[5]

I will therefore first comment on the Supplier's sales and marketing materials and practices more generally, before turning to the evidence Mr and Mrs P have provided in this particular case.

The Lender has again highlighted in their response to my PD the various disclaimers in the sales paperwork which state that the product should not be seen as an investment. And,

[5] See paragraphs 73 and 76 of the judgment in *Shawbrook & BPF v FOS*

they've said that Mr and Mrs P confirmed (by signing some of the documentation) that they understood this at the Time of Sale.

I acknowledged in my PD, and I again acknowledge here, that the Supplier did try in the sales documentation to avoid describing Fractional Membership as an 'investment' or giving any indication of the likely financial return. And as the Lender has pointed out, Mr and Mrs P signed the relevant documentation confirming they had read and understood these various disclaimers.

However, as I said before, deciding what happened in practice is often not as simple as looking at the contemporaneous paperwork. Especially when such paperwork was produced and signed *after* a potential customer, such as Mr and Mrs P, had already been through a lengthy sales presentation.

Overall, the Lender says they consider that there is inadequate evidence that the Supplier did in fact market the Fractional Membership as an investment in the way I set out in my PD.

I've considered the additional evidence the Lender provided and referred me to in relation to the Supplier's sales process. These include a general statement by the Supplier in respect of the PD, and a witness statement made by one of the Supplier's members of staff ('SC') commenting on the September 2012 slides previously referred to. Prior to finalising my decision, I also asked for the Lender's comments on some of the Supplier's other sales documentation, namely:

- 'Fractional Ownership Comparison' document – which compared fractional ownership to other options, including owning a holiday home, including that they both involved a '*future residual value*' and '*rental income*' as benefits of ownership. And that Fractional Ownership is an '*alternative to a second home*'.
- 'Fractional Sales Logic – 2013' document – provided a comparison between fractional ownership and owning a holiday home including advice to sales agents about what they should tell consumers including the phrase '*real estate*' and '*the fractions should be compared to the purchase of a second home*'.
- 'Fractions FAQ – Early Training' document – answered FAQs about fractional ownership compared to the Supplier's European Collection, including the question '*what are the benefits of Fractional Ownership?*' including in the answer '*the chance of a return on the money they have spent on membership*'.

I've also considered the further evidence the Lender has provided in relation to these documents, including further witness statements from two other members of staff ('RW' and 'PP'), the 'final version' of the FAQs document described above, and the 'standard operating procedure' document signed in 2012 by the sales representative for Mr and Mrs P's sale that is the subject of this complaint.

Firstly, regarding the September 2012 slides, as noted above I've been directed to a witness statement in which SC says she was wrong to have said previously that the September 2012 slides were used by the Supplier to sell Fractional Membership. She explained that, at the time she had originally informed our Service about the September 2012 slides, she had been unable to obtain confirmation from a sales manager who had been in the role at the relevant time. Having now done so, she understood the slides were in fact "*never used during the sales presentation of the fractional product*". SC went on to say that the Supplier's fractional product had been developed further after September 2012 and so the slides were not reflective of the final product offered to customers four months later. SC added that certain content within the slides was likely to have raised "*compliance concerns*".

I think it's worth noting here the context in which the September 2012 slides were received by this Service. The slides were attached to an email from SC, in which she said the following:

"*The Power Point was dated 14 September 2012 (which was a couple of months before we started selling Fractional points).*

I am advised that this Power Point was used as a training tool for our sales reps. I am also advised that the Power Point was converted into an A1 size flip presenter (and that the pages were laminated) and that this was used by sales team members as a sales aide".

SC then went on to describe conversations she'd had with a sales manager ("AS") based at a site called 'Pine Lake' in the UK, about what materials had been used to assist with sales of the fractional product, but it's unclear if AS was also the person who had originally advised SC of how the September 2012 slides had been used by the Supplier.

It seems SC received two very different accounts of how the September 2012 slides were used by the Supplier's sales teams. It appears that one source advised her the slides were never used to sell the product, while another source said they had been used in training and blown up to A1 size to be "*used…as a sales aide*".

I think it's possible for both accounts to be at least partially accurate. I note the Supplier had multiple sites in different countries through which it conducted sales of the fractional product. This includes sites abroad such as Tenerife and the site at which Mr and Mrs P had purchased their Fractional Membership in September 2013. It is possible that different materials were used in different ways at different sites by different sales teams.

I note SC does not say in her witness statement that the slides were never used in training – she refers to them not having been used to sell the fractional product to customers. So, I think it remains plausible, notwithstanding the witness statements referred to, that the September 2012 slides were used in some capacity within the Supplier's business, be it in the training of sales representatives or in sales presentations to potential customers.

Secondly, in relation to the other documents I asked the Lender about following my PD, they provided a witness statement from PP, a sales representative for the Supplier and a witness statement from RW, the Director of EU Sales Operations for the Supplier, both of which I've considered.

I note that, in relation to the 'Fractional Sales Logic – 2013' document, RW said this was developed by an individual ('JA') who was a sales representative in Spain. And, that it wasn't used as a training document and wasn't used in sales presentations. RW also says JA wasn't part of the team responsible for developing the formal documentation to be used in training or sales presentations. But RW doesn't explain why a sales representative would develop such a document with that being the case, or provide any assurance that the document wasn't shared at least informally with other sales representatives, for example. RW only says that JA had been "*trying to be helpful*". The document provides a comparison between fractional ownership and owning a holiday home including advice to sales representatives about what they should tell consumers including the phrase "real estate" and "the fractions should be compared to the purchase of a second home". I think this demonstrates that there was a risk that sales representatives could and would draw such comparisons, despite any training they may have been given not to – such that the governance principles and paperwork might not have been quite enough to mitigate this.

While the Supplier's centralised training documents and policies may have emphasised compliance with Regulation 14(3), it's important to consider what happened in each individual case.

Ultimately, however, I don't think the outcome of this complaint turns on how the September 2012 slides, or these other documents were used. And that's because I think Mr and Mrs P's own testimony is sufficient evidence that, at least on the specific occasion the Supplier sold them Fractional Membership, it went beyond simply describing how the sale of the Allocated Property worked, and strayed into discussion of the financial return they would receive. Mr and Mrs P have said that at the sale of their previous purchase they were told they could make a profit and I think it's clear from what they've said that this simply happened again at the Time of Sale that is the subject of this complaint, being told to exchange more of their European Collection points, therefore invest more 'allowing them the guaranteed investment'. In my PD, I also highlighted how the nature of the purchase, namely that Mr and Mrs P only got a very small number of additional holiday rights, contributed to my findings about how the Supplier had likely marketed the product to Mr and Mrs P, and also their motivations for going ahead with it (which I've addressed further below).

In my view, this would have fallen foul of the prohibition on marketing or selling timeshares as an investment, and I remain of the view, on balance, that the Supplier was therefore in breach of Regulation 14(3) of the Timeshare Regulations when it sold the Fractional Membership to Mr and Mrs P.

I have read and considered the Lender's concerns about Mr and Mrs P's testimony and having done so, these appear to be similar to the concerns it expressed prior to my PD which I've already addressed. I don't think the Lender has said much new regarding Mr and Mrs P's testimony following my PD, other than a comparison between Mr and Mrs P's testimony and the Letter of Complaint which followed it.

I think the Lender is restating its view that either Mr and Mrs P's testimony or the original Letter of Complaint, or both, are not representative of Mr and Mrs P's concerns about how the Supplier sold Fractional Membership to them. The Lender has questioned the point at which the witness statement was drafted but I think it's worth highlighting that in this particular case, the PR has provided evidence that the witness statement was drafted in March 2018. The Lender's broader concerns about the PR's business practices which come across in their response to my PD, are ultimately matters which fall outside of the scope of this individual complaint. While I acknowledge the Lender has these concerns, it doesn't mean that Mr and Mrs P's complaint is invalid. So, while it may be relevant to a discussion of the PR's business practices or whether it gave proper voice to Mr and Mrs P's concerns, I don't think the point the Lender has made here is particularly relevant to whether or not Mr and Mrs P's testimony can be relied on.

I acknowledge the Lender's (and Supplier's) points regarding Mr and Mrs P's testimony about their previous sale (and this sale) but in my view, any discussion of a financial gain or profit at a previous sale (as Mr and Mrs P have said there was) heightens the risk that this happened in the same way at later sales too, as Mr and Mrs P's testimony about the purchase that is the subject of this complaint suggests, particularly since this sale was only four months after the previous one. The Supplier has said that even if that was the case, the evidence provided in relation to their sales training and other documentation should outweigh it. But I've already addressed that evidence and documentation above and explained why I don't think that's the case.

The Supplier has highlighted that a different PR was previously engaged by Mr and Mrs P and they contacted the Supplier in July 2017, and in that correspondence there was no mention of the investment element. But having reviewed the correspondence, this was only

a generic letter with the purpose of trying to terminate their membership, rather than a complaint to the Lender like the one being considered here. So, I wouldn't necessarily expect it to explain in detail what Mr and Mrs P remembered of the sale, for example. And for these reasons, again, I don't think it's particularly relevant to whether Mr and Mrs P's testimony in this complaint can be relied on.

The Supplier also said Mr and Mrs P had made another, separate complaint about an earlier purchase they had made of another type of timeshare membership (the Supplier's 'European Collection'). They said there was inconsistency between the testimony Mr and Mrs P had provided in relation to that other complaint and this one, which calls into question the credibility of what they have said here. They also highlighted that the ombudsman in that case issued a provisional decision not to uphold the complaint after which the PR withdrew it. But, while I've considered this, I don't see that separate complaint about another purchase of an entirely different type of membership at a different time is of particular relevance to this one I'm deciding here.

The Lender and Supplier have also said there are errors and/or inconsistencies in Mr and Mrs P's testimony that mean I should place little to no weight on it.

I'm mindful here of *Smith v Secretary of State for Transport* [2020] EWHC 1954 (QB). At paragraph 40 of the judgment, Mrs Justice Thornton helpfully summarised the case law on how a court should approach the assessment of oral evidence. Although in this case I have not heard direct oral evidence, I think this does set out a useful way to look at the evidence Mr and Mrs P have provided. That paragraph reads as follows:

> "*At the start of the hearing, I raised with Counsel the issue of how the Court should assess his oral evidence in light of his communication difficulties. Overnight, Counsel agreed a helpful note setting out relevant case law, in particular the commercial case of Gestmin SPGS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) (Leggatt J as he then was at paragraphs 16-22) placed in context by the Court of Appeal in Kogan v Martin [2019] EWCA Civ 1645 (per Floyd LJ at paragraphs 88-89). In the context of language difficulties, Counsel pointed me to the observations of Stuart-Smith J in Arroyo v Equion Energia Ltd (formerly BP Exploration Co (Colombia) Ltd) [2016] EWHC 1699 (TCC) (paragraphs 250-251). Counsel were agreed that I should approach Mr Smith's evidence with the following in mind:*
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> a. *In assessing oral evidence based on recollection of events which occurred many years ago, the Court must be alive to the unreliability of human memory. Research has shown that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts (Gestin and Kogan).*
>
> b. *A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence (Kogan).*

c. *The task of the Court is always to go on looking for a kernel of truth even if a witness is in some respects unreliable (Arroyo).*

d. *Exaggeration or even fabrication of parts of a witness' testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony (Arroyo).*

e. *The mere fact that there are inconsistencies or unreliability in parts of a witness' evidence is normal in the Court's experience, which must be taken into account when assessing the evidence as a whole and whether some parts can be accepted as reliable (Arroyo).*

f. *Wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, may be neither reliable nor even truthful, the difficulty of discerning where the truth actually lies, what findings he can properly make, is often one of almost excruciating difficulty yet it is a task which judges are paid to perform to the best of their ability (Arroyo, citing Re A (a child) [2011] EWCA Civ 12 at para 20).*"

From this, and my own experience, I find that inconsistencies in evidence are a normal part of someone trying to remember what happened in the past. So, I'm not surprised that there are some inconsistencies between what Mr and Mrs P said happened and what other evidence shows. The question to consider, therefore, is whether there is a core of acceptable evidence from them that the inconsistencies have little to no bearing on, or whether such inconsistencies are fundamental enough to undermine, if not contradict, what they say about what the Supplier said and did to market and sell Fractional Membership as an investment.

So, for example, I do not find it in any way material that Mr and Mrs P said their previous purchase with the Supplier was funded by a loan from the Lender when they actually paid for it by card payment. In my view, remembering how they had paid for a previous purchase which is not the subject of this complaint is not material to Mr and Mrs P's memories of what happened at the Time of Sale.

Similarly, I don't think it's material, as the Supplier has suggested, that they referred to their previous purchase on one occasion as taking place in May 2014, as opposed to May 2013. This appears to be simply a typing error, since they referred to the correct date of sale earlier in the same paragraph. And, I don't think it's material that in relation to this Time of Sale, they referred to the resort where they were sold the membership as 'Wynchnall Park' as opposed to 'Wynchnor Park' – these are largely the same so I think it's clear what Mr and Mrs P were referring to.

Even if there is inconsistency here, that does not mean their evidence on how that membership came to be sold to them should be discounted.

The Lender also suggests I attached too little weight to the other reasons given by Mr and Mrs P for entering into the purchase referred to in their testimony and referred to the Supplier's sales notes made shortly after the Time of Sale in support of this. The Lender also says, as I noted in my PD, that the Supplier's breach of Regulation 14(3) had to be material

to Mr and Mrs P's purchasing decision in order for the credit relationship between them and the Lender to have been rendered unfair. The Lender says I reversed the burden of proof when arriving at my conclusions here, taking issue with a particular paragraph which, as I explained above, was not said in my PD and has been misquoted.

But in any event, I don't accept the Lender's overall point here, and I don't think it's taken sufficient account of the following paragraphs of my PD where I said the following:

> "*On my reading of Mr and Mrs P's evidence, the prospect of a financial gain from Fractional Membership was an important and motivating factor when they decided to go ahead with their purchase.*
>
> *Again, the Lender says that because Mr and Mrs P purchased an additional 500 fractional points at the Time of Sale and gained additional holiday rights as a result, they were likely interested in holidays – which is not surprising given the nature of the product at the centre of this complaint and the fact that they had been long-standing European Collection members by the time they purchased Fractional Membership. But if increasing their holiday rights was the only or even the main reason they made the purchase, I don't understand why they would not have simply increased their European Collection points again in the same way they had done before.*
>
> *I have also considered whether Mr and Mrs P wanted to purchase Fractional Membership due to the shorter membership term. I recognise that Fractional Club membership offered Mr and Mrs P a shorter membership term than the European Collection and they did point to that as being one of the reasons they went ahead with the purchase. But they also talked, at length, about the investment element and potential for profit as being a motivating factor in their purchasing decision. On balance, I'm not persuaded that a shorter membership term was the sole or primary motivation rather than their share in the Allocated Property. I say that because Mr and Mrs P could have simply continued to holiday as European Collection members knowing (in all likelihood) that Mr P was 12 years or so from turning 75 at the Time of Sale and that they were likely to have been able to surrender their European Collection membership under Diamond's policy on exceptional circumstances[6] without having to pay nearly £4,000 at the Time of Sale to benefit from a shorter membership term.*
>
> *As Mr and Mrs P say (plausibly in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit. After all, as I've said before, the reality was that, as Mr and Mrs P already had the majority of the holiday rights to which they were entitled under the Purchase Agreement the principal benefits to them of moving to Fractional Membership were its investment elements i.e., the share in the net sale proceeds of the Allocated Property. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.*"

This sets out clearly, in my view, why I found provisionally that the Supplier's breach of Regulation 14(3) was material to Mr and Mrs P's purchasing decision and therefore rendered their credit relationship with the Lender unfair. I've seen no reason to depart from those provisional findings, and it follows that my findings and conclusions remain the same on this point.

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[6] Set out in the EC Relinquishment Fact Sheet.

As outlined above, I have read and considered the judgments on *Gallagher v Diamond Resorts (Europe) Limited* and also *Brown v Shawbrook Bank Limited* (18 June 2021, unreported) and the associated documents provided. However, those cases were each decided by the judge on their own facts and circumstances, and it does not change my own findings that, on balance, Mr and Mrs P's sale did breach Regulation 14(3).

So, overall, 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. I therefore remain of the view that it is fair and reasonable that I uphold this complaint.

Fair Compensation

My views on what would constitute fair compensation are slightly different to those expressed in my provisional decision. And that's because I'm mindful of the fact that, had Mr and Mrs P not gone ahead with their purchase of the Fractional Membership, they'd have a different number of points in their previous European Collection membership with the Supplier. They'd have been able to take holidays using these points, and would have needed to pay management charges in relation to them, but these would likely have been slightly different than what they paid under the Fractional Membership. So, that needs to be taken into account.

So, the Lender should:

(1) Refund Mr and Mrs P's repayments to it under the Credit Agreement and cancel any outstanding balance if there is one.

(2) In addition to (1), the Lender should also refund the difference between Mr and Mrs P's Fractional Membership 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 Membership.

(3) The Lender can also deduct:

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

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. 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 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 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 the consumer a certificate showing how much tax it's taken off if they ask for one.

My final decision

I uphold Mr and Mrs P's complaint against Shawbrook Bank Limited and direct it to work out and pay fair compensation as outlined 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 8 April 2025.

Fiona Mallinson
Ombudsman