DRN-5291560

The complaint

Mr and Mrs F'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 a claim under Section 75 of the CCA.

What happened

Mr and Mrs F purchased membership of a timeshare (the 'Fractional Membership') from a timeshare provider (the 'Supplier') on 4 September 2014 (the 'Time of Sale').

Prior to that, Mr and Mrs F were existing customers of the Supplier, and, between July 2005 and October 2008, they had purchased 8,000 points in the Supplier's 'European Collection'. These points worked like a currency such that, every year, Mr and Mrs F 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.

At the Time of Sale, they entered into an agreement (the 'Purchase Agreement') to buy 8,000 'fractional points', trading in their 8,000 existing points from their 'non-fractional' European Collection membership towards this. This was at a cost of £10,000, with a conversion price given for their European Collection points of £1 per point. This enrolled Mr and Mrs F into Fractional Membership.

Fractional Membership was asset backed – which meant it gave Mr and Mrs F 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 F paid for their Fractional Membership by taking finance of £10,000 from the Lender in both of their names (the 'Credit Agreement').

Mr and Mrs F – using a professional representative (the 'PR') – wrote to the Lender on 4 January 2019 (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. 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 F 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 Membership had a guaranteed end date when that was not true.

2. told them that Fractional Membership was an “investment” when that was not true.

Mr and Mrs F 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 F.

(2) 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 F 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 in themselves as the Lender paid the Supplier commission and this was not disclosed to Mr and Mrs F.
2. Fractional 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 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 F’s concerns as a complaint and issued its final response letter on 13 February 2019, rejecting it on every ground.

Mr and Mrs F 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 Membership as an investment to Mr and Mrs F 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 F 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 30 December 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 Membership to Mr and Mrs F 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 F's complaint, it isn't necessary to make formal findings on all of them. This includes the allegation that the Supplier misrepresented the Fractional Membership and the Lender ought to have accepted and paid the claim under Section 75 of the CCA, and the other reasons they say the credit relationship was unfair to them.

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

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 F 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 F's Fractional Membership 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.

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

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

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

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs F's Fractional 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 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 F say that the Supplier did exactly that at the Time of Sale – saying the following in a statement drafted in July 2018:[2]

> *"As part of this agreement, we were told that this was partial ownership of a complex and after 15 years the property would be sold, and we would get our money back.*
>
> *[...]*
>
> *As this was partial ownership, we were told to view this as an investment as we would see the value of the property increase over time."*

The Letter of Complaint reflects the above comments from Mr and Mrs F.

In a telephone conversation with one of our Service's Investigators on 3 October 2023, Mr F also said (in response to being asked what benefits of the membership they were promised at the Time of Sale):

"We were told that in 15 years we could relinquish it and make some money by selling it back, or we could sell it in the meantime and make some money that way.

Think we were given an estimate, it was a long time ago, but something like 15%, but we

[2] Here, the statement provided by the PR was not signed by Mr and Mrs F, but it appears to be a record of the evidence they gave to the PR about why they were unhappy with Fractional Membership. The PR has provided evidence that the statement was drafted in July 2018. So, I am satisfied this was their evidence.

were given an estimate."

Mr and Mrs F allege, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because they were told by the Supplier that they would get their money back or more during the sale of Fractional Membership.

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 F'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.

To conclude, therefore, that Fractional Membership was marketed or sold to Mr and Mrs F 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 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 Fractional Membership as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs F, 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 Membership was not sold to Mr and Mrs F 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."*

Further, there was a 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 another document titled "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."*

Mr and Mrs F had ticked and signed to say they understood both of these points.

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 F's allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that membership of the Fractional Owners Club was expressly described as an "investment" in several different contexts and (2) that membership of the Fractional Owners 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 Owners Club as an investment, i.e., told Mr and Mrs F or led them to believe during the marketing and/or sales process that Fractional Membership 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 Membership

There is little information available in relation to this particular Supplier in terms of training or sales materials which might give an indication as to how they sold or marketed the membership to Mr and Mrs F. So, I have considered Regulation 14(3) of the Timeshare Regulations, how that provision is to be interpreted and whether, based on the evidence available, I think Mr and Mrs F's sale breached that provision.

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

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

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)*

I've also thought about how Fractional Membership would have been presented to Mr and Mrs F. Without specific details about their sale or how the Supplier normally sold its products, I've considered the inherent probability of the allegation when assessing whether I find that thing did or did not happen. 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 Reg.14(3), compared with the sale of a product without the possibility of a monetary return.[3]

Mr and Mrs F have said they were told by the Supplier that when the property they had partial ownership of was sold at the end of the term, they would get their money back and that the value of the property would increase over time. They've also said they were given an estimate in this regard, of around 15%, which I've taken to mean a 15% return on their investment. The Allocated Property was plainly a major part of the product's features and, in this instance, in my view, was a justification for its cost to Mr and Mrs F. It is not a breach of Regulation 14(3) to merely describe the nature of the product and how it worked. 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 F paid a large sum for no additional holiday rights and the sale was simply a like-for-like swap, but for the interest in the Allocated Property and the shorter membership term.

The Lender has said that the Supplier included specific disclaimers to show that it didn't present Fractional Membership as an investment – I have set these out above. But, it's 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, especially when a customer is not acquiring any additional holiday rights. Mr and Mrs F for example had already held previous, non-fractional timeshares over several years. 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 type of membership in particular, compared to the other non-fractional ones they had bought previously. In other words, some discussion of why Mr and Mrs F ought to have changed their membership type in the way that they did, but without purchasing any additional holiday rights.

So, in my view, there had to be some other benefit which motivated their purchase which was specific to fractional membership. This could only realistically be the investment element in the form of the Allocated Property and/or the shorter duration the membership offered. I do acknowledge that fractional membership offered a shorter term. But, based on what I've seen, I don't think that was a significant reason for their purchase, which I'll go on to explain further below.

The testimony from Mr and Mrs F and the Letter of Complaint is specific in that not only does it say that Mr and Mrs F were told that by purchasing they would get their money back, and that they could make money, but they were given a specific percentage estimate of how much they could expect to receive above and beyond their initial outlay. Taking all of this evidence together, I find they've been consistent from the start of this complaint that Fractional Membership was sold to them as an investment.

Further, I find it fanciful that the Supplier would not have highlighted the possible returns available to Mr and Mrs F when selling Fractional Membership to them. And as Mr and Mrs F were laying out a considerable sum to join, I think it's clear that they expected to get a significant sum back – after all they weren't buying any additional points and therefore not getting any extra holiday entitlement, so it seems common sense that, unless there was evidence to suggest they bought Fractional Membership for the shorter membership term, the return was an important factor in the sale. Further, Mr and Mrs F have said from the outset of their complaint that they were led to believe they would make a profit at the end of the agreement. I think that belief fits with what they did at the Time of Sale – make a

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[3] 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.

significant purchase for the same holiday rights plus an interest in the sale proceeds of the Allocated Property. In my view, therefore, it is more likely than not that the Supplier's salesperson positioned Fractional Membership as an investment that may lead to a financial gain (i.e., a profit) in the future, whether explicitly or implicitly – I fail to see for what other reason they would have bought the same number of points and there is no evidence Mr and Mrs F would have paid out £10,000 and expected to get back less than they paid.

So, overall, when I consider Mr and Mrs F's evidence as a whole, and in combination with the circumstances of what happened which in my view, adds credence to the allegation made, I don't find Mr and Mrs F either implausible or hard to believe when they say they were told that by buying fractional points, they would have 'partial ownership of a complex' and that they would 'get their money back' and could 'make money' which was estimated to be 'something like 15%'. And that the value of the Allocated Property would 'increase over time'. On the contrary, given what I've seen so far, I think that's likely to be what Mr and Mrs F were led by the Supplier to believe at the relevant time. And for these reasons, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale.

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

Having found that the Supplier was likely to have breached Regulation 14(3) at the Time of Sale, I now need to consider whether that breach was causative of an unfair credit relationship between Mr and Mrs F 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 F 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 F, 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) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On my reading of Mr and Mrs F'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.

I accept that Mr and Mrs F were likely interested in holidays. The evidence demonstrates that they quite clearly were, and that is not surprising given the nature of the product at the centre of this complaint. Mr and Mrs F's purchasing history shows that they had increased their points several times in previous years with their non-fractional membership. But buying more holiday rights cannot have been a reason they made the Fractional Membership purchase as they didn't get any more rights. Further, I'm unsure why they would not simply have increased their non-fractional points again in the same way as before If they wished to increase their holiday rights. This suggests there had to be some other reason they purchased the fractional membership, as well as the prospect of holidays.

The Lender has said that they think Mr and Mrs F wanted to purchase the fractional membership due to the length of its term being shorter. They've said Mr and Mrs F were both aged 67 at the Time of Sale and therefore couldn't have relinquished their existing membership until the age of 75.

I recognise that Fractional Membership offered Mr and Mrs F a shorter membership term than the European Collection. And I do acknowledge that in their testimony they have highlighted that as being important to them (alongside the investment element). However, I'm not persuaded that it was that aspect of Fractional Membership that motivated their move to it rather than their share in the Allocated Property. I'll explain.

The Lender has correctly said that Mr and Mrs F were 8 years or so from turning 75 and that they were likely therefore to have been able to surrender their existing European Collection membership under the Supplier's policy on exceptional circumstances[4]. But the important point to note here, is that they would have been able to do so without paying anything.

Since Mr F's 75th birthday is towards the start of December 2021 and the proposed sale date of the Allocated Property on their Purchase Agreement is 31 December 2029, it's not accurate to say the Fractional Membership offered them a shorter term than if they relinquished at age 75, which they would have been entitled to do free of charge

So, Mr and Mrs F could have simply continued to holiday as European Collection members and then relinquished at age 75 without having to pay £10,000 to do so. I fail to understand why they would pay so much for a longer or the same membership term when they could have a shorter or the same membership term for free.

The Lender has also highlighted in their response to the Investigator's view that while they haven't mentioned it in their testimony, Mr and Mrs F also used the Supplier's Fractional Wish to Rent Programme as part of their membership. They've said the Supplier has confirmed Mr and Mrs F used this on 2 separate occasions, suggesting they think this is a reason why Mr and Mrs F bought it.

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

I acknowledge that Mr and Mrs F haven't mentioned this as part of their testimony. But, their use of the Fractional Wish to Rent Programme ultimately provided them with an income and it was part of the membership's investment elements. So again, if they bought their membership for that reason, I'd expect it to be on the basis that they got back more than they paid for it or that a combination of the rental income plus the proceeds of sale from the Allocated Property was more than the cost of membership.

As Mr and Mrs F say (plausibly in my view) that Fractional 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, they have highlighted this as a benefit of the membership and the reality was that, as Mr and Mrs F already had 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 element 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 F 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 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 Fractional Membership, I have not seen enough to persuade me that they would have pressed ahead with their purchase regardless.

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs F 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 F 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 (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr and Mrs F agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs F were existing European Collection members, and their membership was traded in against the purchase price of Fractional Membership. Under their European Collection membership, they had 8,000 European Collection points. And, like Fractional Membership, they had to pay annual management charges as European Collection members. So, had Mr and Mrs F not purchased Fractional Membership, they would have always been responsible for paying annual management charges of some sort. And with that being the case, any refund of the annual management charges paid by them from the Time of Sale as part of their Fractional Membership should amount only to the difference between those charges and the annual management charges they would have paid as ongoing European Collection members.

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

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

(2) In addition to (1), the Lender should also refund the difference between Mr and Mrs F's Fractional Membership annual management charges after the Time of Sale and their European Collection annual management charges

(3) The Lender can deduct:

i. *The value of any promotional giveaways that Mr and Mrs F used or took advantage of; and*
ii. *the market value of the holidays* Mr and Mrs F took using their Fractional Points if their annual management charge for the year in which the holiday(s) were taken was more than the annual management charge they would have paid as ongoing European Collection members. However, the deduction should be a proportion equal to the difference between those annual management charges. And if any of Mr and Mrs F's European Collection annual management charges would have been higher than their equivalent Fractional Membership annual management charge, there shouldn't be a deduction for the market value of any holiday(s) taken using Fractional Points in the year(s) in question as they could have taken those holiday(s) as ongoing European Collection members in return for the relevant annual management charge.*

(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 F's credit files in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr and Mrs F'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 F 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.*"

Responses to my provisional decision

The PR, on behalf of Mr and Mrs F, agreed with my PD.

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*".
- It was an error for me to conclude that it was appropriate to make inferences on the balance of probabilities about how such a sale would have been conducted, in the absence of contemporaneous evidence about this.
- The documentation provided to Mr and Mrs F by the Supplier made clear that fractional points did not constitute an investment in real estate.
- The documentation in relation to the sale is unobjectionable and shows there was no breach of Regulation 14(3).
- There is no evidence that the sale involved marketing or selling the fractional points as an investment to Mr and Mrs F. 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.
- I should give weight to the judgement reached 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 the veracity of Mr and Mrs F's testimony and therefore gave it undue weight.
- There is no evidence to support the conclusion that fractional points were sold to Mr and Mrs F as an investment other than their testimony. Their statement is not signed and was not submitted to the Lender when the original complaint was made.
- There are other issues with the testimony provided which mean it can't be relied on, specifically:

(i) The statement is far from clear about the specific details of the sale and is contradicted by the testimony from the Supplier provided in other, similar complaints.

(ii) The telephone call with Mr F which I referred to in my PD was ten years after the sale and Mr F admits he "could be wrong" which leads the Lender to question the reliability of what he's said.

(iii) The written testimony is differently articulated than the Letter of Complaint and the aforementioned telephone call.

(iv) Mr F said he recalls being told he would 'make some money' but this isn't the same as 'getting their money back or more'. And, it's unclear what was meant by the 15% estimate referred to.

(v) The allegation of pressure is not supported by the contemporaneous evidence – Mr and Mrs F signed paperwork at the Time of Sale which confirmed they had been given sufficient time to consider their purchase and that they hadn't been put under any pressure.

(vi) The written testimony seems to have been obtained through a telephone conversation with the PR. But, it uses stock language so there are reasonable grounds to suspect it has been unduly influenced by the PR.

(vii) The Supplier has provided a screenshot of a system note dated 15 September 2014 which states that Mr F told them they had been reading through the paperwork. There is nothing which suggests that they raised any concerns about their sale which therefore supports that membership wasn't sold to them as an investment.

(viii) I failed to attach sufficient weight to the other reason given by Mr and Mrs F to purchase their points.

- I erred in not applying the test I had highlighted in the judgment of *Carney*, rather I said '*had they not been encouraged by the prospect of a financial gain from Fractional Membership, I have not seen enough to persuade me that they would have pressed ahead with their purchase regardless*', which reverses the burden of proof.

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.

Having considered everything afresh, I still uphold Mr and Mrs F's complaint for the reasons 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 F'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 as I said in my PD, 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 F have provided in this particular case.

The Supplier's sales and marketing materials and practices

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 they've said that Mr and Mrs F 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 F

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

signed the relevant documentation confirming they had read and understood these various disclaimers (set out in my PD).

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* potential customers, such as Mr and Mrs F, 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 my PD, I explained that there was little information in relation to this particular Supplier which might give an indication as to how they sold or marketed the membership to Mr and Mrs F. For example, in relation to some other Suppliers, our Service has been provided with specific sales materials which were used when selling fractional timeshare products to customers. But here, I didn't have specific details as to how the Supplier normally sold its products or specific details about Mr and Mrs F's particular sale.

In response, the Lender has provided some additional evidence in relation to the Supplier's sales processes which I've considered. These include a general statement by the Supplier in respect of the provisional decision, copies of versions of the Supplier's Sales Policy documents, and different witness statements from members of the Supplier's staff with varying roles. While this does provide some information about the Supplier's internal policies and how those particular individuals say staff were trained, it doesn't give me any specific information about Mr and Mrs F's particular sale or assist me in understanding how the product might have been sold or marketed to them at this particular Time of Sale. And 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. Further, I note that the Supplier had multiple sites in different countries through which it conducted sales of the Fractional Membership. It's therefore possible that different materials were used in different ways at different sites by different sales teams.

Ultimately though, I don't think the outcome of this complaint turns on this. This is because I think Mr and Mrs F'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 could receive, leaving them with the impression they would get their money back and the value of their investment would increase over time i.e. making a financial gain. As I noted in my PD, Mr and Mrs F said they were told at the Time of Sale that by buying fractional points they would '*get their money back*' and have '*partial ownership which they should view as an investment as they would see the value of the property increase over time*'. I also highlighted in my provisional decision how the nature of the purchase, namely that Mr and Mrs F didn't get any additional holiday rights, contributed to my findings about how the Supplier had likely marketed the product to Mr and Mrs F, and also their motivations for going ahead with it (which I've expanded on further below).

If it is the case that the Supplier did market the Fractional Membership to Mr and Mrs F in the way they've said it did, I think this falls within the definition of investment that I set out in my PD and would constitute a breach of the prohibition on selling or marketing timeshares as investments.

So, 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 F.

I appreciate the Lender has some concerns about Mr and Mrs F's testimony and I've addressed these further below.

Mr and Mrs F's evidence

I have read and considered the Lender's concerns about Mr and Mrs F'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 F's testimony following my PD, other than a comparison between the testimony from Mr and Mrs F and the Letter of Complaint.

I think the Lender is restating its view that either the written testimony, the Letter of Complaint that followed it, the later verbal testimony, or all of these, are not representative of Mr and Mrs F's concerns about how the Supplier sold Fractional Membership to them. The Lender has questioned the reliability of this evidence given the different way they had articulated their concerns. While it may be relevant to a discussion of the PR's business practices or whether it gave proper voice to Mr and Mrs F's concerns, I don't think the point the Lender has made is particularly relevant to whether or not Mr and Mrs F's testimony can be relied on. 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 the scope of this complaint. While I acknowledge that the Lender has these concerns, it doesn't follow that Mr and Mrs F's complaint is invalid.

I therefore remain of the view, on balance, that the testimony provided in this case is likely to be a genuine reflection of their recollections from the Time of Sale. I've already explained my thoughts on their testimony in the context of whether there was likely a breach of Regulation 14(3) at the Time of Sale both above and in my PD, so it's not necessary to repeat that here.

I also don't particularly see the relevance of the fact that Mr and Mrs F had told the Supplier they had been reading through the paperwork – again, I've already explained my thoughts on the relevant disclaimers above and in my PD.

The Lender says I attached little weight to the other reasons given by Mr and Mrs F for entering into the purchase referred to in their testimony. 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 F'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 in which I said "*had they not been encouraged by the prospect of a financial gain from Fractional Membership, I have not seen enough to persuade me that they would have pressed ahead with their purchase regardless*".

But, 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 F'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.*

I accept that Mr and Mrs F were likely interested in holidays. The evidence demonstrates that they quite clearly were, and that is not surprising given the nature of the product at the centre of this complaint. Mr and Mrs F's purchasing history shows that they had increased their points several times in previous years with their non-fractional membership. But buying more holiday rights cannot have been a reason they made the Fractional Membership purchase as they didn't get any more rights. Further, I'm unsure why they would not simply have increased their non-fractional points again in the same way as before If they wished to increase their holiday rights. This suggests there had to be some other reason they purchased the fractional membership, as well as the prospect of holidays.

The Lender has said that they think Mr and Mrs F wanted to purchase the fractional membership due to the length of its term being shorter. They've said Mr and Mrs F were both aged 67 at the Time of Sale and therefore couldn't have relinquished their existing membership until the age of 75.

I recognise that Fractional Membership offered Mr and Mrs F a shorter membership term than the European Collection. And I do acknowledge that in their testimony they have highlighted that as being important to them (alongside the investment element). However, I'm not persuaded that it was that aspect of Fractional Membership that motivated their move to it rather than their share in the Allocated Property. I'll explain.

The Lender has correctly said that Mr and Mrs F were 8 years or so from turning 75 and that they were likely therefore to have been able to surrender their existing European Collection membership under the Supplier's policy on exceptional circumstances[6]. But the important point to note here, is that they would have been able to do so without paying anything.

Since Mr F's 75th birthday is towards the start of December 2021 and the proposed sale date of the Allocated Property on their Purchase Agreement is 31 December 2029, it's not accurate to say the Fractional Membership offered them a shorter term than if they relinquished at age 75, which they would have been entitled to do free of charge.

So, Mr and Mrs F could have simply continued to holiday as European Collection members and then relinquished at age 75 without having to pay £10,000 to do so. I fail to understand why they would pay so much for a longer or the same membership term when they could have a shorter or the same membership term for free.

The Lender has also highlighted in their response to the Investigator's view that while they haven't mentioned it in their testimony, Mr and Mrs F also used the Supplier's Fractional Wish to Rent Programme as part of their membership. They've said the Supplier has confirmed Mr and Mrs F used this on 2 separate occasions, suggesting they think this is a reason why Mr and Mrs F bought it.

I acknowledge that Mr and Mrs F haven't mentioned this as part of their testimony. But, their use of the Fractional Wish to Rent Programme ultimately provided them with an income and it was part of the membership's investment elements. So again, if they bought their membership for that reason, I'd expect it to be on the basis that they got back more than they paid for it or that a combination of the rental income plus the proceeds of sale from the Allocated Property was more than the cost of membership.

As Mr and Mrs F say (plausibly in my view) that Fractional 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, they have highlighted this as a benefit of the membership and the reality was that, as Mr and Mrs F already had 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

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

element 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."

If we accept (as it appears the Lender does), that Mr and Mrs F's aim going into their purchase discussions with the Supplier was to get out of their membership sooner, then their options would have been:

- To purchase Fractional Membership for an up-front cost of £10,000 (plus finance interest), which would allow them to exit in 2029. They would also have had access to the Wish to Rent Programme the Lender has mentioned, which I discounted as being a significant factor in Mr and Mrs F's purchasing decision for the reasons I referred to in my PD (and outlined again above).
- To continue with their existing European Collection membership until 2021, at which point they would have been eligible to leave the membership at no charge. This would also likely involve paying less in management fees due to the fewer years they would hold the points, and they would have also been able to continue holidaying in that time.

This assumes that the Supplier would have informed Mr and Mrs F that they could leave their membership at the age of 75, meaning they would have been aware of the second of the two options outlined above. I've seen that one of the Supplier's sales policies that the Lender has provided to this Service, and which was apparently implemented in June 2013, instructed staff to provide this information to members, so it's seems likely that Mr and Mrs F would have been made aware of it.

It still therefore appears to me that it would make little financial sense for someone to choose the first option, assuming their aim was to exit their membership, unless they perceived some other significant benefit to having the Fractional Membership product. As I explained in my PD, the main thing which set this product apart from the European Collection membership Mr and Mrs F already owned, was the share in the net sale proceeds of the Allocated Property. And, in this case, Mr and Mrs F have been clear that the Supplier told them that Fractional Membership was an investment and they would get their money back, and that the value of the Allocated Property would increase over time. If the Fractional Membership had been sold in the way they describe, it would become a more attractive proposition from a financial perspective than waiting until 2021 to leave the European Collection, and the decision to purchase it would make more financial sense.

I also note that earlier in their submissions the Lender takes issue with the witness statement provided by Mr and Mrs F and what they had said in the phone call with our Investigator and questions the credibility of the testimony provided. But when addressing this point, the Lender then seeks to rely on comments from the witness statement and the phone call in support of its view that the credit relationship was fair, which to me, is somewhat contradictory.

While I acknowledge what the Lender has said, for the reasons I've already explained, I remain of the view that the particular facts of this case point towards the Supplier having stated or implied to Mr and Mrs F that Fractional Membership was an investment that would, or was likely to, generate a profit, thus breaching Regulation 14(3). And it still appears to me that even if Mr and Mrs F had gone into the purchase discussions with the aim of exiting their existing membership, they would not have proceeded with the purchase had it not been for the Supplier's breach. It follows that I still consider the breach was material to their

purchasing decision and that it rendered unfair the credit relationship between Mr and Mrs F and the Lender under Section 140A of the CCA.

Lastly, I disagree with the Lender's suggestion that I have applied the wrong test or reversed the burden of proof when determining if the credit relationship was unfair. The Lender has observed that the correct way to proceed is to assess if there was sufficient evidence that the Supplier's breach had a material impact on Mr and Mrs F's purchasing decision. But that is what I did in my PD, and have set out again above.

Other matters

As outlined above, I have read and considered the judgments on *Gallagher v Diamond Resorts (Europe) Limited* and *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 F's sale did breach Regulation 14(3).

I've also read and considered the other complaint with this Service (relating to a different consumer) that the Lender has highlighted. But again, each case is decided on its own facts and circumstances so this also does not change my own findings here.

Conclusion

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

Fair Compensation

Having found that Mr and Mrs F 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 still 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 (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr and Mrs F agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

As I explained previously, Mr and Mrs F were existing European Collection members, and their membership was traded in against the purchase price of Fractional Membership. Under their European Collection membership, they had 8,000 European Collection points. And, like Fractional Membership, they had to pay annual management charges as European Collection members. So, had Mr and Mrs F not purchased Fractional Membership, they would have always been responsible for paying annual management charges of some sort. And with that being the case, any refund of the annual management charges paid by them from the Time of Sale as part of their Fractional Membership should amount only to the difference between those charges and the annual management charges they would have paid as ongoing European Collection members.

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

(1) The Lender should refund Mr and Mrs F's repayments to it under the Credit

Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.

(2) In addition to (1), the Lender should also refund the difference between Mr and Mrs F's Fractional Membership annual management charges after the Time of Sale and their European Collection annual management charges.

(3) The Lender can deduct:

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

ii. the market value of the holidays* Mr and Mrs F took using their Fractional Points if their annual management charge for the year in which the holiday(s) were taken was more than the annual management charge they would have paid as ongoing European Collection members. However, the deduction should be a proportion equal to the difference between those annual management charges. And if any of Mr and Mrs F's European Collection annual management charges would have been higher than their equivalent Fractional Membership annual management charge, there shouldn't be a deduction for the market value of any holiday(s) taken using Fractional Points in the year(s) in question as they could have taken those holiday(s) as ongoing European Collection members in return for the relevant annual management charge.

(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 F's credit files in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr and Mrs F'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 F 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 F's complaint against Shawbrook Bank Limited and direct it to calculate and pay fair compensation as outlined above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F and Mrs F to accept or reject my decision before 3 April 2025.

Fiona Mallinson
Ombudsman