DRN-5442254

The complaint

Mr and Mrs B'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

Between 2006 and 2012 Mr and Mrs B were members of a timeshare (the 'European Collection') having purchased a total of 50,000 points over four occasions from a timeshare provider (the 'Supplier').

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

In April 2013 Mr and Mrs B traded in 21,000 of their European Collection points for 21,000 points in a different type of timeshare from the Supplier (the 'Fractional Membership 1'). Like their European Collection membership, this new membership granted 'points' every year which they could exchange for holidays. But unlike their European Collection membership, Fractional Membership 1 was also asset backed – which meant it gave Mr and Mrs B more than just holiday rights. It also included a share in the net sale proceeds of a property named on their Purchase Agreement after their membership term ends. After their trade in, Mr and Mrs B paid £11,753 on a debit card for this Fractional Membership 1.

In June 2013 Mr and Mrs B made a further purchase of 14,000 fractional points ('Fractional Membership 2') by trading in 14,000 of their European Collection points, paying an additional £7,616 on a debit card. Neither the April 2013 nor the June 2013 fractional purchases are the subject of this complaint and are included for background information only.

On 10 April 2014 (the 'Time of Sale') Mr and Mrs B traded in their remaining 15,000 European Collection points ('Fractional Membership 3'). They entered into an agreement with the Supplier to buy 17,000 fractional points (the 'Purchase Agreement'), and after the trade-in value attributed to their European Collection points, they ended up paying £13,560 for their Fractional Membership 3. This membership, like the other two fractional memberships, was asset-backed, as 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 B paid for these 17,000 Fractional Membership points by taking finance of £13,560 from the Lender (the 'Credit Agreement') in their joint names. It is this purchase and the associated Credit Agreement that is the subject of this complaint.

Mr and Mrs B – using a professional representative (the 'PR') – wrote to the Lender on 29 April 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.
3. The decision to lend being irresponsible because the Lender did not carry out the right creditworthiness assessment.
4. The Credit Agreement being unenforceable because it was not arranged by a credit broker regulated by the Financial Conduct Authority (the 'FCA') to carry out such an activity.

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

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

- They would own a "Fraction" of a property at the Suppliers resort. It was a great investment and a highly valuable asset due to the property's ever appreciating price. This was untrue.
- They could sell their Fractional Membership whenever they wanted and be able to make a healthy profit from the proceeds. This was untrue.
- If they did not sell during the term, their property would be sold in 19 years' time and the profits shared amongst members. This was untrue.
- They could sell their points if they did not wish to use them for holidays. This was untrue.
- The Supplier's resorts were exclusive to members. This was untrue.
- They would have booking priority over European Collection points-members. This was untrue.

Mr and Mrs B 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 B.

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

The Letter of Complaint set out several terms within the Purchase Agreement and Credit Agreement which the PR said were unfair, and the inclusion of such terms in the contractual documentation rendered the credit relationship between Mr and Mrs B and the Lender unfair to them under Section 140A of the CCA. The PR also said the decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mr and Mrs B's concerns as a complaint and issued its final response letter on 30 May 2019, rejecting it on every ground.

Mr and Mrs B 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 B at the Time of Sale in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the

'Timeshare Regulations'). And given the impact of that breach on their purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr and Mrs B 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.

On 15 January 2025 I issued a Provisional Decision (the 'PD') on this complaint. I set out that I thought the Supplier had sold and/or marketed the Fractional Club to Mr and Mrs B as an investment in breach of Regulation 14(3) of the Timeshare Regulations. And I thought the impact of that breach on their purchasing decision was such that it rendered their resultant credit relationship with the Lender unfair to them for the purposes of Section 140A of the CCA. I then went on to say how I thought the Lender should calculate and pay fair compensation to Mr and Mrs B.

In my PD I said:

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

And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Membership to Mr and Mrs B 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 B's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the Supplier made misrepresentations about the Fractional Membership 3 at the Time of Sale, and that the Supplier was not correctly authorised to broker the Credit Agreement, because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs B in the same or a better position than they would be if the redress was limited to those other aspects.

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 B 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 B'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.

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

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

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

The Lender doesn't dispute, and I am satisfied, that Mr and Mrs B's Fractional Membership 3 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:

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

"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 B say that the Supplier did exactly that at the Time of Sale – saying the following in a statement dated 31 January 2019 and submitted to this Service during the course of this complaint:

> *"We were told of the same advantages of trading in our remaining European Collection points into Fractional Points as we were in the meetings in 2013, such as it being a greater investment and we would receive a healthy return once the property was sold. This interested us as we wanted to get as much out of our points as possible and didn't want them going to waste and the investment side of it seemed very beneficial, especially as the memberships would expire when we came to retire so we would receive a healthy profit at that time."*

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

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

(2) *They were told by the Supplier that they would get their money back or more during the sale of Fractional 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 B'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 3 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 <u>as an investment</u>. 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 3 was marketed or sold to Mr and Mrs B 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 3 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 B, 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 3 was not sold to Mr and Mrs B 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 B ticked each 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 B's allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that both over the course of their relationship with the Supplier, and during the Time of Sale of their Fractional Membership 3, it was expressly described as an "investment" and (2) that the Fractional Membership 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 the Fractional Membership 3 as an investment, i.e. told Mr and Mrs B or led them to believe during the marketing and/or sales process that the Fractional Membership 3 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

During the course of its dealing with complaints of a similar nature, this Service has seen some training material and some internal documents relating to the sale of fractional memberships by the Supplier. The Lender has also provided, in relation to other fractional timeshare complaints, witness statements from both previous and (at the time) existing employees of the Supplier setting out how its sales staff were trained to sell all its products, and how Fractional Membership in particular was sold to both new and existing members – all of which I have considered.

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

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

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

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

"[…] I endorse the observation made by Mr Jaffey KC, Counsel for BPF, that, whatever the position in principle, ***it is apparently a major challenge in practice for timeshare companies to market fractional ownership timeshares consistently with Reg.14(3). […] Getting the governance principles and paperwork right may not be quite enough.***

The problem comes back to the difficulty in articulating the intrinsic benefit of fractional ownership over any other timeshare from an individual consumer perspective*. […]* ***If it is not a prospect of getting more back from the ultimate proceeds of sale than the fractional ownership cost in the first place, what exactly is the benefit?*** *[…] What the interim use or value to a consumer is of a prospective share in the proceeds of a postponed sale of a property owned by a timeshare company – one they have no right to stay in meanwhile – is persistently elusive."*

"[...] although the point is more latent in the first decision than in the second, it is clear that both ombudsmen viewed fractional ownership timeshares – simply by virtue of the interest they confer in the sale proceeds of real property unattached to any right to stay in it, and the prospect they undoubtedly hold out of at least 'something back' – as products which are inherently dangerous for consumers. ***It is a concern that, however scrupulously a fractional ownership timeshare is marketed otherwise, its offer of a 'bonus' property right and a 'return' of (if not on) cash at the end of a moderate term of years may well taste and feel like an investment to consumers who are putting money, loyalty, hope and desire into their purchase anyway.*** *Any timeshare contract is a promise, or at the very least a prospect, of long-term delight. [...] A timeshare-plus contract suggests a prospect of happiness-plus. And a timeshare plus 'property rights' and 'money back' suggests adding the gold of solidity and lasting value to the silver of transient holiday joy." (emphasis my own)*

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

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

Mr and Mrs B, in their testimony, say the Supplier sold and/or marketed the Fractional Membership 3 to them as an investment. So, I've thought about how the Fractional Membership 3 would likely have been presented to Mr and Mrs B. Alongside the information I have about the sale and what this Service has been told about 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.

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

The Lender may, in response to this provisional decision, point to the witness statements it has submitted from employees of the Supplier that say that sales representatives were all trained specifically to avoid breaching the Timeshare Regulations when selling Fractional Membership, all of which I have considered. But I need to consider what I think was most

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

likely to have happened during the sale of Fractional Membership to Mr and Mrs B specifically, and while I find the statements useful in understanding how the Supplier trained its sales staff, they don't assist me greatly when thinking about what happened on this particular occasion.

Mr and Mrs B had purchased fractional points from the Supplier on two occasions the previous year. And on those occasions they made a like-for-like conversion of their European Collection points into fractional points, and paid a not inconsiderable sum on both occasions to do so. So as on both of these previous occasions Mr and Mrs B did not receive any additional holiday rights from these purchases, it seems likely there was another reason for them to make this switch.

Although a complaint about the April and June 2013 sales of the fractional points to Mr and Mrs B is not being considered here, I think it is entirely reasonable for me to think about what they were likely to have been told during those sales. Afterall, the Fractional Membership 3 they purchased in April 2014 at the Time of Sale was the same product as that sold to them by the same Supplier on two occasions during the previous 12 months. So I think there is a clear risk that whatever they had been told during the previous sales of the fractional points was likely to have influenced their subsequent purchase of Fractional Membership 3 at the Time of Sale. And this is supported by their written statement.

For example, when describing the April 2013 sale, Mr and Mrs B said:

> *"During the course of the [April 2013] meeting, we were advised of the following advantages of becoming Fractional Owners;*
>
> 1. *It was a great investment*
> 2. *It was an interest in real estate owning actual bricks and mortar*
> 3. *Due to it being an interest in property, it could be used as an asset for us to take luxury holidays in the [Supplier] resorts for a much cheaper price than those on the open market*
> 4. *[Fractional Membership] attracted a number of points redeemable against holidays*
> 5. *[The Supplier] resorts were exclusive to members only*
> 6. *When the contract expired after 15 years, the property would be sold, and the amount would be split between the fractional owners*
> 7. *[The Supplier] properties had a huge resale value and were in high demand from new and existing customers*
> 8. *By entering into Fractional Ownership, we would have an early exit from our [Supplier] membership"*

So it seems to me, from reading this testimony, that at the April 2013 sale the Supplier appears to have gone further than merely setting out how Fractional Membership worked. Mr and Mrs B have said that the Supplier told them the allocated properties linked to Fractional Membership "had a huge resale value and were in high demand from new and existing customers". This seems to be an implication by the Supplier of a potential profit, as it suggests an increase in value due to high demand.

And my thoughts on this are strengthened by what Mr and Mrs B said about the June 2013 sale.

"…The same benefits were pitched to us about [Fractional Membership] as the meeting in April, explaining how it was a long-term investment and we would be able to exit our membership earlier than we would in the [European Collection] and gain a healthy return when [the Supplier] sold the properties in 15 years' time...

We were not getting much use out of our European Collection points and believed that investing them into real estate was the best thing to do and the representatives at the meeting made it sound like a great idea…

At the time, we were happy with our investment and thought we would get a reasonable return, as this is what we had been told at the meeting. We also believed that by trading in our points into [Fractional Membership] would make more use out of them and we could get even better holidays."

And then, in their testimony about the April 2014 sale, they said:

"We were told of the same advantages of trading in our remaining European Collection points into Fractional Points as we were in the meetings in 2013, such as it being a greater investment and we would receive a healthy return once the property was sold. This interested us as we wanted to get as much out of our points as possible and didn't want them going to waste and the investment side of it seemed very beneficial, especially as the memberships would expire when we came to retire so we would receive a healthy profit at that time."

So again, the allegation that Mr and Mrs B are making here is that the Supplier sold the Fractional Membership to them as an investment that would give them a healthy return. And here they have linked all three purchases together, as they have said that all the memberships (plural) would expire at around the time of their retirement, linking the possible returns from their purchases to the time when they expected to stop working.

The Lender has said that the Supplier included specific disclaimers to show that it didn't present Fractional Membership as an investment – and 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 Fractional Membership 3 as an investment. That risk seems an obvious one, given the difficulty of articulating the benefit of fractional ownership otherwise than as an investment, in a way that distinguishes it from other timeshares from the viewpoint of prospective members.

Further, given the circumstances here, I think it unlikely that the Supplier would not have highlighted the possible returns available to Mr and Mrs B when selling Fractional Membership to them, given that they were already members of the Supplier's European Collection at the Time of Sale – holding 15,000 European Collection points. I cannot see how the Supplier could have justified a price of over £13,000 to Mr and Mrs B for a relatively modest increase (a little over 13%) in holiday rights. I think it likely that the Supplier relied on other aspects of Fractional Membership to promote its sale.

The investment elements of 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 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.

And Mr and Mrs B have said from the outset of their complaint that they were led to believe by the Supplier that Fractional Membership 3 was a sound investment that would lead to a healthy return. I think that belief fits with what they did at the Time of Sale – lay out a significant amount of money for only a 13% increase in holiday rights plus an interest in the sale proceeds of the Allocated Property.

Mr and Mrs B, in both their statement and in their Letter of Complaint, have been specific in what they say about how the Fractional Membership 3 was sold to them. They have said that it was positioned as an investment in property from which they would get a healthy return. And although I have highlighted the risk that what Mr and Mrs B allege they were told at the earlier fractional sales may have influenced their subsequent purchasing decision at the Time of Sale, I want to make clear that even if I were to disregard everything they said about the April and June 2013 sales, given the circumstances, I am still persuaded it is more likely than not that the Supplier's salesperson positioned Fractional Club 3 membership at the Time of Sale as an investment that may lead to a financial gain (i.e., a profit) in the future, whether explicitly or implicitly. So, I am currently satisfied that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale.

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

Having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr and Mrs B 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 B and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3)[3] led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On my reading of Mr and Mrs B's testimony, the prospect of a financial gain from Fractional Membership 3 was an important and motivating factor when they decided to go ahead with their purchase. That doesn't mean they were not interested in holidays – their own testimony, purchase history and membership usage demonstrate 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 B were laying out a considerable sum to make the purchase of Fractional Membership 3. And although on this occasion they did purchase some additional points which gave them some extra holiday rights, this wasn't a particularly significant increase (a little over 13%) and they paid over £13,000 for this increase, significantly more than they would have likely paid had they just increased their European Collection points by the same amount.

So, I can't see the extra holiday rights as being a motivation for Mr and Mrs B to purchase Fractional Membership 3 specifically. I say this because the extra points did not mean they would be able to access different accommodation than that they would have had access to if they retained their European Collection points. The same stock of accommodation was available under both memberships. So if it was additional holiday rights that Mr and Mrs B were looking for, they could have simply purchased 2,000 additional European Collection points to achieve the same upgrade, and from what I have seen, this would have cost them significantly less than £13,560.

I have also considered whether the shorter membership term associated with the Fractional Membership, when compared with the term of the European Collection was likely to have been a motivating factor. And I think it was, and indeed this is something that has been highlighted by Mr and Mrs B as important to them. But this needs to be considered in the context of why they say it was important to them. They have said that the shorter term, and the timing of the sale of the Allocated Property(s) would coincide with the time that they would be looking to retire. So I agree that it is likely that the shorter membership term was important, but only because of the connection to the investment element of the Fractional Membership and because they had been led to believe it was likely they would achieve a healthy return from that investment. In my assessment of what Mr and Mrs B have said, I do not think the evidence suggests that they would have continued with the purchase of Fractional Membership solely for the shorter membership term had the Supplier not breached Regulation 14(3).

So, it seems common sense that the potential financial return associated with the Fractional Membership 3 was an important factor in the sale, and Mr and Mrs B say (plausibly in my view) that Fractional Membership 3 was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights. Having considered everything, on the balance of probabilities, I think their purchase was motivated by their share in the

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[3] which, having taken place during its antecedent negotiations with Mr and Mrs B, 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

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 European Collection membership.

Mr and Mrs B 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 the Fractional Membership 3, I have not seen enough to persuade me that they would have pressed ahead with their purchase regardless. They have been consistent during the course of this complaint that the potential investment return was a central part of their reason to purchase. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

Conclusion

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

I then set out what I considered to be a fair and reasonable way for the Lender to calculate and pay compensation to Mr and Mrs B.

The responses to my PD

Mr and Mrs B accepted the PD, but had some concerns regarding the redress suggested. The PR said on their behalf that they thought the way it allowed the Lender to make deductions for the value of holidays taken, left it open to being unfair. They suggested that any deduction in the compensation for holiday usage should be limited to the value of the annual maintenance fee for the year that holiday(s) was taken.

The Lender also responded, disagreeing with my provisional findings. It provided witness statements from both previous and (at the time) existing employees of the Supplier setting out how its sales staff were trained to sell all its products, and how Fractional Membership in particular was sold to both new and existing members. In addition to these statements it said, in summary:

- The PD was premised on a material error of law in its approach to the prohibition under Regulation 14(3) of the Timeshare Regulations. And it erred in its application of that prohibition to the underlying documentation in support of the Fractional Club sale.
- The error(s) above undermined the approach to Mr and Mrs B's witness testimony; and
- The PD was premised on a material error of law in its approach to the legal test to determine the existence of an unfair relationship.

The Lender then went on to set out how it thought the PD erred in its approaches above. While I don't intend to repeat its submissions here in detail, I will summarise them:

- There is nothing inherent in the Fractional Membership which contravenes Regulation 14(3).

- The wording of the PD is inconsistent with the definition of an "*investment"* as set out in *Shawbrook & BPF v FOS*.
- The customer being told that some money would be 'returned' upon sale of the Allocated Property does not breach Regulation 14(3).
- The prospect of a return is not the same as an investment, and in any event, that is only a component of the product, which must be viewed alongside its other features and the sale of which must be assessed by reference to the evidence.
- It was an error to conclude that it is appropriate to make inferences about the conduct of the sale based on generic assumptions about the Fractional Points, rather than engaging meaningfully with the evidence in this specific case.
- the documentation provided to Mr and Mrs B made clear that the membership did not constitute an investment in real estate.
- Interpreting the disclaimers as indicative of an intention to promote an investment is not reasonable.
- The extensive submissions provided about how the Supplier sold fractional memberships have been discounted, and the Ombudsman has made assumptions about how the product was sold.
- The Ombudsman is not entitled to rely on the generic features of fractional products and conclude that a specific customer must have been sold a specific product as an investment.
- The Supplier only gave the consumers information about the sale of the Allocated Property, merely describing its features, and doing so has been found by the court[4] to be not inherently objectionable. Indeed a failure to clarify there would be a financial interest in the Allocated Property would likely infringe other parts of the Timeshare Regulations.
- Selling an investment requires the prospect of a financial gain/profit, and the corresponding motive on the part of the consumer. Referring to the prospect of a residual return does not satisfy this test.

The Lender continued by making submissions regarding the Fractional Membership documentation:

- The documentation relating to the sale is unobjectionable and shows no breach of Regulation 14(3).
- The disclaimers emphasised that the product should not be seen as an investment, and Mr and Mrs B confirmed they understood this at the Time of Sale. There was at no stage during the sale any representation as to the future price or value of the fractional share.
- There is no evidence that the sale of the Fractional Membership involved marketing or selling the fractional points as an investment to Mr and Mrs B.
- The witness evidence it submitted in relation to complaints which were materially similar to Mr and Mrs B's indicated that the Supplier delivered extensive training to its staff to ensure that fractional points clubs were not marketed or sold as investments.
- The Ombudsman ought to give some weight to the decision of HHJ Beech in *Gallagher v Diamond Resorts (Europe) Limited* (County Court, 24 September 2021)

[4] *Shawbrook & BPF v FOS*

in which it was held that the court was satisfied that the Supplier's sales staff in that case were trained as described.

- It is irrational to conclude that it is inherently more probable that the fractional product was marketed and sold to Mr and Mrs B as an investment, as this conclusion relies solely on Mr and Mrs B's testimony, and discounts significantly more evidence from the sales materials and statements from the Supplier's staff.
- On the balance of probabilities, it is more likely the product was not marketed as an investment.
- The question the Ombudsman should have considered is whether there is sufficiently clear, compelling evidence that the timeshare product was marketed and sold as an investment (i.e., for intended financial profit or gain as against the initial outlay). The reasonable answer, is that the sales documentation provides no reason to consider there was any such marketing or sale.

The Lender then assessed the witness statement from Mr and Mrs B. It said, in summary:

- The veracity of Mr and Mrs B's witness statement was not adequately considered in the PD, meaning it was given undue weight.
- The statement is dated 31 January 2019, which is around five years after the Time of Sale. The Ombudsman ought to have assessed whether the evidence is clear, consistent and contemporaneous. Its view is that the statement is far from clear about the Fractional Membership sale and is contradicted by testimony consistently provided by the Supplier in similar complaints.
- It is irrational for the Ombudsman to conclude that Mr B's recollections are more reliable than witness testimonies provided by the Supplier given its detailed knowledge of the product design, features and training materials.
- Reliance on Mr and Mrs B's testimony is unsafe.
- The Ombudsman has not attached sufficient weight to the other reasons advanced by Mr and Mrs B for their purchase of the Fractional Membership i.e. the shorter membership term.
- The witness statement contains material inconsistencies including Mr and Mrs B saying they had never been advised of the Supplier's Wish to Rent scheme. The contemporaneous evidence recorded by the Supplier shows Mr B was told about this scheme in April 2013, and the Supplier states Mr and Mrs B actually used this scheme in October 2016.
- The Lender received a letter direct from Mr and Mrs B in July 2022 complaining about its actions and decision to lend. This letter did not contain any allegation that the Fractional Membership had been sold to them as an investment.

And finally, it made submissions regarding the legal test applied in the PD when assessing if the relationship is unfair:

- The test to be applied, as stated in *Carney v NM Rothschild and Sons Ltd,* was whether there was a "material impact on the debtor when deciding whether or not to enter the agreement".
- The Ombudsman has erred here and applied a different test – reversing the burden of proof. It is necessary to assess whether there is sufficient evidence of a material impact on the decision to enter the agreement, not to start from the position, as the

Ombudsman has done, that the prospect of a financial gain existed, but that this was not insignificant enough for it not to render the relationship unfair.

- The lack of evidence of sale as an investment(as opposed to the prospect of a financial return) means there is no breach to impact upon the fairness of the relationship.

It concluded that there is no clear, compelling evidence that the Fractional Club was sold to Mr and Mrs B either as an investment or with the intention of financial gain, and as such the complaint in respect of this Time of Sale should be rejected.

Following the Lender's and the PR's submissions in response to the PD, I asked the Lender to obtain and provide me a full breakdown of the holidays taken after April 2014 using the 52,000 fractional points. It did so, and said that none of the holidays taken post this date had used more then the 50,000 points Mr and Mrs B had previously owned, so if this complaint was upheld, and it maintained it thought it should not be, it would not make a deduction to the calculated redress for the cost of the holidays taken.

As the deadline for responses to my PD has now passed, the complaint has come back to me to reconsider. Before I come to my findings, I'll set out what I still consider to be the relevant legal and regulatory context.

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 Consumer Protection from Unfair Trading Regulations 2008.
- 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*').

I have also taken into account *Gallagher v Diamond Resorts (Europe) Limited* (County Court, 24 September 2021) ('*Gallagher')*

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').

What I've decided – and why

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

And having done that, and having read and considered all of the statements, training material and sales documentation, along with the reasons the Lender gave for why it disagreed with my PD, I remain satisfied that this complaint should be upheld for the reasons set out above in the extract of my PD. I think it is more likely than not that the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club 3 membership to Mr and Mrs B as an investment. And, in the circumstances of this complaint, this breach rendered the credit relationship between them and the Lender unfair to them for the purposes of Section 140A of the CCA.

I will also deal with the matters raised by the Lender in response. In doing so, I note again that 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, on the balance of probabilities, in the circumstances of this complaint. So, while I have read the Lender's response in full, I will confine my findings to what I believe are the salient points.

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

> *"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 B'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 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."*

However, for the avoidance of doubt, I recognise that it was possible to market and sell the Fractional Membership 3 without breaching the relevant prohibition in Regulation 14(3). For instance, depending on the circumstances and when considering what an *investment* is, there is every chance that simply telling a prospective customer very factually that a fractional membership included a share in an allocated property, and that they could expect to receive a financial return or some money back on the sale of that property, would not breach Regulation 14(3).

With this in mind, I have reconsidered the sales and marketing materials more generally, alongside the statements submitted by the Lender.

I recognise the amount of witness evidence that's been provided in support of the disclaimers in the paperwork I've referred to above, both previously and in response to the PD. Indeed, I acknowledge what the witness statements say about the Supplier' sales representatives being trained to not refer to Fractional Membership as an 'investment', to not make any reference to the value of the Allocated Property and making every effort to not give customers, such as Mr and Mrs B, the impression that they were investing in something that would make them a profit.

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

So, in my view, if a supplier *implied* to consumers that future financial returns (in the sense of possible profits) from a timeshare were a good reason to purchase it, I think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment. And I acknowledge again that the Supplier, within the sales documentation, made efforts to avoid specifically describing Fractional Club membership as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs B, 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.

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 B, had already been through a lengthy sales presentation. So it is important to balance it with what I think it is likely that Mr and Mrs B were told about Fractional Club membership.

Mr and Mrs B set out their recollections of the Time of Sale, along with what they remembered about the previous two fractional sales in a statement dated 31 January 2019. The Lender has said the veracity of the statement has not been adequately considered, and therefore it has been given undue weight. But having considered it again, I think, on balance, the statement sets out Mr and Mrs B's actual memories.

In the case 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 B have provided. Paragraph 40 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:*
>
> *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 from 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 am not surprised that there are some inconsistencies between what Mr and Mrs B said happened and what other evidence shows. The question to consider, therefore, is whether there is a core of acceptable evidence from Mr and Mrs B that the inconsistencies have little or 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 3 to them as an investment.

So, for example, I do not find it significant that Mr and Mrs B say that they were unaware of the Wish to Rent scheme when the evidence from the Supplier tends to contradict this. The Supplier says they were informed about this scheme in April 2013 and that they used it in 2016. But given that this part of the membership doesn't appear to have been of particular importance to Mr and Mrs B I don't find this apparent error significant, especially when their focus in the statement was on what happened at the Time of Sale.

So, even if there are inconsistencies in their evidence, it does not mean their evidence on how the Fractional Membership 3 came to be sold should be discounted.

I have again considered what Mr and Mrs B said in their evidence, and I have considered it in the light of the statements provided by the Lender. But Mr and Mrs B's statement is regarding their specific sale, and what they say they remember being told by their particular salesperson. So, whilst I can see the training the Supplier's staff were given set out that Fractional Membership should not be referred to as an 'investment', and that no reference as to the value of the Allocated Property should be made, as I said in the PD, the statements don't assist me greatly when thinking about what happened on this particular occasion.

In Mr and Mrs B's witness statement, they said that at the Time of Sale:

> *"We were told of the same advantages of trading in our remaining European Collection points into Fractional Points as we were in the meetings in 2013, such as it being a greater investment and we would receive a healthy return once the property was sold. This interested us as we wanted to get as much out of our points as possible and didn't want them going to waste and the investment side of it seemed very beneficial, especially as the memberships would expire when we came to retire so we would receive a healthy profit at that time."*

It is clear to me that Mr and Mrs B are saying that the Supplier sold to them the Fractional Membership as an investment. This fits with the fact that they only purchased an additional 2,000 points (around a 13% increase) at a cost of over £13,000, which would not have increased their holiday rights greatly. This points to there being a different motivation behind their purchase. Mr and Mrs B have said they thought they weren't getting as much use from their points as they could, and saw the benefits of the investment element as they were told they would receive a *"healthy profit"* at around the time they would be retiring. So I agree that the shorter membership term was part and parcel of their decision to make the purchase, but only because this was linked with receiving a profit at the time they would be wanting to retire.

I also do not think it of particular importance that the investment element of Fractional Membership was not mentioned in a letter of complaint Mr and Mrs B sent to the Lender in July 2022. This letter followed a Data Subject Access Request responded to by the Lender. The complaint letter was in response to the information sent to Mr and Mrs B when they thought it showed the Supplier was not properly authorised to broker credit at the Time of Sale, and that the Lender had not carried out the proper affordability checks before agreeing to lend to Mr and Mrs B. I do not think it material that Mr and Mrs B did not repeat their concerns about the investment element of the sale at that point, as that was not what the letter was about.

The Lender has asked me to consider the County Court ruling in *Gallagher* when it comes to my consideration of how the Fractional Membership 3 was sold to Mr and Mrs B, and I have done so. However, that case was decided by the judge on its own facts and circumstances,

and it does not change my own findings that, on balance, Mr and Mrs B's Fractional Membership was sold to them in breach of Regulation 14(3).

Whilst I accept it is *possible* that Mr and Mrs B would have purchased the Fractional Membership 3 even if the Supplier hadn't led them to believe that there was the prospect of a financial gain from the membership, I don't think that's *probable* based on what I've seen. And as Mr and Mrs B say (plausibly in my view) that Fractional Membership 3 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 at around the time they would be looking to retire, as that share and profit was one of the defining features of membership that marked it apart from their existing European Collection membership.

Mr and Mrs B have been consistent during the course of this complaint that the potential profit at the time they were looking to retire was a central part of their reason to purchase. And with that being the case, I think the evidence suggests that:

1. Fractional Membership 3 being presented to Mr and Mrs B as an investment was a material part of their purchasing decision; and
2. I am not persuaded that Mr and Mrs B would have continued with their purchase had it not been presented as an investment.

Conclusion

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

Putting things right

Having found that Mr and Mrs B would not have agreed to purchase Fractional Membership 3 were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and Mr and Mrs B was unfair to them 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 Fractional Membership 3 (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr and Mrs B agree to assign to the Lender the 17,000 fractional points that relate to Fractional Membership 3 or hold them on trust for the Lender if that can be achieved.

As I've said before, Mr and Mrs B were already Fractional members at the Time of Sale. But they were also European Collection members at that time – holding 15,000 European Collection points. So, when they made the purchase in question, they traded-in their remaining European Collection points against the purchase price of the final 17,000 fractional points they purchased as part of Fractional Membership 3. Under their European Collection membership, they also had to pay annual management charges like they did as Fractional Members. So, had Mr and Mrs B not purchased the 17,000 fractional points as part of Fractional Membership 3, they would have always been responsible for paying an annual management charge of some sort under what remained of their European Collection membership. With that being the case, any refund of the annual management charges paid by Mr and Mrs B from the Time of Sale that can be directly attributable to the 17,000 fractional points they purchased at that time should amount only to the difference between those charges and the annual management charges they would have paid as ongoing European Collection members with 15,000 European Collection points.

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

(1) The Lender should refund Mr and Mrs B'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 B's Fractional Membership 3 annual management charges (relating to 17,000 fractional points) paid after the Time of Sale and what their European Collection annual management charges would have been (as members with 15,000 European Collection points) had they not purchased Fractional Membership 3 at the Time of Sale.

(3) As the Lender has confirmed that the holidays taken by Mr and Mrs B following their April 2014 purchase of Fractional Membership 3 would have always been available to them using their existing 50,000 points, there should be no deduction in the redress calculated above for the holidays taken. However, the Lender can deduct:

- The value of any promotional giveaways that Mr and Mrs B used or took advantage of at the Time of Sale;

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

(6) If the 17,000 fractional points Mr and Mrs B purchased as part of Fractional Membership 3 are still in place at the time of this decision, as long as they agree to hold those points on trust for the Lender (or assign them to the Lender if that can be achieved), the Lender must indemnify Mr and Mrs B against all ongoing liabilities that stem from those 17,000 fractional points.

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

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B and Mr B to accept or reject my decision before 28 April 2025.

Chris Riggs
Ombudsman