DRN-5508366

The complaint

Mr and Mrs C'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 C were existing customers of a timeshare provider (the 'Supplier') and had been since March 2009. Between July 2009 and September 2012, they had purchased 15,500 points in the Supplier's 'European Collection'. These points worked like a currency such that, every year, Mr and Mrs C 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.

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

On 17 July 2013 (the 'Time of Sale'), Mr and Mrs C traded in their 15,500 European Collection points towards the purchase of 16,500 fractional points from the Supplier (the 'Fractional Membership'), therefore acquiring an additional 1,000 points in the process. This was at a cost of £12,220, with a conversion price given for their European Collection points of £1 per point (the 'Purchase Agreement').

Mr and Mrs C paid for this membership by taking finance of £29,209.65 from the Lender in both of their names. This also consolidated previous lending from another lender.

Fractional Membership was asset backed – which meant it gave Mr and Mrs C 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 C – using a professional representative (the 'PR') – wrote to the Lender on 11 January 2018 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. 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 C say that the Supplier made a pre-contractual misrepresentation at the Time of Sale – namely that the Supplier:

- told them that Fractional Membership had a guaranteed end date when that was not true.

Mr and Mrs C say that they have a claim against the Supplier in respect of this misrepresentation, 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 C.

(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 C say that the credit relationship between them and the Lender was unfair to them under Section 140A of the CCA. In summary, they include the following:

1. The terms of the agreement were unfair as commission was paid to the Supplier which was not disclosed to Mr and Mrs C.
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 C's concerns as a complaint and issued its final response letter on 22 March 2018, rejecting it on every ground.

Mr and Mrs C 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 C 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 C 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 27 March 2025.

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').

What I've provisionally decided – and why

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 C 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 C's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the Supplier misrepresented the Fractional Membership and the Lender ought to have accepted and paid that claim under Section 75 of the CCA.

I say this because, even if that aspect of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs C 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 C 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 C'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 C 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:

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

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;*
4. *The inherent probabilities of the sale given its circumstances.*

I have then considered the impact of 1-4 on the fairness of the credit relationship between Mr and Mrs C 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 C'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 C say in their witness statement that the Supplier did exactly that at the Time of Sale – saying the following during the course of this complaint:

> *"They told us that the previous timeshare was not an investment because we couldn't make any money on it and that we should exchange our timeshare product to a fractional product because fractional products were investments that could be sold that we would definitely make money on it. They said that there would be a definite, guaranteed sale and that they could guarantee that the sale would happen at the date on the paperwork. We therefore purchased purely because they said it was an investment and that we would make money on it".*

And, the Letter of Complaint said:

> *"Our clients were advised that the previous points that they had purchased, that being 5,000 points in September 2012, were not an investment. They were advised that they would simply lose money on them and that the previous points were essentially a waste of money. Our clients were then advised that if they purchased fractional points, this would be an investment. They were advised that fractional points would be sold at the end of the fractional period and that a significant profit would be made."*

Mr and Mrs C 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.*

I acknowledge the Lender has some concerns about the witness testimony provided, particularly since this wasn't dated or signed by Mr and Mrs C. But, the statement was provided to our Service at the outset when the complaint was referred to us, and I've seen evidence that it was drafted in October 2017. So, while being cognisant of the fact that

memories fade over time, I'm satisfied that I'm able to place weight on, and rely on, the contents of the statement.

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 C'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 C 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 C, 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 C as an investment.

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

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

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

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

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And there are a number of strands to Mr and Mrs C's allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that

Fractional Membership was expressly described as an "investment" and (2) that 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 Fractional Membership as an investment, i.e. told Mr and Mrs C 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

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 C, the impression that they were investing in something that would make them a profit.

However, if I were to only concern myself with express efforts to quantify to Mr and Mrs C the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that '[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).'[2] *And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.*

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

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[2] The Department for Business Innovation & Skills *"Consultation on Implementation of EU Directive 2008/122/EC on Timeshare, Long-Term Holiday Products, Resale and Exchange Contracts (July 2010)".* https://assets.publishing.service.gov.uk/media/5a78d54ded915d0422065b2a/10-500-consultation-directive-timeshare-holiday.pdf

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

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

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

"[...] 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 C, in their testimony, say the Supplier sold and/or marketed Fractional Membership to them as an investment. So, I've thought about how the Fractional Membership would likely have been presented to Mr and Mrs C. 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'm satisfied it's 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 Reg.14(3), compared with the sale of a product without the possibility of a monetary return.*[3]

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 likely to have happened during the sale of Fractional Membership to Mr and Mrs C 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.

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 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.

Mr and Mrs C were already members of the Supplier's European Collection at the Time of Sale – holding 15,500 European Collection points. They paid, on average, £1.39 for each of those points. And if they simply wanted to increase their holiday rights, I don't understand why they would have paid over £12,000 in return for 16,500 fractional points (only 1,000 of which were additional which is a relatively small increase in holiday rights), unless the Supplier had relied on other aspects of Fractional Membership to promote its sale.

I acknowledge that Fractional Membership offered Mr and Mrs C a shorter term. But the investment elements of Fractional Membership were plainly major parts of its rationale and justification for its cost. And as it was designed to offer its members a way of making a financial return from the money they invested – whether or not, like every investment, the return was more, less or the same as the sum invested, it would not have made much sense if the Supplier included the features in the product without relying on them to promote sales – especially when the reality was that, as existing European Collection members with significant holiday rights, the principal benefits of the move to Fractional Membership were its investment elements i.e. the share in the net sale proceeds of the Allocated Property and the potential financial returns from the Fractional Wish to Rent Programme.

Mr and Mrs C have said from the outset of their complaint that they were led to believe by the Supplier that they would make a profit when the Allocated Property was sold. And I think that belief fits with what they did at the Time of Sale – which, as existing European Collection members with significant holiday rights, was make a significant purchase for an interest in the sale proceeds of the Allocated Property and a small number of extra holiday rights.

So, overall, when I consider the evidence as a whole, and in combination with the particular circumstances of Mr and Mrs C's sale, I don't find them either implausible or hard to believe when they say they were told that fractional membership was 'an investment that could be

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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.

sold' and they would 'definitely make money on it'. On the contrary, given what I've seen so far, I think that's likely to be what Mr and Mrs C 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.

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

Having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Times of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr and Mrs C 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 C 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 C, 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 Agreements and the Credit Agreements is an important consideration.

On my reading of Mr and Mrs C'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.

The Lender has said that because Mr and Mrs C purchased an additional 1,000 fractional points at the Time of Sale and gained additional holiday rights as a result, they were likely interested in holidays – which is not surprising given the nature of the product at the centre of this complaint and the fact that they had been long-standing European Collection members by the time they purchased Fractional Membership. But if increasing their holiday rights was the only or even the main reason they made the purchase, I don't understand why they would not have simply increased their European Collection points again in the same way they had done before.

The Lender has also said that Mr and Mrs C likely wanted to purchase Fractional Membership due to the shorter membership term. I recognise that Fractional Membership offered Mr and Mrs C a shorter membership term than the European Collection. But 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 say that because Mr and Mrs C could have simply continued to holiday as European Collection members knowing (in all likelihood) that Mrs C was 13 years or so from turning 75 at the Time of Sale and that they were likely to have been able to surrender their European Collection membership under Diamond's policy on exceptional circumstances[4] without having to pay over £12,000 at the Time of Sale to benefit from a shorter membership term. So, as they would have been able to surrender their European Collection membership earlier that their new Fractional Membership if they wished to, I cannot see that the membership term offered by the Fractional Membership would have been a motivation for them.

As Mr and Mrs C 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 purchases were motivated by their share in the Allocated Property and the possibility of a profit. After all, as I've said before, the reality was, that as Mr and Mrs C already had the majority of the holiday rights to which they were entitled under the Purchase Agreement, the principal benefit to them of moving to Fractional Membership were its investment elements i.e., the share in the net sale proceeds of the Allocated Property.

Mr and Mrs C 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 am not persuaded that they would have pressed ahead with their purchase regardless.

As a result of all of the above, 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 C under the Credit Agreement and

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

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 C would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable to put them back in the position they would have been in had they not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr and Mrs C 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 C 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 15,500 European Collection points. And, like Fractional Club membership, they had to pay annual management charges as a European Collection member. So, had Mr and Mrs C not purchased Fractional Membership, they would have always been responsible for paying an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr and Mrs C 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.

What's more, Mr and Mrs C paid for their existing European Collection membership using finance ('Loan 1'), £16,989.65 of which they refinanced using the Credit Agreement. So, I recognise that part of what they borrowed at the Time of Sale was used to repay the earlier borrowing under Loan 1 that always had to be repaid. But I can see that Mr and Mrs C complained about an unfair credit relationship under Loan 1 and that complaint was rejected by the Financial Ombudsman Service in June 2023. As a result, I don't think it would be fair or reasonable to direct the Lender in the complaint I'm considering here to refund everything that was paid and, if relevant, due to be repaid under the Credit Agreement, otherwise Mr and Mrs C would be in a better position than they would have been if they hadn't purchased Fractional Club membership. In light of that, I think this ought to be reflected in my redress when remedying the unfairness I have found.

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

(1) The Lender should refund the difference between Mr and Mrs C's repayments to it under the Credit Agreement and what they would have paid under Loan 1, including the difference between any sums paid to settle the debt owing under the Credit Agreement and what would have needed to have been paid to settle Loan 1. I can't see that there is any outstanding balance under the Credit Agreement which needs to be taken into account.

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

(3) The Lender can deduct:

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

ii. *The market value of the holidays* Mr and Mrs C took using their Fractional Points if the Points value of the holiday(s) taken amounted to more than the total number of European Collection points they would have been entitled to use at the time of the holiday(s) as ongoing European Collection members. However, this deduction should be proportionate and relate only to the additional Fractional Points that were required to take the holiday(s) in question.*

For example, if Mr and Mrs C took a holiday worth 2,550 Fractional Points and they would have been entitled to use a total of 2,500 European Collection points at the relevant time, any deduction for the market value of that holiday should relate only to the 50 additional Fractional Points that were required to take it. But if they would have been entitled to use 2,600 European Collection Points, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

(I'll refer to the output of steps 1 to 3 as the 'Net Repayments' hereafter)

*(4) Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.*

(5) The Lender should remove any adverse information recorded on Mr and Mrs C's credit files in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr and Mrs C'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 Club membership.

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

The PR didn't respond to the 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. I won't repeat their response in full, but I will summarise it here:

- The wording in my PD is inconsistent with the premise that there is no prohibition to the sale of fractional timeshares, only a prohibition on the way they were sold, and the definition of 'investment' that I used. It argues that I took the position that "*the mere existence of the "prospect of a financial return" constituted an "investment". In*

particular, the PD falls into that error by conflating two different meanings of the word 'return': (i) a 'return on investment', which is normally understood to mean the measure of profit (return) on the original investment; and (ii) a customer being told that some money will be 'returned' upon sale, which carries no connotation of investment or profit".

- The documentation in relation to the Fractional Membership sale is unobjectionable and shows 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 C. The Supplier delivered extensive training to its staff, including the 2012 slides and 2013 training manual provided to this Service previously, 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. In particular, the training manual does not say that the purpose or benefit of the product was the opportunity to make a financial gain/profit on the initial outlay.
- I didn't adequately consider the veracity of Mr and Mrs C's testimony and therefore gave it undue weight and misinterpreted some parts of it. The Lender raised the following specific points in relation to their testimony:
    (i) The testimony was created in July 2013[5], four years after the Time of Sale but wasn't provided to the Lender until November 2023. The testimony is also brief and lacks sufficient detail as well as not being signed or dated. The Lender disputes the evidence provided to show when the statement was drafted and says they think the witness statement was manufactured by the PR.
    (ii) Mr and Mrs C have provided little detail in relation to the allegation of the sales process being unduly pressured and if they were, they haven't explained why they didn't cancel their membership during the cooling off period.
    (iii) The testimony does not include the full background to Mr and Mrs C's purchase history which is integral in understanding their experience and understanding of how timeshare products work and are sold.
    (iv) The witness testimony lacks detail around their actual motivations for their previous purchases. My starting point should have been why Mr and Mrs C made all of their previous purchases. The Lender says Mr and Mrs C wanted to use the membership for additional holidays, a shorter term and the option to use the 'Wish to Rent' programme.
    (v) Mr and Mrs C used the product a number of times and stopped doing so around two months before submitting their complaint. The testimony does not explain why they continued to use the product until they complained.
    (vi) There is no evidence to support the conclusion that the fractional points were sold to Mr and Mrs C as an investment other than the Letter of Complaint and their witness statement – which both lack detail and are contradicted by the sales documentation.
- Mr and Mrs C's motivations for the purchase (the shorter term and additional holidays) mean that the 'future sale of the timeshare' did not have a material impact on Mr and Mrs C's purchasing decision, meaning the credit relationship was fair.

[5] The Lender appears to have referred to the wrong date here, as the witness testimony was drafted in late 2017.

- I erred in not applying the test I had highlighted in the judgment of *Carney*, rather I said "*I don't find them either implausible or hard to believe when they say they were told that fractional membership was 'an investment that could be sold' and they would 'definitely make money on it'.".*

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 C's complaint for broadly the same reasons as I gave in my PD as set out above. I will also address the matters the Lender raised in response.

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

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

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

> "*Mr and Mrs C's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.*
>
> *In other words, the Timeshare Regulations did not ban products such as the Fractional Membership. They just regulated how such products were marketed and sold.*"

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

But, with that said, there seem to me to be many ways of marketing and selling a timeshare as an investment, without necessarily referring to (or even including) an allocated property. And if the Supplier said and/or did something in relation to an allocated property and/or Fractional Membership more generally that at least implied to a prospective member that

membership offered them the prospect of a financial gain, that would, in my view, breach Regulation 14(3).[6]

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 C have provided in this particular case.

The Lender has again highlighted in their response to my PD the various disclaimers in the sales paperwork which state that the product should not be seen as an investment. And they've said that Mr and Mrs C confirmed (by signing some of the documentation) that they understood this at the Time of Sale.

I acknowledged in my PD, and again I 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 C signed the relevant documentation confirming they had read and understood these various disclaimers.

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

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

In my PD, I explained that in the course of 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. I also explained that 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 considered when reaching my provisional conclusions. The Lender hasn't provided anything new in this regard in their response and has referred me back to this aforementioned evidence, which to confirm, I've considered again.

While this does provide some information about the Supplier's internal policies and how those particular individuals say staff were trained, it still doesn't give me any specific information about Mr and Mrs C'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 C'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 Mr and Mrs C could receive, leaving them with the impression they would make a financial gain. As I noted in my PD, Mr and Mrs C said they were told that fractional

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

membership was '*an investment that could be sold*' and they would '*definitely make money on it'.* In my PD, I also highlighted how the nature of the purchase contributed to my findings about how the Supplier had likely marketed the product to Mr and Mrs C, and also their motivations for going ahead with it (which I've addressed further below).

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 C.

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

Mr and Mrs C's evidence

I have read and considered the Lender's (and Supplier's) concerns about Mr and Mrs C'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 think the Lender is restating its view that either Mr and Mrs C's testimony or the original Letter of Complaint, or both, are not representative of Mr and Mrs C's concerns about how the Supplier sold Fractional Membership to them.

As outlined in my PD, Mr and Mrs C provided a witness statement setting out their memories of what happened. I don't agree with the Lender when it suggests that as the statement appears to have been prepared by a third party, its contents should either be disregarded or treated with more caution than a statement would normally be. I say that because it is not unusual for statements to be taken down by others, and Mr and Mrs C have been consistent with their recollections throughout. It's also worth highlighting here that the testimony was provided to our Service when the matter was first referred to us in July 2018. So, while I acknowledge that the PR was involved in Mr and Mrs C making their complaint and recorded what Mr and Mrs C had said about what happened, as I explained in my PD, I'm satisfied from what's been provided that this testimony was drafted in late 2017, sets out Mr and Mrs C's actual memories and is specific to their particular sale.

In terms of the other points the Lender has made, I don't consider these to be particularly relevant to whether Mr and Mrs C's testimony can be relied on. For example, the Lender has made various points as to why they don't agree that the sale was pressured, but this is a completely separate point than whether membership was sold as an investment and whether this had a material impact on their purchasing decision. Similarly, I don't consider it relevant that the testimony didn't outline all of their previous purchases or why they bought these – these previous purchases aren't the subject of this complaint. But in any event, as outlined in my PD, I'm already aware of Mr and Mrs C's previous purchases and have considered this wider context when reaching my decision.

I also don't see the relevance of Mr and Mrs C using the membership for holidays and that they stopped doing so prior to making this complaint. I think this likely only reflects their unhappiness which led to this complaint and again isn't particularly relevant to whether their testimony can be relied on.

So again, I remain of the view, on balance, that their testimony is likely to be a genuine reflection of their recollections from the Time of Sale.

Both the Lender and the Supplier suggest I didn't attach sufficient weight to the other reasons they say Mr and Mrs C entered into the purchase, in particular, additional holiday rights and the shorter membership term. 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 C'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 "*I don't find them either implausible or hard to believe when they say they were told that fractional membership was 'an investment that could be sold' and they would 'definitely make money on it'.*".

While I did say this in my PD, the Lender seems to have either misquoted or misunderstood this part of it. The part of my PD they've quoted here related to whether I thought there was a breach of Regulation 14(3) by the Supplier at the Time of Sale, not the issue of whether the credit relationship was rendered unfair as a result.

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

> "*On my reading of Mr and Mrs C'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.*
>
> *The Lender has said that because Mr and Mrs C purchased an additional 1,000 fractional points at the Time of Sale and gained additional holiday rights as a result, they were likely interested in holidays – which is not surprising given the nature of the product at the centre of this complaint and the fact that they had been long-standing European Collection members by the time they purchased Fractional Membership. But if increasing their holiday rights was the only or even the main reason they made the purchase, I don't understand why they would not have simply increased their European Collection points again in the same way they had done before.*
>
> *The Lender has also said that Mr and Mrs C likely wanted to purchase Fractional Membership due to the shorter membership term. I recognise that Fractional Membership offered Mr and Mrs C a shorter membership term than the European Collection. But 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 say that because Mr and Mrs C could have simply continued to holiday as European Collection members knowing (in all likelihood) that Mrs C was 13 years or so from turning 75 at the Time of Sale and that they were likely to have been able to surrender their European Collection membership under Diamond's policy on exceptional circumstances[7] without having to pay over £12,000 at the Time of Sale to benefit from a shorter membership term. So, as they would have been able to surrender their European Collection membership earlier that their new Fractional Membership if they wished to, I cannot see that the membership term offered by the Fractional Membership would have been a motivation for them.*
>
> *As Mr and Mrs C 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 purchases were motivated by their share in the Allocated Property and the possibility of a profit. After all, as I've said before, the reality was, that as Mr and Mrs C already had the majority of the holiday rights to which they were entitled under the Purchase Agreement, the principal benefit to them of moving to Fractional Membership were its investment elements i.e., the share in the net sale proceeds of the Allocated Property.*

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

Mr and Mrs C 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 am not persuaded that they would have pressed ahead with their purchase regardless.

As a result of all of the above, 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 C'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 £12,220, which would allow them to exit in 2028. They would also (as the Lender has pointed out) have had access to the Supplier's Wish to Rent Programme.
- To continue with their existing European Collection membership until 2026, 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 C 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. As part of the aforementioned wider documentation, I've seen that one of the Supplier's sales policies that the Lender has provided to this Service, instructed staff to provide this information to members, so it's seems likely that Mr and Mrs C 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 C already owned, was the share in the net sale proceeds of the Allocated Property. And, in this case, Mr and Mrs C have been clear that the Supplier told them that Fractional Membership was an investment from which they would make money. 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 2026 to leave the European Collection, and the decision to purchase it would make more financial sense.

I also think it's worth highlighting again here that in their testimony, Mr and Mrs C have said "*We therefore purchased purely because they said it was an investment and that we would make money on it*". In my view, this is quite clear as to their motivation for purchase.

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 C 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 C 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 their credit relationship with the Lender unfair 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 C's purchasing decision. But that is what I did in my PD, and have set out again above.

Lastly, I have read and considered the judgment in *Gallagher v Diamond Resorts (Europe) Limited* (21 September 2021, unreported). 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 C's sale did breach Regulation 14(3).

So, overall, given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs C under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. I therefore remain of the view that it is fair and reasonable that I uphold this complaint.

Fair Compensation

Neither party provided any comment on the redress I proposed in my PD. So, it follows that I still think this is a fair and reasonable way for the Lender to put things right and I've set this out again below.

Having found that Mr and Mrs C would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I 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 Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr and Mrs C 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 in my PD, Mr and Mrs C 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 15,500 European Collection points. And, like Fractional Club membership, they had to pay annual management charges as a European Collection member. So, had Mr and Mrs C not purchased Fractional Membership, they would have always been responsible for paying an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr and Mrs C 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.

What's more, Mr and Mrs C paid for their existing European Collection membership using finance ('Loan 1'), £16,989.65 of which they refinanced using the Credit Agreement. So, I recognise that part of what they borrowed at the Time of Sale was used to repay the earlier borrowing under Loan 1 that always had to be repaid. But I can see that Mr and Mrs C complained about an unfair credit relationship under Loan 1 and that complaint was rejected by the Financial Ombudsman Service in June 2023. As a result, I don't think it would be fair or reasonable to direct the Lender in the complaint I'm considering here to refund everything that was paid and, if relevant, due to be repaid under the Credit Agreement, otherwise Mr and Mrs C would be in a better position than they would have been if they hadn't purchased Fractional Club membership. In light of that, I think this ought to be reflected in my redress when remedying the unfairness I have found.

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

(1) The Lender should refund the difference between Mr and Mrs C's repayments to it under the Credit Agreement and what they would have paid under Loan 1, including the difference between any sums paid to settle the debt owing under the Credit Agreement and what would have needed to have been paid to settle Loan 1. I can't see that there is any outstanding balance under the Credit Agreement which needs to be taken into account.
(2) In addition to (1), the Lender should also refund the difference between Mr and Mrs C's Fractional Membership annual management charges paid after the Time of Sale and what their European Collection annual management charges would have been had they not purchased Fractional Membership.
(3) The Lender can deduct:

    i. The value of any promotional giveaways that Mr and Mrs C used or took advantage of; and
    ii. The market value of the holidays* Mr and Mrs C took using their Fractional Points *if* the Points value of the holiday(s) taken amounted to more than the total number of European Collection points they would have been entitled to use at the time of the holiday(s) as ongoing European Collection members. However, this deduction should be proportionate and relate only to the additional Fractional Points that were required to take the holiday(s) in question.

        For example, if Mr and Mrs C took a holiday worth 2,550 Fractional Points and they would have been entitled to use a total of 2,500 European Collection points at the relevant time, any deduction for the market value of that holiday should relate only to the 50 additional Fractional Points that were required to take it. But if they would have been entitled to use 2,600 European Collection Points, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

    (I'll refer to the output of steps 1 to 3 as the 'Net Repayments' hereafter)

(4) Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.

(5) The Lender should remove any adverse information recorded on Mr and Mrs C's credit files in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr and Mrs C'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 Club membership.

*I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Mr and Mrs C 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 C's complaint against Shawbrook Bank Limited and direct it to work out and pay fair compensation as outlined above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C and Mrs C to accept or reject my decision before 12 June 2025.

Fiona Mallinson
Ombudsman