DRN-5528600

The complaint

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

What happened

Mr and Mrs J purchased membership of a timeshare (the 'Balkan Jewel membership') from a timeshare provider (the 'Supplier') on 19 May 2015 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 8,500 fractional points at a cost of £6,240 (the 'Purchase Agreement').

Balkan Jewel membership was asset backed – which meant it gave Mr and Mrs J 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 J paid for their Balkan Jewel membership by taking finance of £6,240 from the Lender in both of their names (the 'Credit Agreement').

Mr and Mrs J – using a professional representative (the 'PR') – wrote to the Lender on 11 November 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. A breach of contract by the Supplier giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

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

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

1. told them that Balkan Jewel membership had a guaranteed end date when that was not true.
2. told them that Balkan Jewel membership was an "investment" when that was not true.
3. told them that if they purchased more points, they would have more availability to holiday in worldwide resorts whenever they wanted when that was not true.

Mr and Mrs J 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 J.

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

Mr and Mrs J say that they found it difficult to book the holidays they wanted, when they wanted.

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

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

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

1. The terms of the agreement were unfair in and of themselves as commission was paid to the Supplier by the Lender but this was not disclosed to Mr and Mrs J.
2. Balkan Jewel 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 Balkan Jewel membership by the Supplier.
4. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.
5. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
6. The Supplier failed to give Mr and Mrs J sufficient time to read and consider the information given to them.

The Lender dealt with Mr and Mrs J's concerns as a complaint and issued its final response letter on 24 February 2021, rejecting it on every ground.

Mr and Mrs J, via their PR, 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 Balkan Jewel membership as an investment to Mr and Mrs J 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 J 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') dated 3 April 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 CPUT Regulations.*
- *Case law on Section 140A of the CCA – including, in particular:*

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

Good industry practice – the RDO Code

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

My provisional findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Balkan Jewel membership to Mr and Mrs J 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 J's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the Supplier misrepresented the Balkan Jewel membership and breached the Purchase Agreement and the Lender ought to have accepted and paid those claims under Section 75 of the CCA.

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

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

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

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between Mr and Mrs J 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 J's Balkan Jewel 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.140A(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

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

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 J 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 J 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 J's Balkan Jewel 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 Balkan Jewel 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 J say that the Supplier did exactly that at the Time of Sale in a witness statement dated 22 August 2019[2]:

> *"The representatives advised that they could offer us another investment at a [sic] excellent price with a [sic] fractional points in a resort called the Balkan Jewel. This would give us a return on our money however, in the interim we could use the points to give us more flexibility and more holidays to choose from.*
>
> *Again, the fractional property would be sold, and we would have our investment money back and exit our timeshare product. The representatives advised that we would have the market price on this property and showed us a projection of the property prices increasing. We therefore believed this was a good investment."*

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

(1) *There were two aspects to their Balkan Jewel membership: holiday rights and a profit on the sale of the Allocated Property.*

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[2] This witness statement was not signed but was provided to our Service at the outset of the complaint, so I'm satisfied I'm able to rely on, and place weight on, its contents.

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

(3) *They were told by the Supplier that Balkan Jewel membership was the type of investment that would only increase in value.*

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 J'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 Balkan Jewel 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 Balkan Jewel membership. They just regulated how such products were marketed and sold.

To conclude, therefore, that Balkan Jewel membership was marketed or sold to Mr and Mrs J 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 Balkan Jewel 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 Balkan Jewel membership as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs J, 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 Balkan Jewel membership was not sold to Mr and Mrs J 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 J had ticked and signed to say they understood both of these points.

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And there are a number of strands to Mr and Mrs J's allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that Balkan Jewel membership was expressly described as an "investment" and (2) that Balkan Jewel 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 Balkan Jewel membership as an investment, i.e. told Mr and Mrs J or led them to believe during the marketing and/or sales process that Balkan Jewel 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 Balkan Jewel membership

This particular Supplier sold two similar types of membership at the same time. One was the Balkan Jewel fractional owner's club membership which was the type that Mr and Mrs J purchased at the Time of Sale. This was sold from 2012 to approximately October 2015. They also sold another version, simply called the Fractional Owners' Club which was sold from January 2013 to November 2015.

I've seen a variety of internal materials produced by the Supplier dating from around the time it started selling these products, along with witness statements from various staff members who worked for the Supplier commenting on the materials. These materials appear to relate to the Fractional Owners Club and it's not clear if they were ever intended to be directly relevant to the sale of Balkan Jewel Membership particularly since it isn't specifically mentioned within the materials. But nonetheless, it seems inherently unlikely that the sale of Balkan Jewel membership would have taken place in a materially different way to the sale of the Fractional Owners' Club, particularly since there was, at certain points, overlap with the two products being sold at the same time, and the similarities in the way the products worked. For example, they were both asset-backed with the net proceeds of the sale of the allocated properties split between the fractional owners at the end of the membership term.

I think, in general, these materials indicate that the Supplier was concerned, at a senior level, to avoid breaching Regulation 14(3). For example, I've seen copies of Sales Policies which warned staff that promoting the product as an investment, or discussing resale values with potential purchasers, was considered unacceptable. I've also seen evidence that the Supplier did not consider promoting the residual value of the Allocated Property to be a part of its sales strategy. The documents I've seen indicate that the Supplier's management considered the strategy should be to market the product as something that could be used to go on holiday, but with a shorter term than other types of membership it offered.

On the other hand, it's apparent from the materials I've seen that the Supplier was aware that the sale of the fractional asset at the end of the term was a benefit to a potential purchaser. For example, I've seen presentation slides dating from September 2012 which, in my view, implied that the Supplier's brand and other positive attributes would contribute to enhancing the value of the fractional asset at the end of the membership term. I'm aware that the Supplier now denies that these slides were ever used to sell the Fractional Club to potential customers. But based on the communications this Service received from the Supplier at the time these slides first came to light, it's apparent that there were employees of the Supplier who had differing recollections of how the slides were used. And, the Supplier has not, to my knowledge, denied the slides were ever used to train staff, only denied that they were shown to potential customers. So, if the Supplier's sales staff were trained that the Supplier's brand and other positive attributes would enhance the value of the Allocated Property when it came to being sold, it follows that the risk of this idea being passed to prospective customers was increased.

Additionally, I'm aware of other materials from the Supplier which show the possibility that different materials were used in different ways by different sales teams. And, that it's possible sales representatives created their own documents to assist in explaining how the products worked. For example, some of the Supplier's documentation includes a 'Fractional Sales Logic – 2013' document. This document provided a comparison between fractional ownership and owning a holiday home, and included advice to sales agents about what they should tell consumers, including the phrase 'real estate' and 'the fractions should be compared to the purchase of a second home'.

Our Service has asked for the Supplier's comments on this document (and others) previously and they provided further witness statements from staff members about how they were used.

I note that in relation to the 'Fractional Sales Logic – 2013' document, one of the Supplier's staff members has said this was developed by an individual ('JA') who was a sales representative in Spain. And, that it wasn't used as a training document and wasn't used in sales presentations. They've also said JA wasn't part of the team responsible for developing the formal documentation to be used in training or sales presentations. But this doesn't explain why a sales representative would develop such a document with that being the case

or provide any assurance that the document wasn't shared at least informally with other sales representatives, for example. The Supplier has only said that JA had been "trying to be helpful". As noted above, the document provides a comparison between fractional ownership and owning a holiday home including advice to sales representatives about what they should tell consumers including the phrase "real estate" and "the fractions should be compared to the purchase of a second home". I think this demonstrates that there was a risk that sales representatives could and would draw such comparisons, despite any training they may have been given not to – such that the governance principles and paperwork might not have been quite enough to mitigate this.

I can't be certain of what was shown to Mr and Mrs J during their sales process, or what specifically any sales representative may have said to them, any more than the Supplier or Lender can. But I think what I've outlined above highlights that there was the potential for the Balkan Jewel product to be sold in a way which did not accord with the Supplier's official policy. And I don't think the Supplier would have needed to deviate very far from a simple description of how the product worked in terms of the sale of the fractional asset at the end of the term to have fallen foul of 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)).'[3] *And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.*

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

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

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

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

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

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

I think it’s also important here to consider the circumstances of the sale. Mr and Mrs J had been customers of the Supplier since 2007 and had purchased other types of timeshare membership in Florida. According to their witness statement, by 2014 they had grown tired of the long flights to their Florida timeshare and so, in September of that year they made their first fractional purchase, trading in their existing Florida timeshare to purchase 8,000 points in the Supplier’s aforementioned Fractional Owners Club. So, they already had an existing fractional membership, and their purchase of the Balkan Jewel membership in 2015 was entirely separate and new i.e. they didn’t trade in any existing membership towards it. And, neither membership gave them any rights to stay in the relevant Allocated Properties.

So, the benefits to the product could only realistically be the holidays it offered and the investment element. And, rather than upgrading their existing fractional product, they made another separate purchase meaning they then had the right to the net sale proceeds from the sale of two Allocated Properties rather than one. So, it seems likely to me, given this set of particular facts, that the Supplier would have focused on that benefit when making their further purchase.

And, this is what comes across in Mr and Mrs J’s testimony, saying the selling points for them on the day was that they’d have more points, thus allowing them more holidays to choose from, but only “in the interim” until their investment was realised.

So, overall, when I consider the evidence as a whole, and in combination with the circumstances of what happened, which in my view adds credence to the allegation made, I don’t find them either implausible or hard to believe when they say they were told that by buying fractional points, this would give them ‘a return on their money’ and that they would ‘have their investment money back’. And, that they would receive ‘the market price’ of the property, and that because they were shown ‘a projection of property prices increasing’ they believed it was ‘a good investment’. On the contrary, given what I’ve seen so far, I think that’s likely to be what Mr and Mrs J were led by the Supplier to believe at the relevant time.

So, I think it’s more likely than not that the Supplier strayed from simply describing how the product worked and either stated or implied to Mr and Mrs J that by purchasing, they would or could make a financial gain i.e. a profit. And, I therefore think at the Time of Sale, 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 Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr and Mrs J 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 J 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 J, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On my reading of Mr and Mrs J's testimony, the prospect of a financial gain from Balkan Jewel membership 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 demonstrates that they quite clearly were. And that is not surprising given the nature of the product at the centre of this complaint.

But again, I note that their own testimony suggests that the prospect of holidays and the potential of a profit from the sale of the Allocated Property were very much wrapped up together in the sense that the holidays are simply what they would have 'in the interim' until

their investment was realised. And while I acknowledge that Mr and Mrs J have described unhappiness with booking holidays, they've also raised concerns about the sales process of the Allocated Property i.e. the investment element of the product. And again, with this purchase, Mr and Mrs J weren't simply buying more holiday rights and the right to the net sale proceeds of a new Allocated Property. Rather they were buying more holiday rights and another Allocated Property, suggesting, as they've said, they bought it as 'another investment' in addition to the one they had already purchased in 2014.

As Mr and Mrs J say (plausibly in my view) that Balkan Jewel membership was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit, as that share was one of the defining features of membership that marked it apart from the more 'standard' type of timeshare available to them, which they had held previously.

Mr and Mrs J 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 Balkan Jewel 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 Balkan Jewel Membership, I'm not persuaded that they would have pressed ahead with their purchase regardless.

And with all of 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 J under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint.

Fair Compensation

Having found that Mr and Mrs J would not have agreed to purchase Balkan Jewel 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 Balkan Jewel membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr and Mrs J agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

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

(1) The Lender should refund Mr and Mrs J'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 annual management charges Mr and Mrs J paid as a result of Balkan Jewel membership.
(3) The Lender can deduct

i. *The value of any promotional giveaways that Mr and Mrs J used or took advantage of; and*
ii. *The market value of the holidays* Mr and Mrs J took using their Balkan Jewel points.*

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

*(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 J's credit files in connection with the Credit Agreement reported within six years of this decision.
(6) If Mr and Mrs J's Balkan Jewel 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 Balkan Jewel 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 J took using their Balkan Jewel points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.*

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

Responses to my PD

The PR responded to the PD and confirmed that Mr and Mrs J agreed, without adding anything further.

The Lender disagreed. It argued that my PD was based on an error in my approach to the prohibition in Regulation 14(3) and my analysis of the evidence referred to in my PD. 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 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 J. The Supplier delivered extensive training to its staff to ensure that their fractional points clubs are not marketed or sold as investments to customers, none of which include language from which an investment promotion could be inferred.
- I should give weight to the judgment in *Gallagher v Diamond Resorts (Europe) Limited* (21 September 2021, unreported) where it was held that the sales representative had been trained as described by the witnesses in that case. And, that that training would have included a prohibition on selling membership as an investment in property.
- I didn't adequately consider the veracity of Mr and Mrs J'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 around four years after the Time of Sale but wasn't provided to the Lender until January 2024. The testimony is also brief and lacks sufficient detail. 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) Mrs J refers to herself with the wrong surname in the first line of their testimony, instead stating her surname as the same as Mr J's first name.

  (iii) The witness testimony isn't signed.

  (iv) Mr and Mrs J have provided little detail on who they spoke to and when certain discussions are alleged to have taken place. They've also 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.

  (v) The testimony does not include the full background to Mr and Mrs J's purchase history which is integral in understanding their experience and understanding of how timeshare products work and are sold.

  (vi) They believe Mr and Mrs J made their purchase for the following reasons:

    - They 'liked the fractional product';
    - They were tired of 'taking long haul holidays to their Florida timeshare';
    - They were interested in 'a deal on one of the properties in sunset view'; and
    - They were interested in the exclusivity to members and the availability.

  (vii) Mr and Mrs J used the product a number of times and stopped doing so around a year prior to submitting their complaint. The testimony does not explain why they continued to use the product until they complained.

  (viii) It's incorrect for them to suggest that they struggled to book accommodation. Their allegations lack detail and in any event, availability of accommodation is

not unlimited, particularly at certain times of year such as school holidays.

(ix) 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 are both unclear about the details of the sale and are contradicted by the sales documentation.

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 J'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 Balkan Jewel 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 J'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 Balkan Jewel 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 Balkan Jewel 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 Balkan Jewel membership without breaching the relevant prohibition in Regulation 14(3). For example, simply telling a prospective customer very factually that Balkan Jewel 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 Balkan Jewel 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).[4]

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 J 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 J 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 Balkan Jewel membership as an 'investment' or giving any indication of the likely financial return. And, as the Lender has pointed out, Mr and Mrs J 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 J, 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 Balkan Jewel membership as an investment in the way I set out in my PD.

I've considered the additional evidence the Lender referred me to in relation to the Supplier's sales process, the majority of which I was already aware of and considered in reaching my provisional conclusions, since they've already been provided to our Service in relation to other, similar complaints.

These include a general statement by the Supplier in respect of the PD, a witness statement made by one of the Supplier's members of staff ('SC') commenting on the September 2012 slides previously referred to as well as witness statements from other members of the Supplier's staff commenting on how staff were trained. And, the Lender has also provided copies of the 'standard operating procedure' documents signed in 2013 by the sales representative and sales manager for Mr and Mrs J's sale.

I think it's important to highlight again here that the materials available relate to the Supplier's Fractional Owners Club membership, and as I've said before, it's not clear if they were ever intended to be directly relevant to the sale of Balkan Jewel membership, particularly since it isn't specifically mentioned within the materials. But nonetheless, for the reasons I gave in my PD, it still seems inherently unlikely that the sale of Balkan Jewel membership would have taken place in a materially different way to the sale of the Fractional Owners' Club. Neither the Lender nor the Supplier has disputed this in their response.

And again, I don't have specific details here as to how the Supplier normally sold its products or specific details about Mr and Mrs J's particular sale. So, while the additional evidence the Lender and Supplier have referred to, such as the witness statements from other staff members, 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

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

information about Mr and Mrs J'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.

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

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

> "*The Power Point was dated 14 September 2012 (which was a couple of months before we started selling Fractional points).*
>
> *I am advised that this Power Point was used as a training tool for our sales reps. I am also advised that the Power Point was converted into an A1 size flip presenter (and that the pages were laminated) and that this was used by sales team members as a sales aide*".

SC then went on to describe conversations she'd had with a sales manager ("AS") based at a site called 'Pine Lake' in the UK, about what materials had been used to assist with sales of the fractional product, but it's unclear if AS was also the person who had originally advised SC of how the September 2012 slides had been used by the Supplier. The Supplier has suggested it wasn't AS because they've confirmed they've never seen the slides in question. But they haven't said who did advise SC of this, so again, this remains unclear.

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

I think it's possible for both accounts to be at least partially accurate. I note the Supplier had multiple sites in different countries through which it conducted sales of the fractional product. This includes sites abroad such as the site at which Mr and Mrs J had purchased their Balkan Jewel membership in May 2015. It is therefore possible that different materials were used in different ways at different sites by different sales teams.

I note SC does not say in her witness statement that the slides were never used in training – she refers to them not having been used to sell the fractional product to customers. Although, I note that the Supplier has now said (with reference to a witness statement from another staff member), that the slides were also not used to train staff.

But, as I said in my PD, based on the communications this Service received from the Supplier at the time these slides first came to light, it's apparent that there were employees of the Supplier who had differing recollections of how the slides were used. So, I think it remains plausible, notwithstanding the witness statements referred to, that the September 2012 slides were used in some capacity within the Supplier's business.

I also explained in my PD that I'd also seen other materials which indicated that sales representatives may have drawn comparisons between memberships like Balkan Jewel and owning a holiday home, including phrases such as "real estate". And I still think this demonstrates that there was a risk that sales representatives could and would draw such comparisons, despite any training they may have been given not to – such that the governance principles and paperwork (referred to by the Lender and Supplier in their responses here) might not have been quite enough to mitigate this.

And I think this all serves to illustrate the point that different materials may have been used in different ways, at different times, in different places. So, as I explained in my PD, while I can't be certain of what was shown to Mr and Mrs J during their sales process, or what specifically any sales representative may have said to them (any more than the Lender or Supplier can), I think what I've outlined above and in my PD shows that there was the potential for the Balkan Jewel Product to be sold in a way which did not accord with the Supplier's official policy. And, as I've already said, I don't think the Supplier would have needed to deviate very far from a simple description of how the product worked in terms of the sale of the fractional asset at the end of the term to have fallen foul of Regulation 14(3).

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

Ultimately, however, I don't think the outcome of this complaint turns on how the September 2012 slides, or these other documents were used. And that's because I think Mr and Mrs J's own testimony is sufficient evidence that, at least on the specific occasion the Supplier sold them Balkan Jewel membership, it went beyond simply describing how the sale of the Allocated Property worked, and strayed into discussion of the financial return they would receive, including that they would get '*a return on their money*' and that they would '*have their investment money back*'. As I noted in my PD, Mr and Mrs J said they were told they would receive '*the market price of the property*', and that because they were shown '*a projection of property prices increasing*', they believed it was '*a good investment*'. I also highlighted in my PD how the nature of the purchase contributed to my findings about how the Supplier had likely marketed the product to Mr and Mrs J, and also their motivations for going ahead with it (which I've addressed further below).

So, if it is the case that the Supplier did market Balkan Jewel membership to Mr and Mrs J in the way they've described, then in my view, this would have fallen foul of the prohibition on marketing or selling timeshares as an investment. And as I've said, I am persuaded by Mr and Mrs J's testimony that the product was sold to them as an investment, 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 Balkan Jewel membership to Mr and Mrs J.

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

Mr and Mrs J's evidence

I have read and considered the Lender's (and Supplier's) concerns about Mr and Mrs J'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 J's testimony or the original Letter of Complaint, or both, are not representative of Mr and Mrs J's concerns about how the Supplier sold Balkan Jewel membership to them.

As outlined in my PD, Mr and Mrs J provided a witness statement setting out their memories of what happened. I don't agree with the Lender and Supplier when they suggest 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 J 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 March 2021. So, while I acknowledge that the PR was involved in Mr and Mrs J making their complaint and recorded what Mr and Mrs J 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 August 2019, sets out Mr and Mrs J's actual memories and is specific to their particular sale.

The Lender (and Supplier) have said that the witness statement was drafted around four years from the Time of Sale and therefore is unlikely to be accurate. While I acknowledge that memories can fade over time, I don't think the date of the testimony in and of itself is sufficient reason to completely disregard what they've had to say in the way the Lender and Supplier suggest. I've been mindful of the passage of time and of any inconsistencies in their testimony and for the reasons I've explained (including those in my PD), I'm satisfied I can rely, and place weight, on their testimony.

In terms of the other points the Lender (and Supplier) has made, I don't consider these to be particularly relevant to whether Mr and Mrs J'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 or with Mr and Mrs J's allegations regarding a lack of availability. I agree with the Lender that it's important to consider the testimony provided as a whole (which I did in my PD and have done so again here). But ultimately, the points they've raised here are completely separate than whether the 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 the Supplier thinks they may have bought other memberships previously – 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 J's previous purchases and have considered this wider context when reaching my decision.

I also don't see the relevance of Mr and Mrs J 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.

Lastly, the Lender has highlighted that in the first line of the testimony provided, Mrs J referred to herself by the wrong name. But, she used the correct first name for herself and Mr J, and the surname she used for herself was the same as Mr J's first name. So, I think it's clear this is likely simply a typographic error and is not 'significant' in the way the Lender (and Supplier) has suggested, such as to undermine the rest of what they've had to say.

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.

The Lender suggests they think Mr and Mrs J made the purchase for the following reasons:

- They liked the fractional product
- They were tired of taking long haul holidays to their Florida timeshare
- They were interested in a deal on one of the properties in one of the Supplier's resorts
- They were interested in the exclusivity to members and the availability

But, I don't think the fact that Mr and Mrs J liked the product gives any indication as to their motivations for purchase – they could have liked the product for any number of different reasons.

In relation to being tired of taking long haul flights to their previous Florida timeshare and being interested in a deal on one of the properties in one of the Supplier's resorts, as I explained in my PD, these are comments Mr and Mrs J made in relation to their previous fractional purchase in 2014, not this purchase that is the subject of this complaint.

In my PD, I explained that Mr and Mrs J already had an existing membership at the Time of Sale which was the Supplier's other, similar product – the Fractional Owners Club. And, that their purchase that is the subject of this complaint was entirely new and separate i.e. they didn't trade in any existing membership towards it. So, this meant they had the right to the net sale proceeds from the sale of two Allocated Properties rather than one. And I thought this therefore lent credence to what Mr and Mrs J had to say in their testimony.

The Supplier has said this is incorrect and I've misunderstood the nature of the product. They've explained that if Mr and Mrs J had chosen to purchase additional points in the Fractional Owners Club rather than Balkan Jewel, they would have been allocated an interest in a second allocated property.

But I don't agree with the Supplier's point here and I think they've misunderstood the point I was making. It is a fact that as they didn't trade in their existing Fractional Owners Club membership towards the purchase in question here, Mr and Mrs J were (and are) entitled to the net sale proceeds from the sale of two different Allocated Properties – one for their Fractional Owners Club membership and one for their Balkan Jewel membership, with both memberships running concurrently. I agree with the Supplier where they say that if a consumer simply purchased additional points in the Fractional Owners Club, usually by 'trading in' their existing membership and therefore 'upgrading' their existing agreement, a consumer would simply be assigned a new Allocated Property, giving up any rights they had in relation to the old one. But as I've already explained, that isn't what happened here. So again, for the above reasons and those I already explained in my PD, I still think the circumstances of the sale lend credence to what Mr and Mrs J have had to say in their testimony i.e. that as a result of how the salesperson sold them the Balkan Jewel membership at the Time of Sale, they considered that they were purchasing another investment in addition to the one they had already purchased in 2014.

The Lender and Supplier's other points suggest they think Mr and Mrs J were interested in holidays. For example, the Supplier has highlighted that purchasing Balkan Jewel points was cheaper than purchasing additional Fractional Owners Club points. But I already acknowledged Mr and Mrs J's likely interest in holidays in my PD. And I don't think the Lender (or Supplier) has taken sufficient account of the following paragraphs of my PD where I said:

> "*On my reading of Mr and Mrs J's testimony, the prospect of a financial gain from Balkan Jewel membership 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 demonstrates that they quite clearly were. And that is not surprising given the nature of the product at the centre of this complaint.*
>
> *But again, I note that their own testimony suggests that the prospect of holidays and the potential of a profit from the sale of the Allocated Property were very much wrapped up together in the sense that the holidays are simply what they would have 'in the interim' until their investment was realised. And while I acknowledge that Mr*

and Mrs J have described unhappiness with booking holidays, they've also raised concerns about the sales process of the Allocated Property i.e. the investment element of the product. And again, with this purchase, Mr and Mrs J weren't simply buying more holiday rights and the right to the net sale proceeds of a new Allocated Property. Rather they were buying more holiday rights and another Allocated Property, suggesting, as they've said, they bought it as 'another investment' in addition to the one they had already purchased in 2014.

As Mr and Mrs J say (plausibly in my view) that Balkan Jewel membership was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit, as that share was one of the defining features of membership that marked it apart from the more 'standard' type of timeshare available to them, which they had held previously.

Mr and Mrs J 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 Balkan Jewel 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 Balkan Jewel Membership, I'm not persuaded that they would have pressed ahead with their purchase regardless.

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

In conclusion, it remains my view that the evidence suggests that Balkan Jewel membership being marketed to Mr and Mrs J as an investment was a material part of their purchasing decision.

Lastly, I disagree with the Supplier's suggestion that I have applied the wrong test when determining if the credit relationship was unfair. As they've suggested, 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 J's purchasing decision. But that is what I did in my PD and have done again here. To repeat - it remains my view that the evidence suggests that Balkan Jewel membership being marketed to Mr and Mrs J as an investment was a material part of their purchasing decision.

Other matters

Lastly, I have read and considered the judgments in *Gallagher v Diamond Resorts (Europe) Limited* (21 September 2021, unreported) and *Brown v Shawbrook Bank Limited* (18 June 2021, unreported). However, those cases were decided by the judge on their own facts and circumstances, and it does not change my own findings that, on balance, Mr and Mrs J's sale did breach Regulation 14(3).

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

Conclusion

Ultimately, having considered everything, I have seen no good reason to depart from the findings and conclusions I reached in my PD. I therefore remain satisfied that the Lender

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

Fair Compensation

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 J would not have agreed to purchase Balkan Jewel 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 Balkan Jewel membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr and Mrs J agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

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

(1) The Lender should refund Mr and Mrs J'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 annual management charges Mr and Mrs J paid as a result of Balkan Jewel membership.
(3) The Lender can deduct

    i. The value of any promotional giveaways that Mr and Mrs J used or took advantage of; and
    ii. The market value of the holidays* Mr and Mrs J took using their Balkan Jewel points.

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

(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 J's credit files in connection with the Credit Agreement reported within six years of this decision.
(6) If Mr and Mrs J's Balkan Jewel 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 Balkan Jewel 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 J took using their Balkan Jewel points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement

seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

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

My final decision

I uphold Mr and Mrs J'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 Mrs J and Mr J to accept or reject my decision before 26 June 2025.

Fiona Mallinson
Ombudsman