DRN-5575753

The complaint

Ms F has recently reverted to using her maiden name. So, I will refer to her as Ms F throughout this decision, whereas I previously referred to her as Mrs W.

Ms F and Mr W'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

In April 2015, Ms F and Mr W purchased a Trial Membership from a timeshare provider (the 'Supplier'), for which they paid £3,995 using a loan. This loan was provided by a different lender and the trial membership is not the subject of this complaint.

2015 Balkan Jewel Fractional Club membership ('Balkan Jewel membership')

While on holiday with the Supplier using their Trial Membership, Ms F and Mr W upgraded from their Trial Membership by purchasing Balkan Jewel membership on 5 November 2015 (the 'Time of Sale'). They entered into an agreement with the Supplier (the 'Purchase Agreement') to buy 10,000 fractional points at a cost of £15,099.

Balkan Jewel membership was asset backed – which meant it gave Ms F and Mr W 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 – the 'sale date' of the property being shown on the Purchase Agreement as 31 December 2029.

Ms F and Mr W paid for their Balkan Jewel membership by trading in their Trial Membership at a value of £3,995 and taking finance of £13,791.70 from the Lender in both their names (the 'Credit Agreement'), which was used to pay the remaining £11,104 of the purchase price and consolidate the outstanding amount of the Trial Membership loan.

2016 European Collection membership

In November 2016, Ms F and Mr W purchased a European Collection membership from the Supplier, giving them a further 5,500 annual holiday points at a cost of £6,655.00. This provided them with additional holiday points to use with the Supplier. The European Collection points worked in the same way as Fractional Points, but European Collection membership gave them no additional rights to the sale proceeds of any property.

Ms F and Mr W took out a further loan with the Lender, which was used to purchase the European Collection membership and pay off the outstanding amount on the Credit Agreement.

Ms F and Mr W's Complaint

Ms F and Mr W – using a professional representative (the 'PR') – wrote to the Lender on 17 March 2020 (the 'Letter of Complaint') to complain about misrepresentations by the Supplier and that Ms F and Mr W's relationship with the Lender was unfair on them due to the Supplier's making the following misrepresentations:

On purchasing Balkan Jewel membership at Time of Sale 1:

1. Ms F and Mr W would have access to a "Canadian Rockies Railway" holiday which they could easily book using their fractional points.

2. The fractional points were a financial investment.

On purchasing the European Collection membership at Time of Sale 2:

1. Purchasing additional points would solve the problems Ms F and Mr W had been having with booking holidays using the fractional points.

2. Maintenance fees would not increase that much.

The Letter of complaint also said that there were unfair terms in the contract and that the Supplier "breached" Regulation 5 of the Consumer Protection from Unfair Trading Regulations ('CPUT').

The Lender's response to the complaint

The Lender dealt with Ms F and Mr W's concerns as a complaint and issued its final response letter on 13 April 2021, rejecting it on every ground.

Referral to the Financial Ombudsman Service and our Investigator's assessment

Ms F and Mr W 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 in relation to the Balkan Jewel membership only.

The Investigator thought that the Supplier had marketed and sold Balkan Jewel membership as an investment to Ms F and Mr W at the Time of Sale in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'). And given the impact of that breach on their purchasing decision, the Investigator concluded that the credit relationship between the Lender and Ms F and Mr W was rendered unfair to them for the purposes of section 140A of The Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) (the 'CCA').

The Investigator didn't uphold the complaint in relation to European Collection Membership, since they were not persuaded that there had been a misrepresentation by the Supplier nor an unfair relationship created.

Responses to our Investigator's assessment

Ms F and Mr W's PR said they would accept this outcome, so the only outstanding part of the complaint that I must decide is in relation to the Credit Agreement that arose from the Balkan Jewel Membership.

The Lender disagreed with the Investigator's assessment in relation to the Fractional Club membership and asked for an Ombudsman's decision. In summary, the Lender said:

- Ms F and Mr W's recollection of the trial sale was inaccurate since they wouldn't have been given so much champagne and wouldn't have been allowed to sign anything if intoxicated.

- The notes from the next day's quality assurance follow-up discussion said the following, indicating the reason they purchased Fractional Club membership was for a higher standard of holidays:

    - *"Trading in trial for fractional [points] for quality of [accommodation]. Total amount [Shawbrook Bank finance] [consolidation loan], aware not to [cancel] off original [Direct Debit] mandate until [consolidation loan] gone [through]. Purchase funded by joint salaries. [Annual management fees] covered and confirmed affordable. During preview week holiday they agree to attend presentation about full membership.*

- Balkan Jewel membership Included significant accommodation entitlement which they didn't have as part of their trial membership.

- 10,000 fractional points gave access to hundreds of resorts with the Supplier, and thousands more through affiliates. Although the sale of property at the end of the term would've been explained, Ms F and Mr W's holiday usage and the associated benefits of being members was the primary focus of the presentation.

- The witness statement repeatedly refers to Ms F and Mr W's interest in securing better holidays (such as a cruise which they took in 2018) in more popular higher peak times of year.

- Ms F and Mr W signed a number of documents making clear Balkan Jewel membership should not be viewed as a property or financial investment.

- Ms F and Mr W's witness statement says they didn't read the paperwork, and it was not explained to them. However, the Supplier had a strict quality assurance process where someone from a separate team takes customers through all of the documentation the next day.

- There is no evidence in the sales material that indicates the Balkan Jewel membership was sold or marketed as an investment. So, it is unlikely that the representative described it in that way.

Because the Lender has requested an ombudsman's decision, the complaint was passed to me.

My Provisional Decision

I issued a provisional decision saying that I was planning to uphold this complaint. I explained my reasons for this (my provisional findings are copied below in the section titled *"What I've decided – and why")* and what I thought should happen to put things right. And I gave the Lender and Ms F and Mr W an opportunity to respond before I made this final decision.

The PR responded on behalf of Ms F and Mr W to say that they agreed with my provisional decision.

The Lender's response

The Lender responded to say that it disagreed with my provisional decision. In summary it said:

1. Ms F and Mr W's witness testimony is vague, brief, inconsistent and includes factual inaccuracies which distort the events surrounding the sale. The Lender questions the reliability of the testimony because:

    a. Ms F and Mr W's actions are inconsistent with their testimony, in that they never enquired with the Supplier about what would happen to their Balkan Jewel membership and any profit when the Allocated Property is sold.

    b. Ms F and Mr W's motivations for the purchase were five-star accommodation and holidays in spectacular resorts, wonderful holidays at a fraction of the costs, and taking certain holidays mentioned in the testimony. The Ombudsman finds that Ms F and Mr W were motivated by the prospect of a financial gain from Balkan Jewel membership, but Ms F and Mr W have only made a vague and brief reference to it being an investment.

    c. Ms F and Mr W's claims are not substantiated. Their allegation of a breach of Regulation 14(3) of the Timeshare Regulations lacks detail and is generic, with no information or clarity on how it was allegedly sold as an investment (for example what information they were given about the likely return or mechanisms of how the agreement works) which suggests their recollections are incorrect. The notes made by the Supplier during and after the sale do not reference a financial investment or anything that can be construed as an investment.

    d. Ms F and Mr W's testimony includes factual inaccuracies and was prepared for them by the PR rather than it being their own recollections. The Lender alleges that the PR has manufactured the witness testimony using a templated format and that Ms F and Mr W, with the help of the PR, have attempted to assert a negative experience between them and the Supplier.

    e. The testimony and Letter of Complaint include factual inaccuracies which call into question the veracity and reliability of Ms F and Mr W's recollections, including:

        i. Being given champagne which they drank during the presentation when they purchased Trial Membership. But the Supplier says it was not its policy or procedure to provide alcohol during presentations and its Quality Assurance representative would not have allowed them to complete the purchase while intoxicated. In that instance the

compliance meeting was on the next day, giving them sufficient time to withdraw from the purchase.

ii. Ms F and Mr W allege one of the reasons they purchased was due to the offer of a Canadian Rockies Railway holiday. But the Supplier says Ms F and Mr W would've been given a brochure showing the destinations in its portfolio including via affiliates, and such a holiday is not present in the brochure from the Time of Sale.

iii. Ms F and Mr W say they weren't told about additional costs of booking through affiliates, but the Supplier says such costs were made clear to customers in booking materials.

iv. Ms F and Mr W say they enquired with the Supplier about the Canadian Rockies and Fjord Cruise holidays. But the Supplier says they have no record of this. Ms F and Mr W never complained to the Supplier about being unable to take these holidays. But this inaccurate information attempts to put a negative light on their experience with the Supplier.

v. Ms F and Mr W says they had problems with booking but the Supplier has no record of them being unable to secure their requested bookings. They did not complain about this to the Supplier.

vi. Ms F and Mr W made regular use of the Fractional Points to take holidays until 2019.

vii. The Letter of Complaint says Ms F and Mr W did not receive what they were promised regarding the standard of holidays, but they never complained to the Supplier about this, which the Lender would expect someone to do if there was an issue.

viii. Ms F and Mr W say they were told the maintenance fees would be low, were not fully explained to them and have spiralled out of control. But the fees are shown in the purchase documents, which Ms F and Mr W signed and ticked. The sales process involved the Supplier informing Ms F and Mr W of the current management fee and that they would increase each year.

ix. Ms F and Mr W have not explained why they did not cancel the purchase within the 14-day withdrawal period.

f. The Ombudsman should place more weight on the contemporaneous documents from the Time of Sale, which are more reliable than Ms F and Mr W's testimony. It is not credible that Ms F and Mr W were informed Balkan Jewel membership was a financial investment.

2. The Ombudsman conflates the meaning of a "return on investment" (a measure of profit) with some money being "returned" on the sale of the Allocated Property (which has no connotation of investment or profit). And that the Ombudsman has concluded that there was a breach of Regulation 14(3) merely because Balkan Jewel membership offered the prospect of a financial return. Whereas the definition of investment stated in the Provisional Decision requires both the finding of a representation by the seller that the reason, or significant reason, for a customer to purchase the product was the prospect of financial gain/profit, together with a

corresponding financial gain/profit motive on the part of the customer. If this were to be an "investment" then surely Mr & Mrs W would have been informed of the return, but they have not mentioned this happening.

a. The sales documents are unobjectionable and do not show there to be a breach of Regulation 14(3).

3. The Ombudsman has applied the incorrect legal test in determining whether the credit relationship was unfair. He should have considered whether any breach of Regulation 14(3) had a material impact on Ms F and Mr W's decision to enter into the purchase. But the Ombudsman appears to reverse the burden of proof, by starting from the position that the prospect of a financial gain existed but this was not insignificant enough for it not to render the relationship unfair.

The Lender also provided the comments of the Supplier, which included the following:

1. Upgrading from Trial Membership (which included four week's holidays over four years at a limited selection of resorts) to Balkan Jewel membership gave Ms F and Mr W access to the Supplier's full portfolio of holiday resorts and points to spend each year of their membership.

2. The Provisional Decision did not mention some evidence previously provided by the Supplier to the Financial Ombudsman Service which was intended to illustrate the Supplier's sales processes and procedures. This included:

a. Witness statements from various employees including from:

i. SC – an in-house solicitor who was heavily involved in the compliance documentation for the sale of the Supplier's products – which the Supplier says is important in illustrating the approach it took to its compliance responsibilities and how that fed down into the sales processes and procedures.

ii. RW – European Sales and Marketing Operations Director – the Supplier says this provides significant detail as to the sales and marketing processes and discussion which usually took place between the sales and Quality Assurance team and customers, as well as the training of team members and how this sought to prevent the sale of timeshares as an investment.

iii. PP – a sales representative

iv. GH – a third party sales manager.

v. NB – Sales Director.

b. Sales and Training Manual which states, *"it is forbidden when selling to our guests to discuss eventual values or returns"* and includes a section where team members do an exercise which asks, *"Why do you think it is impotant never to present the Fractional ownership club as an investment?"*.

c. Policy and Procedure document, which states:

i. *"[The Supplier] does not represent vacation ownership as an investment."*

ii. *"[The Supplier] international® does not have a buyback program or resale department."*

iii. *"With regards to the presentation of the Fractional product:*
Sales Team members will not represent the Fractional product as an investment,

Sales Team members will not discuss any predictions with regards to the residual value"

iv. *"If It is proven that the agent is pitching rental, investment, or buyback program/resale department the consequence will be mandatory termination."*

d. Standard Operating Procedure document signed by the salesperson involved in Ms F and Mr W's sale and their sales manager, acknowledging their awareness that they were prohibited from marketing or selling the Fractional product as an investment and that doing so would lead to disciplinary action including dismissal.

3. The Supplier said it does not and did not pay lip service to its compliance requirements and that it specifically trained its team members to be well aware of the prohibition on selling timeshares as an investment and to ensure they did not tell prospective customers (or to imply by discussing at all) the returns they might receive on sale of the Allocated Property. The Supplier pointed to the comments of the judges in *Brown v Shawbrook Bank Limited* (18 June 2020, County Court at Wrexham) *and Gallagher v Diamond Resorts (Europe) Limited (9 February 2021, County Court at Preston)*, which said:

"'The evidence provided and the evidence I heard (which was unshaken, in my judgment) was that [the Supplier] as a company take their responsibilities in relation to documentation, selling, quality assurance and compliance very seriously."
Brown v Shawbrook Bank Limited

And:

""Whilst [the Supplier] was unable to produce the training materials that were likely to have been used to train [the salesperson] … the Court is satisfied that she was trained as described by the witnesses. Moreover, that the training would have included a prohibition upon selling [Fractional Owners Club] as an investment. In the circumstances, it is unlikely that [the salesperson] would have described [Fractional Owners Club] as an investment in property."
Gallagher v Diamond Resorts (Europe) Limited

I have considered the Lender's and the Supplier's additional comments and submissions when reaching my final decision. And I discuss these further below in the section titled *"My additional findings"*.

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.

The legal and regulatory context that I think is relevant to this complaint is set out below and forms part of this decision.

The Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) (the 'CCA')

The timeshare(s) at the centre of the complaint in question was/were paid for using restricted-use credit that was regulated by the Consumer Credit Act 1974. As a result, the purchase(s) was/were covered by certain protections afforded to consumers by the CCA provided the necessary conditions were and are met. The most relevant sections as at the relevant time(s) are below.

Section 56: Antecedent Negotiations
Section 75: Liability of Creditor for Breaches by a Supplier
Sections 140A: Unfair Relationships Between Creditors and Debtors
Section 140B: Powers of Court in Relation to Unfair Relationships
Section 140C: Interpretation of Sections 140A and 140B

Case Law on Section 140A

Of particular relevance to the complaint in question are:

1. The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') remains the leading case.

2. The judgment of the Court of Appeal in the case of *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')* sets out a helpful interpretation of the deemed agency and unfair relationship provisions of the CCA.

3. *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*') – in which the High Court held 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 relationship or otherwise the date the relationship ended.

4. The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*') – which approved the High Court's judgment in *Patel*.

5. *Deutsche Bank (Suisse) SA v Khan and others* [2013] EWHC 482 (Comm) – in Hamblen J summarised – at paragraph 346 – some of the general principles that apply to the application of the unfair relationship test.

6. *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').

7. *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').

8. *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*').

My Understanding of the Law on the Unfair Relationship Provisions

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."*

So, the negotiations conducted by the Supplier during the sale of the timeshare(s) in question was/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 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.

<u>The Law on Misrepresentation</u>

The law relating to **misrepresentation** is a combination of the common law, equity and statute – though, as I understand it, the Misrepresentation Act 1967 didn't alter the rules as to what constitutes an effective misrepresentation. It isn't practical to cover the law on misrepresentation in full in this decision – nor is it necessary. But, summarising the relevant pages in *Chitty on Contracts (33rd Edition)*, a material and actionable misrepresentation is an untrue statement of existing fact or law made by one party (or his agent for the purposes of passing on the representation, acting within the scope of his authority) to another party that induced that party to enter into a contract.

The misrepresentation doesn't need to be the only matter that induced the representee to enter into the contract. But the representee must have been materially influenced by the misrepresentation and (unless the misrepresentation was fraudulent or was known to be likely to influence the person to whom it was made) the misrepresentation must be such that it would affect the judgement of a reasonable person when deciding whether to enter into the contract and on what terms.

However, a mere statement of opinion, rather than fact or law, which proves to be unfounded, isn't a misrepresentation unless the opinion amounts to a statement of fact and it

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

can be proved that the person who gave it, did not hold it, or could not reasonably have held it. It also needs to be shown that the other party understood and relied on the implied factual misrepresentation.

Silence, subject to some exceptions, doesn't usually amount to a misrepresentation on its own as there is generally no duty to disclose facts which, if known, would affect a party's decision to enter a contract. And the courts aren't too ready to find an implied representation given the challenges acknowledged throughout case law.

The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations')

The relevant rules and regulations that the Supplier in this complaint had to follow were set out in the Timeshare Regulations. I'm not deciding – nor is it my role to decide – whether the Supplier (which isn't a respondent to this complaint) is liable for any breaches of these Regulations. But they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair. After all, they signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

The Regulations have been amended in places since the Time of Sale. So, I refer below to the most relevant regulations as they were at the time(s) in question:

- Regulation 12: Key Information
- Regulation 13: Completing the Standard Information Form
- Regulation 14: Marketing and Sales
- Regulation 15: Form of Contract
- Regulation 16: Obligations of Trader

The Timeshare Regulations were introduced to implement EC legislation, Directive 122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts (the '2008 Timeshare Directive'), with the purpose of achieving 'a high level of consumer protection' (Article 1 of the 2008 Timeshare Directive). The EC had deemed the 2008 Timeshare Directive necessary because the nature of timeshare products and the commercial practices that had grown up around their sale made it appropriate to pass specific and detailed legislation, going further than the existing and more general unfair trading practices legislation.[2]

The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations')

The CPUT Regulations put in place a regulatory framework to prevent business practices that were and are unfair to consumers. They have been amended in places since they were first introduced. And it's only since 1 October 2014 that they imposed civil liability for certain breaches – though not misleading omissions. But, again, I'm not deciding – nor is it my role to decide – whether the Supplier is liable for any breaches of these regulations. Instead, they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair as they also signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

Below are the most relevant regulations as they were at the relevant time(s):

- Regulation 3: Prohibition of Unfair Commercial Practices

[2] See Recital 9 in the Preamble to the 2008 Timeshare Directive.

- Regulation 5: Misleading Actions
- Regulation 6: Misleading Omissions
- Regulation 7: Aggressive Commercial Practices
- Schedule 1: Paragraphs 7 and 24

The Consumer Rights Act 2015 (the 'CRA')

The CRA, amongst other things, protects consumers against unfair terms in contracts. It applies to contracts entered into on or after 1 October 2015 – replacing the Unfair Terms in Consumer Contracts Regulations 1999.

Part 2 of the CRA is the most relevant section as at the relevant time(s).

County Court Cases on the Sale of Timeshares

1. *Hitachi v Topping* (20 June 2018, Country Court at Nottingham) – claim withdrawn following cross-examination of the claimant.
2. *Brown v Shawbrook Bank Limited* (18 June 2020, County Court at Wrexham).
3. *Wilson v Clydesdale Financial Services Limited* (19 July 2021, County Court at Portsmouth).
4. *Gallagher v Diamond Resorts (Europe) Limited* (9 February 2021, County Court at Preston).
5. *Prankard v Shawbrook Bank Limited* (8 October 2021, County Court at Cardiff)

Relevant Publications

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

What I've decided – and why

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

I have decided 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 Ms F and Mr W 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.

I have copied below my provisional findings, which form part of this final decision. Below that I discuss the Lender's response to my Provisional Decision and explain why I have decided not to depart from my provisional decision to uphold this complaint.

However, before I do that, 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 Ms F and Mr W complaint, it isn't necessary to make formal findings on all of them. This includes the allegation that the Supplier should have accepted and paid Ms F and Mr W's claim 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 Ms F and Mr W in the same or a better position than they would be if the redress was limited to misrepresentation.

START OF COPY OF MY PROVISIONAL FINDINGS

Ms F[3] and Mr W's recollection of the sale of Balkan Jewel membership

In their witness statement dated 5 February 2019 Ms F and Mr W provided a reasonable amount of detail including the resort where the sales meeting took place, certain details of what was discussed (whether they were enjoying their holiday, what types of holidays they could book if they upgraded to Balkan Jewel membership, the incentives they were offered) and that:

- *"Fractional was not just an investment in holidays, it was also a financial investment. We were told that we would receive a return and that we were investing in our future. We were told that there would be financial gain once the property was sold in 14 years. This was appealing because we would have something that was financially worthwhile."*

And:

- *"We genuinely believed that we were making a good financial investment whilst securing our future holidays."*

In my view, Ms F and Mr W's recollection suggests that the Supplier may have breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Balkan Jewel membership to Ms F and Mr W as an investment. If I am satisfied that it did so, this could mean that the credit relationship between them and the Lender was rendered unfair to them for the purposes of Section 140A of the CCA.

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

Having considered the entirety of the credit relationship between Ms F and Mr W and the Lender along with all of the circumstances of the complaint, I think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale.

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.

[3] In my Provisional Decision I referred to Ms F as Mrs W. But in the copy of my provisional findings here I have changed this to Ms F, given she has recently reverted to using her maiden name.

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 Ms F and Mr W 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 Ms F and Mr W'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 Ms F and Mr W say that the Supplier did exactly that at the Time of Sale – saying the following during the course of this complaint:

- *"Fractional was not just an investment in holidays, it was also a financial investment. We were told that we would receive a return and that we were investing in our future. We were told that there would be financial gain once the property was sold in 14 years. This was appealing because we would have something that was financially worthwhile."*

- *"We genuinely believed that we were making a good financial investment whilst securing our future holidays."*

Ms F and Mr W allege, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because they were told the Balkan Jewel membership was a financial investment for their futures that would lead to a financial gain when the Allocated Property is sold.

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.

Ms F and Mr W 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 Ms F and Mr W as an investment in breach of Regulation 14(3), I have to be persuaded that it is 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 Ms F and Mr W, 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 Ms F and Mr W as an investment.

The Purchase Agreement said:

> *"You should not purchase Your Diamond 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 Diamond Fractional Points at any time prior to the Sale Date in accordance with Rule 7 of the Rules of the Owners Club."*

The Customer Compliance Statement 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 recognize 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 that 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 Ms F and Mr W 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.

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 Ms F and Mr W 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

We have been provided with a number of documents relating to how the Supplier sold and marketed Fractional Property Owners Club (the 'Fractional Club'). This includes:

- Fractional Sales Logic 2013

- Fractions FAQ – early training document 2012
- Fractional Ownership Comparison
- Training Slides – September 2012
- Sales Representative Training Program – 2013
- June 2013 Sales Policy

Although the Supplier initially provided these documents to us to illustrate how it designed and sold Fractional Club membership, it has since told us that it was mistaken in doing so, suggesting we should not rely on them when deciding complaints relating to the sale of Fractional Club membership.

Given the relevance of these documents are in dispute I have decided in this instance to not rely upon them when reaching my decision. The Lender and Supplier have not provided alternative documents or evidence to illustrate how the Supplier sold and marketed Balkan Jewel membership at the Time of Sale. And in the absence of such evidence, I am left with what Ms F and Mr W have said about the sale and what the Lender and the Supplier have said about it in response to this complaint. I think this leaves open the possibility that the Supplier did sell or market Balkan Jewel membership as an investment at the Time of Sale.

Are Ms F and Mr W's recollections plausible and persuasive?

In all the circumstances of this complaint, I do find Ms F and Mr W's recollections to be plausible and persuasive in relation to the allegation that the Supplier sold and marketed Balkan Jewel membership to them as an investment at the Time of Sale. This is because:

- Their witness statement is dated 5 February 2019. This was before the Letter of Complaint was written on 17 March 2020. The Letter of Complaint incorporates some of what is said in the witness statement, and I am satisfied that the witness statement was written first.

- Their recollections include details that appear to be specific to them and has not been disputed by the Lender or the Supplier, such as where the sale presentation took place, the incentives they were offered and how long the whole sales process took.

In response to our Investigator's assessment the Lender questioned the accuracy of Ms F and Mr W's recollection in relation to the sale of the Trial Membership and how much alcohol was offered to them. But that was a different sale to the one I'm considering, and even if Ms F and Mr W misremembered a minor detail such as this, it would not necessarily mean that I should ignore or discount other parts of their recollections.

The Lender also provided evidence suggesting that Ms F and Mr W made the purchase because they wanted better quality accommodation. That is in line with their own recollections, as they say they were disappointed with the quality of accommodation they got on their first holiday after purchasing Trial Membership and that purchasing Balkan Jewel Membership was offered as a way to ensure they received better quality accommodation.

The Lender says that Ms F and Mr W's recollections repeatedly refer to their interest in securing better holidays. But I do not think that precludes them having multiple reasons for entering into the purchase, which is what they recall.

The Lender says the primary focus of the presentation was the opportunity to take holidays and membership benefits other than a share in the net sale proceeds when the Allocated Property is sold (although that would also have been explained to them). But it is hard for me to give much weight to the Lender's assertion when there is a little other evidence to support it (such as training materials or presentation scripts or slides that were in use at the time).

The Lender suggests that Ms F and Mr W are wrong when they say they didn't read the paperwork and it was not explained to them, because the Supplier had a strict quality assurance process where someone from a separate team takes customers through all of the documentation the next day. While the Supplier may have had a process in place (albeit I've seen no documentary evidence of what that process entailed), this does not guarantee it happened in every case (although it may make it more likely). But even if Ms F and Mr W have misremembered this, I do not think it is so fundamental a part of their recollections that I should discard or give significantly less weight to the other things they have said.

Overall, I find Ms F and Mr W's recollections to be plausible and persuasive, particularly in relation to what the Supplier told them about Balkan Jewel Membership at the Time of Sale. In particular that:

- *"The representative said that we could have a "consolidation and upgrade" which would mean that we would receive what we were previously promised but also, we would have much more choice for "very little financial outlay". We were told that Fractional was the best way forward for us."*

- *"The sales representative told us that Fractional was not just an investment in holidays, it was also a financial investment. We were told that we would receive a return and that we were investing in our future. We were told that there would be financial gain once the property was sold in 14 years."*

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 Ms F and Mr W 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.

It also it seems to me in light of *Carney* and *Kerrigan* that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Ms F and Mr W and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On my reading of Ms F and Mr W'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. In regard to this, they say that:

- *"The sales representative told us that Fractional was not just an investment in holidays, it was also a financial investment. We were told that we would receive a return and that we were investing in our future. We were told that there would be financial gain once the property was sold in 14 years.* ***This was appealing because we would have something that was financially worthwhile****.*

And:

- *"We* ***genuinely believed that we were making a good financial investment*** *whilst securing our future holidays."*

(my emphasis added)

So, it seems to me that Ms F and Mr W have been clear in explicitly stating the investment side of Balkan Jewel Membership was an important factor in their decision to purchase.

Ms F and Mr W's recollections suggest some other reasons why they made the purchase and why they became dissatisfied, including the availability of specific holidays (which they did not get to book), and to use the membership to take their grandchildren on holiday (which they ultimately couldn't do). The Supplier's notes go some way to confirming what they have said, in that it was noted that *"quality accommodation"* was a factor in their decision. But the Supplier's notes are clearly not an exhaustive list of everything that was discussed during what was a long sales process lasting many hours. And in my opinion the Supplier's notes are unlikely to include anything that would confirm the Supplier breached the Timeshare Regulations when selling or marketing Balkan Jewel Membership to Ms F and Mr W.

So, although there were several factors in Ms F and Mr W's decision to go ahead with the purchase, I think that their understanding of Balkan Jewel membership being an "investment", which is what the Supplier told them, was also an important motivating factor for them given the following:

- How much it would cost them (£23,936.40 including interest) and the long-term commitment of repaying the loan over ten years.

- They could independently book the specific types of holidays they were interested in without being Balkan Jewel members.

- Availability during school holidays was likely to be better on the open market, where they could book holidays with any provider rather than only through the Supplier and its affiliates.

So, I'm not persuaded that Ms F and Mr W would have gone ahead with the purchase if it was not for the Supplier describing Balkan Jewel membership to them as an investment (as defined above) at the Time of Sale. Although they were attracted to the other benefits of membership as well, they have described the investment element as being attractive and that they believed by entering into the Purchase Agreement they were making a good financial investment as well as securing their future holidays. Given this, I think that the investment aspect of the purchase was important to Ms F and Mr W, and so the Supplier's breach of Regulation 14(3) of the Timeshare Regulations led to Ms F and Mr W's relationship with the Lender being unfair to them.

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Ms F and Mr W 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.

END OF COPY OF MY PROVISIONAL FINDINGS

My additional findings

I have carefully considered what the Lender has said in response to my Provisional Decision. But I remain of the opinion that this complaint should be upheld.

I do not agree that Ms F and Mr W's witness statement is vague or brief. It is ten pages long and includes a significant amount of detail about what they remember of purchasing both Trial Membership and Balkan Jewel membership and why they decided to complain. The statement provided appears to be specific to their circumstances.

I do not think it is significant whether the statement was written by Ms F and Mr W themselves or by the PR on their behalf. It says, *"the facts in this statement come from our personal knowledge and belief"* and *"We believe the facts in this Witness Statement are true"*. The statement was signed and dated by Ms F and Mr W on 5 February 2019. So, it seems clear that they are saying this reflects their recollections of what happened. I am not persuaded that the statement was manufactured by the PR, which is authorised and regulated by The Solicitors Regulation Authority.

The Supplier says it would have explained how having a right to a share of the net sale proceeds of the Allocated Property would work at the Time of Sale. That, is, that at the end of the membership term the fractional owners would receive their share, and that this was handled by the trustee, after which membership ceased. So, I do not think it is significant that, as the Lender phrases it – *"there is no evidence that [Ms F and Mr W] enquired with the Supplier about what would happen to their [Balkan Jewel membership] and any potential financial gain once the property was sold in 14 years".* According to the Supplier, this ought to have been clear to Ms F and Mr W from what they were told at the Time of Sale.

I accept, as I acknowledged in my Provisional Decision, that Ms F and Mr W had multiple reasons for purchasing Balkan Jewel membership, which they also acknowledged in their witness statement. But that does not mean that, if there was a breach of Regulation 14(3), this was not material to Ms F and Mr W's decision to sign the contract. And I remain of the opinion that it was.

Ms F and Mr W have not suggested that they were unhappy with the purchase at the Time of Sale nor that they entered into the purchase due to pressure when they otherwise would not have done so. So, it appears to me that they would've had no reason not exercise their cancellation rights within the 14-day withdrawal period.

The Lender says that Ms F and Mr W's reference to Balkan Jewel membership being an investment is vague and brief, lacks detail and is generic. In their statement they said:

> *"The sales representative told us that Fractional was not just an investment in holidays, it was also a financial investment. We were told that we would receive a return and that we were investing in our future. We were told that there would be*

financial gain once the property was sold in 14 years. This was appealing because we would have something that was financially worthwhile."

To me this does not seem vague (that is uncertain, indefinite, or unclear). It seems to me that Ms F and Mr W are very clearly stating that the Supplier's representative told them Balkan Jewel membership was a financial investment from which they would get a financial gain in the future. And that this was appealing to them.

Ms F and Mr W could potentially have provided more detail about what was said, but only if they recalled such detail. And even if they didn't, it does not strike me as unlikely in this instance that they would plausibly retain the memory of the main thrust of what they were told about this aspect of Balkan Jewel membership, or their understanding of it.

The Lender says it was not the Supplier's policy or procedure to provide alcohol during presentations. But it is an allegation that I have seen in a number of complaints about the Supplier. So, it seems that the Supplier's policy or procedure may not always have been followed. In this case, Ms F and Mr W do not appear to have included that information in an attempt to suggest that they were intoxicated and their ability to make a reasoned decision was impaired. It appears to me that they are simply relaying what they remember. And I do not think what they say is implausible nor that it undermines the rest of their statement. In any case, that part of their statement was about the purchase of the Trial Membership, not Balkan Jewel membership.

The Lender points to what it says are other inaccuracies in Ms F and Mr W's statement, particularly around the Canadian Rockies Railway holiday, not being told about booking fees, and enquiring about that holiday and the Fjord Cruise. The Supplier says the Canadian Rockies Railway holiday is not shown in its brochure from the time which listed what was available, including through its affiliates. And the Supplier has no record of discussions with Ms F and Mr W about trying to book these holidays, nor any complaint about them being unavailable.

However, I can see that the Supplier's brochure from the time does list a resort in Banff, Canada, which is in the Rocky Mountains. And that Fractional Points could also be used as part payments towards booking cruises. So, it does not seem implausible that these holidays were discussed at the Time of Sale, nor that any uncertainty about this should lead me to give little weight to Ms F and Mr W's statement.

The Lender suggests that to sell Balkan Jewel membership as an investment the Supplier would've had to go beyond suggesting there could be an unquantified financial gain. But to also give more information on the likely return (such as how much it might be). Or how they go about realising that return. But I do not think it is necessary for the return to be quantified by the Supplier in order for it to breach Regulation 14(3) during a sale.

In relation to the information provided by the Supplier, I accept that this shows the Supplier took steps to avoid breaching Regulation 14(3) when selling fractional timeshares such as Balkan Jewel membership.

The Policy and Procedure (sales misrepresentation) document included the following:

"[The Supplier] strictly prohibits any forms of Misrepresentation. In this respect, [the Supplier] specifically stresses the importance of representing the [Supplier's] product in line with the following guidelines:

- *[The Supplier] does not represent vacation ownership as an investment.*

…

- *With regards to the presentation of the Fractional product:*
    - *Sales Team members will not represent the Fractional product as an investment*
    - *Sales Team members will not discuss any predictions with regards to the residual value."*

The document went on to say that *"non compliance of the rules established herein, will lead to the adoption of the relevant disciplinary actions … including the automatic extinction of the employment relationship by means of a dismissal."*

The Supplier has provided the Policy and Procedure (sales misrepresentation) documents signed on 1 July 2013 by the salesperson and sales manager involved in Ms F and Mr W's sale. They have signed the document under the statement that

- *"I hereby acknowledge receipt of the present Misrepresentation [Standard Operating Procedure] … as detailed above."*

The Supplier has also provided a copy of its training manual, which states on page 53:

> *"**The basis of both products is centered on the experiences clients will enjoy when travelling, neither product is an investment type product and as such <u>it is forbidden</u> when selling to our guests to discuss eventual values or returns.**"*
>
> [emphasis in original]

While this forbids discussion of eventual values or returns it does not forbid describing the product in such a way that might imply it is nevertheless an investment. Nor does it mention that the reason for saying this is because the Timeshare Regulations prohibit the sale or marketing of a timeshare as an investment.

The Training Manual includes an exercise on page 54 that asks the question:

> *"Why do you think it is important never to present the Fractional ownership club as an investment?"*

This question does suggest that salespeople should not present Fractional timeshares as an investment. But no examples are given in terms of what answers are to be expected from trainees. Again, there is no mention of the Timeshare Regulations, nor anything that clearly explains what would constitute a breach of Regulation 14(3).

Looking at these documents I am satisfied that the Supplier took steps to try and prevent a breach of Regulation 14(3) by its salespeople when selling Fractional Timeshares like Balkan Jewel membership. And that these steps will have gone some way to reducing the risk of breaches occurring. But the materials are not as explicit as they could be in making salespeople aware of the prohibition in Regulation 14(3), which they do not explicitly refer to. So, it is not clear to me that a salesperson would've understood why they should not present a fractional timeshare as an investment (the above question is not answered in the Training Manual). Nor that the concept of an investment was clearly defined nor clear guidance provided on what was acceptable. For example, there are no sales scripts or prescribed wordings that limit how a salesperson could describe a fractional timeshare and specifically the right to a share in the net sale proceeds of the Allocated Property.

In *Shawbrook & BPF v FOS* the judge acknowledged the difficulty in selling a fractional timeshare without breaching Regulation 14(3), where he said at 77:

- *"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 documents referred to above suggest to me that the Supplier may have taken too narrow a view of what constituted selling or marketing a timeshare as an investment (a view which the Lender appears to share). I say this because these documents focus on not presenting the fractional timeshare as an investment in the context of not discussing the residual value of the Allocated Property or the eventual values or returns a customer might receive. I think this left open the possibility that a salesperson might engage in other discussions about this benefit which could cross the line into breaching Regulation 14(3) – even if that was not the intention of the salesperson nor the Supplier.

In my opinion, as explained in my Provisional Decision, merely suggesting or implying that a customer might make a financial gain (that is, potentially get back more than they paid for Balkan Jewel membership) would be enough to breach the prohibition in Regulation 14(3).

So, I am not persuaded that these documents are sufficient for me to conclude that it is implausible or inherently unlikely that Balkan Jewel membership could have been sold or marketed as an investment at the Time of Sale. That makes it important to consider the evidence from the Time of Sale as well as Ms F and Mr W's recollections of what happened.

Ms F and Mr W's recollections are the only evidence available that is specific to the sale from someone who was there. And while the sales documents do reflect the Supplier's intention to comply with Regulation 14(3), the sales documents in themselves again do not guarantee that Regulation 14(3) was not breached. Those documents were provided to Ms F and Mr W *after* they had agreed in principle to make the purchase. So, the disclaimers and statements contained therein may not have been enough to prompt Ms F and Mr W to question what they had been told if that was different to what was shown in the documents.

I have not suggested in my Provisional Decision that there was a systemic issue that meant Balkan Jewel membership was sold in breach of Regulation 14(3) in every case. I was clear in my decision that a fractional timeshare could be sold without breaching Regulation 14(3). And that my provisional decision was specific to the circumstances of Ms F and Mr W's sale.

For the reasons I've explained, I do not think that I should disregard Ms F and Mr W's recollection of events. Nor do I think that the other evidence in this case is sufficient for me to conclude that they are mistaken in their recollections of Balkan Jewel membership being sold or marketed to them as an investment. And while there were multiple reasons why Ms F and Mr W were attracted to the purchase, the prospect of making a profit on what they paid for Balkan Jewel membership (which they described as *"appealing"* and said they *"genuinely believed we were making a sound financial investment"* in their statement) appears to have been material to their decision to purchase. Had the breach of Regulation 14(3) not occurred, I am not persuaded they would have entered into the purchase. So, I remain of the opinion that this complaint should be upheld.

Putting things right

Having found that Ms F and Mr W 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 Ms F and Mr W both agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Ms F and Mr W was a trial member before purchasing Balkan Jewel membership. As I understand it, trial membership involved the purchase of a fixed number of week-long holidays that could be taken with the Supplier over a set period in return for a fixed price. The purpose of trial membership was to give prospective members of the Supplier's longer-term products a short-term experience of what it would be like to be a member of, for example, the Fractional Club. According to an extract from the Supplier's business plan, roughly half of trial members went on to become timeshare members.

If, after purchasing trial membership, a consumer went on to purchase membership of one of the Supplier's longer-term products, their trial membership was usually cancelled and traded in against the purchase price of their timeshare – which was what happened at the Time of Sale. Ms F and Mr W's trial membership was, therefore, a precursor to their Balkan Jewel membership. With that being the case, the trade-in value acted, in essence, as a deposit on this occasion and I think this ought to be reflected in my redress when remedying the unfairness I have found.

So, given all of the above, here's what I think needs to be done to compensate Ms F and Mr W – whether or not a court would award such compensation:

(1) The Lender should refund Ms F and Mr W'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:

i. The annual management charges Ms F and Mr W paid as a result of Balkan Jewel membership; and

ii. The difference between the trade-in value given to Ms F and Mr W's trial membership and the capital sum refinanced from the loan taken to pay for the trial membership into the Credit Agreement.

(3) The Lender can deduct:

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

ii. The market value of the holidays* Ms F and Mr W took using their Fractional Points.

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

(6) If Ms F and Mr W's Fractional Club 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 Ms F and Mr W 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

For the reasons explained above, I've decided to uphold this complaint. I direct Shawbrook Bank Limited to put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms F and Mr W to accept or reject my decision before 1 July 2025.

Phillip Lai-Fang
Ombudsman