DRN-5628028

The complaint

Mr and Mrs 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

Mr and Mrs W had been members of a points-based timeshare arrangement (the 'Vacation Club'), from a timeshare provider (the 'Supplier') since 2009. As members, every year they could use their points in exchange for holidays at the Supplier's holiday resorts. Different accommodation had different points values, depending on factors such as location, size, and time of year. So, for example, a larger apartment in peak season would cost more to a member in their points than a smaller apartment outside of school holiday periods.

Whilst on a holiday as part of their existing membership, Mr and Mrs W purchased a new type of membership (the 'Fractional Club 1') from the Supplier on 4 November 2012 (the 'Time of Sale 1'). They entered into an agreement with the Supplier to buy 2,241 fractional points, and after trading in their existing Vacation Club points, the Fractional Club 1 ended up costing them £13,249 (the 'Purchase Agreement 1').

Unlike the Vacation Club, the Fractional Club 1 membership was asset backed – which meant it gave Mr and Mrs 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') at the end of their full membership term.

Mr and Mrs W paid for their Fractional Club 1 membership by taking finance of £13,249 from the Lender in their joint names (the 'Credit Agreement 1').

Then, on 9 January 2013 (the 'Time of Sale 2'), as a result of attending a sales presentation by the Supplier while on holiday, Mr and Mrs W traded in their Fractional Club 1 for an upgraded membership ('Fractional Club 2')[1]. They entered into an agreement with the Supplier to buy 3,105 fractional points, and after the trade in value given to their existing points, they ended up paying £10,867 (the 'Purchase Agreement 2') for membership of Fractional Club 2. And like their previous membership, Fractional Club 2 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 W paid for this Fractional Club 2 membership by taking further finance of £10,867 from the Lender in their joint names (the 'Credit Agreement 2') to run concurrently with their existing lending.

Mr and Mrs W – using a professional representative (the 'PR') – wrote to the Lender on 19 October 2018 (the 'Letter of Complaint') to complain about:

[1] By trading in their Fractional Club 1 membership, Mr and Mrs W gave up their rights to their share in the associated Allocated Property.

1. Misrepresentations by the Supplier at the Time(s) 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 in breach of its fiduciary duty as undisclosed commission was paid by it to the Supplier.
4. The Lender being party to an unfair credit relationship under the Credit Agreement 1 and 2 and related Purchase Agreement(s) 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 W say that the Supplier made a number of pre-contractual misrepresentations at the Time(s) of Sale – namely that the Supplier:

- Told them that the purchase of Fractional Club membership was the only way to exit their existing timeshare membership[2].
- Told them that Fractional Club membership had a guaranteed end date when that was not true.
- Told them that Fractional Club membership was an "investment" and that buying a further membership (Fractional Club 2) would guarantee them seeing a larger return on their investment, when that was not true.
- Told them they were buying into an "exclusive" membership, however almost all of the properties can be accessed and booked by non-members.

Mr and Mrs W 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 W.

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

The Letter of Complaint set out that the Supplier breached both of the Purchase Agreements because there were unfair terms within them under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR')[3]. Namely that the terms were not individually negotiated, and Mr and Mrs W have no control over the sums incurred and/or charged.

As a result of the above, Mr and Mrs W say 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 W.

(3) Breach of fiduciary duty

The Letter of Complaint said that the Lender had breached its fiduciary duty by not disclosing to Mr and Mrs W that it was paying commission to the Supplier as a result of the brokering of the Credit Agreement(s).

[2] By its nature, this allegation must only relate to Time of Sale 1
[3] I fail to see how this point relates to a breach of contract by the Supplier. In any event this point was also raised as causing an unfairness to their credit relationships with the Lender under s.140A CCA.

(4) 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 W say that the credit relationships between them and the Lender were unfair to them under Section 140A of the CCA. In summary, they include the following:

- Commission was paid to the Supplier by the Lender, and this was not disclosed to Mr and Mrs W.
- The Supplier's sales presentation at the Time(s) 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.
- The products were not worth the money paid for them.

The Lender dealt with Mr and Mrs W's concerns as a complaint and issued its final response letter on 23 May 2019, rejecting it on every ground.

Mr and Mrs 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 on its merits.

The Investigator thought that the Supplier had marketed and sold both Fractional Club memberships as investments to Mr and Mrs W at the Time(s) 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 each breach on their purchasing decisions, the Investigator concluded that both credit relationships between the Lender and Mr and Mrs W were 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.

Having considered everything that had been submitted, I agreed with the outcome reached by the Investigator, in that I thought the complaint ought to be upheld, but I expanded somewhat on the reasons for doing so. As such I set out my initial thoughts in a provisional decision (the 'PD') and invited all parties to submit any new evidence or arguments that they wished me to consider before I made my final decision.

The provisional decision

In my PD I said:

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

And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling both Fractional Club memberships to Mr and Mrs W as investments, which, in the circumstances of this complaint, rendered the associated credit relationships 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 W's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the Supplier made actionable misrepresentations at the Time(s) of Sale, and the commission allegedly paid to the Supplier by the Lender was not disclosed. That is because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs W in the same or a better position than they would be if the redress was limited to those other aspects.

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

Having considered the entirety of both the credit relationships between Mr and Mrs W and the Lender along with all of the circumstances of the complaint, I think the credit relationships between them were 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(s) of Sale – which includes training material that I think is likely to be relevant to the sales;*
2. *The provision of information by the Supplier at the Time(s) 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(s) of Sale; and*
4. *The inherent probabilities of the sales given their circumstances.*

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

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

The Lender does not dispute, and I am satisfied, that both Mr and Mrs W's Fractional Club memberships met the definition of a "timeshare contract" and "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling Fractional Club 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 W say that the Supplier did exactly that at the Time(s) of Sale – saying the following regarding their November 2012 purchase:

> *"We booked a CLC holiday to Spain in November 2011 and whilst there were asked to attend another presentation with free breakfast etc. During this session we were informed that members were now being asked to change to the [Fractional Club] and were told that this was a much more advantageous arrangement as it would give us a part ownership of a specific [Supplier] holiday apartment in their Marina del Sol resort and would further increase the amount of holiday points available to us each year.*
>
> *The biggest selling point made, however, was that as we would become part owners of an actual property this was an investment and if we subsequently decided to sell then we would make a profit from the sale providing that property prices had risen, which of course they normally did. We were assured that we could choose to sell the ownership at any time or again if we wished could leave it to our children as part of their inheritance."*

And as regards their January 2013 purchase:

> *"We booked a [Supplier] holiday to Tenerife in January 2013 and once again whilst there attended another very intense and persuasive presentation during which several [Supplier] representatives tried to persuade us to change our Fractional Property from the one we had purchased in Marina del Sol to a property in Paradise Resort, Tenerife. The reason they gave was that the properties in Tenerife were a better investment as they were worth more and that we should have been encouraged to purchase in Tenerife in November 2012. To change involved us an additional cost so we decided against it. On the day before we were due to return home we received a further visit from a [Supplier] rep at the resort where we were staying offering us a reduced price to change the property, and increased number of annual holiday points and also a free 7 day stay at a [Supplier] resort. He again was very persuasive and told us that the offer only stood if we decided on the spot there and then. Despite feeling somewhat pressured, we, therefore, decided to take the offer and new documentation [sic] were drawn up and a new financial loan arranged."*

They concluded by saying:

> *"When fractional property ownership was introduced the big selling point was for us to see it as not just a holiday club purchase but as a property investment and that we would almost certainly make money if at some future point we decided to sell."*

Mr and Mrs W allege, therefore, that the Supplier breached Regulation 14(3) at both the Time of Sale 1 and Time of Sale 2 because:

(1) *There were two aspects to their Fractional Club 1 & 2 memberships: holiday rights and a profit on the sale of the Allocated Property.*

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

The term "investment" is not defined in the Timeshare Regulations. In Shawbrook & BPF v FOS, the parties agreed that, by reference to the decided authorities, "an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit" at [56]. I will use the same definition.

Mr and Mrs W's share in both of the Allocated Properties clearly constituted investments as they offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.

To conclude, therefore, that Fractional Club 1 and/or Fractional Club 2 memberships were marketed or sold to Mr and Mrs W 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 either or both memberships to them as an investment, i.e. told them or led them to believe that the membership(s) 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 membership of either Fractional Club 1 or 2 as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs W, the financial value of their share in the net sales proceeds of either Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork[4] that state that Fractional Club membership was not sold to Mr and Mrs W as an investment.

For example, in the Member's Declaration document given to Mr and Mrs W at both sales to read and sign, there are 15 statements. These include:

> *"5. We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that [the Supplier] makes no representation as to the future price or value of the Fraction."*

And the Standard Information form, for example, stipulated the following on page 8 under the heading "Primary Purpose":

> *"The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for direct purposes of a trade in nor as an investment in real estate. [The Supplier] makes no representation as to the future price or value of the Allocated Property or any Fractional rights."*

When read on their own and together, these disclaimers go some way to making the point that the purchase of Fractional Rights shouldn't be viewed as an investment. But they weren't to be read on their own. They had to be read in conjunction with what else the Standard Information Form had to say, which included the following disclaimer:

> *"**11. Investment advice***
>
> *The Vendor, any sales or marketing agent and the Manager and their related businesses (a) are not licenced investment advisors authorized by the Financial Services Authority to provide investment or financial advice; (b) all the information has been obtained solely from their own experience as investors and is provided as general information only and as such it is not intended for use as a source of investment advice and (c) all purchasers are advised to obtain competent advice from legal, accounting and investment advisors to determine their own specific investment needs; (d) no warranty is given as to any future values or returns in respect of an Allocated Property."*

This disclaimer seems to have been aimed at distancing the Supplier from any investment advice that was given by its sales agents, telling customers to take their own investment advice, and repeating the point that the returns from membership of the Fractional Club weren't guaranteed.

Yet I think it would be fair to say that, while a prospective member who read the disclaimer in question might well have thought that they would be wise to seek professional investment advice in relation to membership of the Fractional Club, rather than rely on anything they might have been told by the Supplier, it wouldn't have done much to dissuade them from regarding membership as an investment. In fact, I think it would have achieved rather the opposite.

It's also difficult to explain why it was necessary to include such a disclaimer in the Standard

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[4] The wording contained in the contemporaneous paperwork was the same for both sales, so it is only set out once in this decision.

Information Form if there wasn't a very real risk of the Supplier marketing and selling membership of the Fractional Club as an investment given the difficulty of articulating the benefit of fractional ownership in a way that distinguishes it from other timeshares from the viewpoint of prospective members.

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 W's allegation that the Supplier breached Regulation 14(3) at both the Time of Sale 1 & 2, including (1) that membership of the Fractional Club was expressly described as an "investment" and (2) that membership of the Fractional Club 1 & 2 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 1 and/or 2, sold or marketed membership of the Fractional Club 1 and/or 2 as an investment, i.e. told Mr and Mrs W or led them to believe during the marketing and/or sales process that membership of the Fractional Club 1 and/or 2 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, for both sales, is 'yes'.

How the Supplier marketed and sold the Fractional Club membership

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives – including a document called "2011 Spain PTM FPOC 1 Practice Slides Manual" (the '2011 Fractional Training Manual')

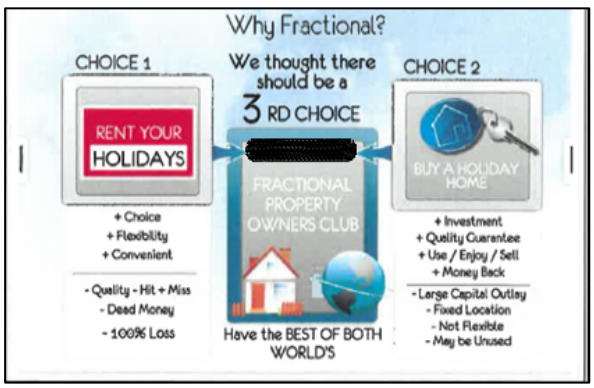
As I understand it, the 2011 Fractional Training Manual was used throughout the sale of the Supplier's first version of the Fractional Club. And given the date of both of the sales to which this particular complaint relates, and from the wording in parts of the contractual documentation, I'm satisfied that both sales were of this first version of the Fractional Club, so the training material I go on to describe below would have been applicable to both sales.

It isn't entirely clear whether Mr and Mrs W would have been shown the slides included in the Manual. But it seems to me to be reasonably indicative of:

(1) *the training the Supplier's sales representatives would have got before selling Mr and Mrs W's Fractional Club memberships; and*

(2) *how the sales representatives would have framed the sale of both Fractional Club memberships to Mr and Mrs W.*

Having looked through the manual, my attention is drawn to page 6 (of 41) – which includes the following slide on it:



This slide titled "Why Fractional?" indicates that sales representatives would have taken Mr and Mrs W through three holidaying options along with their positives and negatives:

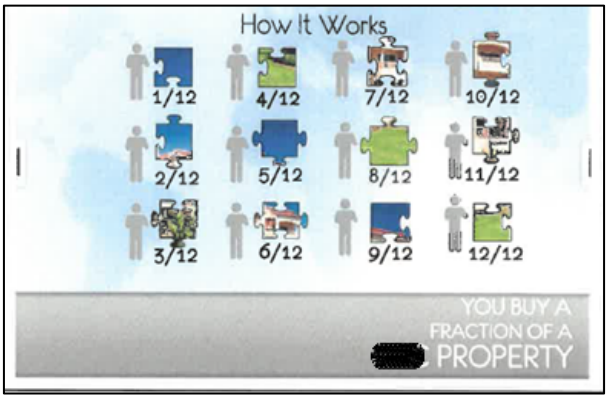
(1) *"Rent Your Holidays"*

(2) *"Buy a Holiday Home"*

(3) *The "Best of Both Worlds"*

It was the first slide in the 2011 Fractional Training Manual to set out any information about Fractional Club membership, and I think it suggests that sales representatives were likely to have made the point to Mr and Mrs W that membership combined the best of (1) and (2) – which included choice, flexibility, convenience and, significantly, an investment they could use, enjoy and sell before getting money back.

The manual then moved on to two slides (on pages 7 and 8) concerned with how Fractional Club membership worked:



I'm aware that the Supplier says that 90-95% of its time during its sales presentations was focused on holidays rather than the sale of an allocated property. Having looked through the 2011 Fractional Training Manual, it seems to me that there were 10 slides on how Fractional Club membership worked before the slides moved on to sections titled "Peace of Mind", "Resort Management" and "Which Fractional". And as 5 of the 10 slides look like they focused on holidays, there seems to me to have been a fairly even split during the Supplier's sales presentations between marketing membership of the Fractional Club as a way of buying an interest in property and as a way of taking holidays.

However, even if more time was spent on marketing membership of the Fractional Club as a way of taking holidays rather than buying an interest in property, as the slides above suggest, in my view, that the Supplier's sales representatives would have probably led prospective members to believe that a share in an allocated property was an investment (after all, that's what the slide titled "Why Fractional" expressly described it as), I can't see why the Supplier wouldn't have been in breach of Regulation 14(3) in those circumstances.

I acknowledge that there was no comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mr and Mrs W the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that "[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3))."[5] And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.

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

Indeed, if I'm wrong about that, I find it difficult to explain why, in paragraphs 77 and 78 followed by 99 and 100 of Shawbrook & BPF v FOS when, 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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[5] 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.”

Here Mr and Mrs W say that at the Time of Sale 1 they were told that they would be part owners of a property, and it was expressly described to them as an investment. They go on to describe how they were told they could sell in the future and make a profit if the price had risen, and that they were told the prices normally did. And at the Time of Sale 2 Mr and Mrs W say they were told the Allocated Property was located in Tenerife, and this was a better investment than the one they currently had as it was worth more. So, at the Time of Sale 2 Mr and Mrs W say the Supplier specifically compared the resale value of the Allocated Property to what they already had, and said they were told they ought to have bought this one before as it was a better investment.

So, the Allocated Property at both sales was plainly a major part of the product’s features and, in this instance, in my view, is a justification for the price of both of Mr and Mrs W’s Fractional Club memberships. And after all, they were existing members of a timeshare with the Supplier, and the Fractional Club membership doesn’t seem to have afforded them access to a different portfolio of resorts. And in any case, I’ve not seen anything which suggests that Mr and Mrs W were unhappy with their Vacation Club membership. I cannot see improving holiday availability, if that was a concern for them, could only be achieved by purchasing Fractional Club membership. They could just as easily have purchased more Vacation Club points, as they had done previously. So, it seems there must have been another reason for them to change to fractional ownership at the Time of Sale 1.

And as the slides clearly indicate that the Supplier’s sales representative was likely to have led them to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e., a profit) in the future, I don’t find Mr and Mrs W either implausible or hard to believe when they say:

> *“The biggest selling point made, however, was that as we would become part owners of an actual property this was an investment and if we subsequently decided to sell then we would make a profit from the sale providing that property prices had risen, which of course they normally did. We were assured that we could choose to sell the ownership at any time or again if we wished could leave it to our children as part of their inheritance.”*

On the contrary, on the balance of probabilities, I think that’s likely to be what Mr and Mrs W were led by the Supplier to believe at Time of Sale 1. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale 1.

And I also think the Supplier breached Regulation 14(3) at Time of Sale 2. After all, the product purchased was the same (albeit with a different Allocated Property in a different part of Spain) and the sale was likely to have been framed in the same way as the first sale. And the second sale was only six weeks after the first, so it is highly likely that the way the first sale was framed would have been at the forefront of Mr and Mrs W’s mind at the second. Again, I don’t find Mr and Mrs W either implausible or hard to believe, when describing how

the Allocated Property for Fractional Club 2 was presented to them, they say:

"The reason they gave was that the properties in Tenerife were a better investment as they were worth more and that we should have been encouraged to purchase in Tenerife in November 2012."

Were the credit relationships between the Lender and Mr and Mrs W rendered unfair?

Having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at both Time of Sale 1 & 2, I now need to consider what impact those breaches had on the fairness of the two credit relationships between Mr and Mrs W and the Lender under the Credit Agreement 1 & 2 and related Purchase Agreement 1 & 2.

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 either or both of the credit relationships between Mr and Mrs W and the Lender being unfair to them and which warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into either of the Purchase Agreement(s) and Credit Agreement(s) is an important consideration.

On my reading of Mr and Mrs W's testimony, the prospect of a financial gain from both of the Fractional Club membership purchases was an important and motivating factor when they decided to go ahead. That doesn't mean they were not interested in holidays – their timeshare ownership history and own testimony demonstrates that they quite clearly were, which is not surprising given the nature of the products at the centre of this complaint.

But, their motivation to purchase Fractional Club 1 is set out in their statement, where they say (plausibly in my view):

> *"The biggest selling point made, however, was that as we would become part owners of an actual property this was an investment and if we subsequently decided to sell then we would make a profit from the sale providing that property prices had risen, which of course they normally did. We were assured that we could choose to sell the ownership at any time or again if we wished could leave it to our children as part of their inheritance."*

So, as I'm satisfied that Fractional Club 1 membership was marketed and sold to them at the Time of Sale 1 as something that offered them more than just holiday rights, and given what they have said about the sale, on the balance of probabilities, I think their purchase of Fractional Club 1 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 their existing membership.

And with that being the case, I think the Supplier's breach of Regulation 14(3) at Time of Sale 1 was material to the decision to purchase Fractional Club 1 that they ultimately made.

As regards their purchase of Fractional Club 2, I can see that they didn't immediately go ahead with the purchase, as they say it involved a further financial outlay. And it was only when, two days later, the Supplier offered the membership to them at a reduced price, and gave them some additional points and a free 7-day accommodation voucher, that they agreed to go ahead.

The Lender may point to this as evidence that their motivation to purchase the second membership was for the holidays it provided, but I don't think it does. This is because the evidence is clear in my view, that both memberships were sold and/or marketed as investments. And as I'm satisfied that it is most likely that Mr and Mrs W decided to trade in their Vacation Club membership for Fractional Club 1 for the potential profit it offered, I see no reason why they would have traded that membership in, and bought Fractional Club 2, only six-weeks later, for different reasons, when the sales process, and the way the sale was framed, was likely to have been very similar.

So, as Mr and Mrs W say (again, plausibly in my view) that Fractional Club 2 membership was marketed and sold to them at the Time of Sale 2 as something that offered them more than just holiday rights, on the balance of probabilities, I think their motivation was the same as the previous sale, which took place only six-weeks earlier. I think their purchase was motivated by their share in the new Allocated Property and the possibility of an increased profit from an apparently more valuable property. I think it's clear from what Mr and Mrs W say that this was the main selling point, and it was only the additional expense which initially put them off the purchase. After all, Mr and Mrs W say:

> *"[We] attended another very intense and persuasive presentation during which several [Supplier] representatives tried to persuade us to change our Fractional Property from the one we had purchased in Marina del Sol to a property in Paradise Resort, Tenerife. The reason they gave was that the properties in Tenerife were a better investment as they were worth more and that we should have been encouraged to purchase in Tenerife in November 2012."*

So, with that being the case, I think the Supplier's breach of Regulation 14(3) at Time of Sale 2 was material to the decision they ultimately made.

Mr and Mrs W have not said or suggested, for example, that they would have pressed ahead with the purchases in question had the Supplier not led them to believe that the Fractional Club memberships were an appealing investment opportunity. Indeed, they have said the opposite in their statement:

> *"… When fractional property ownership was introduced the big selling point was for us to see it as not just a holiday club purchase but as a property investment and that we would almost certainly make money if at some future point we decided to sell."*

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 both memberships of the Fractional Club, I'm not persuaded that they would have pressed ahead with their purchases regardless.

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs W under both Credit Agreement 1 and Credit Agreement 2, and the related Purchase Agreement(s) for the purposes of Section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint."

I then set out how I thought the Lender should calculate and pay fair compensation to Mr and Mrs W. I said:

"Fair Compensation

Having found that Mr and Mrs W would not have agreed to purchase either Fractional Club 1 or Fractional Club 2 membership at the Time(s) 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 relationships between the Lender and the Consumer were 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 either the Fractional Club 1 or Fractional Club 2 memberships (i.e., not entered into the Purchase Agreement 1 or 2), and therefore not entered into the Credit Agreement 1 or 2, provided Mr and Mrs W agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs W were existing Vacation Club members, and their membership was traded in against the purchase price of the Fractional Club 1 membership. Under their Vacation Club membership, they had a number of Vacation Club Points. And, like Fractional Club membership, they had to pay annual management charges as Vacation Club members. So, had Mr and Mrs W not purchased Fractional Club 1 membership, they would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr and Mrs W from the Time of Sale 1 as part of their Fractional Club 1 (and then Fractional Club 2) membership(s) should amount only to the difference between those charges and the annual management charges they would have paid as ongoing Vacation Club members.

In this case, Mr and Mrs W entered into two separate credit agreements which ran concurrently, so the redress I am proposing reflects this.

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

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

(2) The Lender can deduct:

i. *The value of any promotional giveaways that Mr and Mrs W used or took advantage of when purchasing Fractional Club 1; and*

ii. *The market value of the holiday* Mr and Mrs W took using their initial 2,241 Fractional Points if the points value of the holiday taken amounted to more than the total number of Vacation Club Points they would have been entitled to use at the time of the holiday as ongoing Vacation Club members. However, this deduction should be proportionate and relate only to the additional Fractional Points that were required to take the holiday in question.*

For example, if the holiday Mr and Mrs W took using their Fractional Club 1 points was worth more points than they would have been entitled to use with their existing Vacation Club Points at the relevant time, any deduction for the market value of that holiday should relate only to the additional Fractional Points that were required to take it. But if they would have been entitled to take that holiday using their existing Vacation Club Points, there shouldn't be a deduction for the market value of the relevant holiday. If the Lender proposes to make a deduction for the value of the holiday taken under Fractional Club 1, it should clearly set out the reasons for doing so, with its calculations, in response to this provisional decision.

(3) In addition to (1), the Lender should also refund the difference between Mr and Mrs W's Fractional Club 1 annual management charge paid on or after the Time of Sale 1 and what their Vacation Club annual management charges would have been had they not purchased Fractional Club 1 membership.

*(4) Simple interest** at 8% per annum should be added to each of the Net Repayments (from points 1,2 & 3) from the date each one was made until the date the Lender settles this complaint.*

(5) The Lender should refund Mr and Mrs W's repayments to it under the Credit Agreement 2, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.

(6) The Lender can deduct:

- *The value of any promotional giveaways that Mr and Mrs W used or took advantage of when purchasing Fractional Club 2; and*

- *The market value of the holiday(s)* Mr and Mrs W took using their 3,105 Fractional Points if the Points value of the holiday(s) taken amounted to more than the total number of Vacation Club Points they would have been entitled to use at the time of the holiday(s) as ongoing Vacation Club members. However, this deduction should be proportionate and relate only to the additional Fractional Points that were required to take the holiday(s) in question.*

  For example, if the holiday(s) Mr and Mrs W took using their Fractional Club 2 points was worth more points than they would have been entitled to use with their existing Vacation Club Points at the relevant time, any deduction for the market value of that holiday should relate only to the additional Fractional Points that were required to take it. But if they would have been entitled to take that holiday using their existing Vacation Club Points, there shouldn't be a deduction for the market value of the relevant holiday. If the Lender proposes to make a deduction for the value of any holiday taken under Fractional Club 2, it should clearly set out the reasons for doing so, with its calculations, in response to this provisional decision.

(7) In addition to (5), the Lender should also refund the difference between Mr and Mrs W's Fractional Club 2 annual management charges paid on or after the Time of Sale 2 and what their Vacation Club annual management charges would have been had they not purchased Fractional Club 1 or 2 memberships.

*(8) Simple interest** at 8% per annum should be added to each of the Net Repayments (from points 5,6 & 7 above) from the date each one was made until the date the Lender settles this complaint.*

(9) The Lender should remove any adverse information recorded on Mr and Mrs W's credit files in connection with Credit Agreement 1 and Credit Agreement 2 reported within six years of this decision.

(10) If Mr and Mrs W's Fractional Club 2 membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club 2 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 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. If the Lender proposes to deduct more than the relevant annual management charge, it should set out its reasons for doing so, and its calculations, in response to this provisional decision.*

***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".*

The responses to the provisional decision

The PR, on Mr and Mrs W's behalf, said they accepted what I had said in the PD and had no further comment to make.

The Lender did not accept it and sent a lengthy response setting out why they disagreed.

It began by addressing the witness testimony from Mr and Mrs W that I had relied upon. It said the testimony was unsigned, undated, vague, brief, inconsistent and contains factual inaccuracies which distort the events surrounding the sales[6]. It said the reliability of the testimony is questioned because:

- The testimony is unsigned and undated, and it is unclear why the Ombudsman has relied on it, but won't rely on the contemporaneous notes and sales documentation, some of which has been signed by Mr and Mrs W.
- There is no evidence that Mr and Mrs W enquired with the Supplier about what would have happened with their fractional ownership and any potential profit when their claim was submitted. This casts doubt on their motivation for the sale.
- The claims made are generic and lack detail. They have failed to provide any clarity on how the product(s) was sold as an investment, and this is because the recollection is incorrect.
- References made by Mr and Mrs W to being able to sell may be nothing to do with the Allocated Property but instead refer to the 're-sale' market of timeshare agreements.
- It is incorrect for the Ombudsman to conclude that the investment element was an important and motivating factor for the purchase[7]. The real motivation was the holidays it offered. The sales notes from the time of the purchase do not reference it being sold as an investment, and clearly show they were *"happy with everything".*
- Mr and Mrs W had 21 weeks of holiday prior to their membership being suspended for non-payment of management fees. The holidays taken with their fractional membership points would not have been possible with their previous Vacation Club membership, given the points they required.
- The testimony contains factual inaccuracies and was prepared by the PR rather than being customer recollection. The following inaccuracies have not been considered:
    - Mr and Mrs W have apparently never raised a concern over a lack of availability of

[6] The Lender referred to the products sold as being FPOC2. However, as set out in the PD and from earlier submissions from the Lender, the products were clearly FPOC1.
[7] Again, the Lender has incorrectly stated the products were FPOC2.

accommodation.

- The Letter of Complaint alleges that Mr and Mrs W were told the Allocated Property would be sold after 15 years. The actual term is 19 years.
- There is no elaboration on *how* Mr and Mrs W were subjected to a number of very intense and persuasive presentations. In any event there was no obligation to purchase.
- Mr and Mrs W were invited to a total of 9 presentations: 2 were declined and 7 attended, with purchases made on 5 occasions. This shows they knew when to say no if they didn't want to purchase.
- A feedback note from Mr W confirms that he felt the Supplier had 'high standards' and provided 'nothing but excellent service', which contradicts the Letter of Complaint.

- These factual inaccuracies suggest that the PR has manufactured the testimony by using a templates format, which is not specific to the actual facts of the matter.
- If the Ombudsman is prepared to rely on Mr and Mrs W's testimony, the Ombudsman needs to equally rely on the contemporaneous documentation provided which includes information recorded from the point of sale, which is more reliable.
- In 2017 Mr and Mrs W, via another PR, wrote to the Supplier in an attempt to terminate the timeshare agreement. No specific mention was made that the product was sold as an investment. This suggests Mr and Mrs W's motivation was to exit the timeshare, not because they felt it had been mis-sold.

Against the above information, the Lender said it is not credible that Mr and Mrs W were assured that they *"would make a profit",* nor is it credible that their motivation was the investment element, as opposed to their future holiday needs.

The Lender then went on to consider how the PD dealt with the breach(es) of Regulation 14(3) of the Timeshare Regulations. It said, in summary:

- The PD errs in conflating the two meanings of the word 'return' – a 'return' on investment (the measure of profit) and being told some money would be 'returned' upon the sale (no connotation of investment or profit). The customer being told that some money would be 'returned' upon sale of the Allocated Property does not breach Regulation 14(3).
- Selling an investment requires a finding of a representation by the seller that the reason, or significant reason for the purchase is the prospect of a financial gain/profit, and the corresponding motive on the part of the consumer. Referring to the prospect of a residual return does not satisfy this test. If this was an investment, then Mr and Mrs W would have been informed of the return. This has not been alleged in either the Letter of Complaint or the testimony.
- The documentation in relation to the Fractional Club sale is unobjectionable and does not breach Regulation 14(3).
- The question the Ombudsman should have considered is whether there is sufficiently clear, compelling evidence that the timeshare product was marketed and sold as an investment (i.e., for intended financial profit or gain as against the initial outlay). The reasonable answer is that the sales documentation provides no reason to consider there was any such marketing or sale.

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

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

- Mr and Mrs W's circumstances and their motivations for the purchase meant the actual sale process did not have a material impact on their decision to purchase. Therefore, the credit relationship was fair.

The Lender concluded by saying that there is no clear, compelling evidence that the Fractional Club was sold to Mr and Mrs W with the intention of financial gain.

As the deadline for responses to my PD has now passed, the complaint has come back to me to reconsider.

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 still think is relevant to this complaint is set out here:

<u>The Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) (the 'CCA')</u>

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

<u>Case Law on Section 140A</u>

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."[8]

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."

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

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.

The Law on Misrepresentation

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 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.[9]

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

The Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR')

The UTCCR protected consumers against unfair standard terms in standard term contracts. They applied and apply to contracts entered into until and including 30 September 2015 when they were replaced by the Consumer Rights Act 2015.

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

- Regulation 5: Unfair Terms
- Regulation 6: Assessment of Unfair Terms
- Regulation 7: Written Contracts
- Schedule 2: Indicative and Non-Exhaustive List of Possible Unfair Terms

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)

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

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.

And having considered everything again, including everything the Lender has submitted following my PD, I still uphold Mr and Mrs W's complaint for the reasons set out in the extract of my PD above. I will also deal with the matters that the Lender raised in response. But in doing so, I note again that my role as an Ombudsman is not to address every single point that has been made. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I have read the Lender's response in full, I will confine my findings to what I find are the salient points.

Mr and Mrs W's testimony

As part of Mr and Mrs W's submissions to this service, the PR has submitted a statement that it says represents Mr and Mrs W's recollections of the Time(s) of Sale. The Lender has said that it is not safe to place much weight on the statement, for the reasons set out above. So, I have again considered how much weight I think I can place on this statement when assessing the merits of Mr and Mrs W's complaint.

The statement is unsigned and undated, and was not submitted to this Service until December 2023. The PR says it was submitted to it as part of a bundle of documents sent to it in June 2018, which it says is verified by a date stamp on one document in the bundle.

I note that the Lender does not, in its submissions, seem to doubt when the statement was made, but is relying on it being unsigned and undated to cast sufficient doubt on its contents.

But having considered the document, I see no reason to doubt its provenance, and that it was submitted to the PR when it says it was. So, I'll now move on to reconsider the strength of the evidence it provides, and whether I can rely on what is contained within the statement when coming to my decision on the merits of Mr and Mrs W's complaint.

The Lender says that the claims made are generic and lack detail. But I am not persuaded that this means the testimony is unreliable.

The statement was written some five to six years after the events being complained about, so it is unsurprising that there are some things that are recalled which lack detail. What I need to consider, is whether there is a core of acceptable evidence from Mr and Mrs W such that the gaps or vague recollections have little to no bearing on whether their testimony can be relied on, or whether such gaps are fundamental enough to undermine, if not contradict, what they say about what the Supplier said and did to market and sell the Fractional Club memberships as investments.

But the Lender has not identified anything in the testimony that it can point to as being factually incorrect. It is simply disagreeing with what is being alleged. The factual inaccuracies that it says it has identified are contained within the Letter of Complaint. And this letter, whilst it is information as to what the PR says may have gone wrong, is not evidence. And I have not treated it as evidence, nor have I used it to inform my decision, other than it set out the points of complaint.

So, having considered the testimony, I am persuaded that it is likely to be a reliable recollection of events. I say this as it contains a level of detail that only Mr and Mrs W, as parties to the events, could have known, such as what they were thinking and why the second sale was not concluded until later. And they have also been clear as to their motivation to purchase.

So, whilst being mindful of the fact that the testimony was compiled some five to six years after the events, and having considered what the Lender has had to say on this issue, I'm satisfied, in this particular case, that I am able to place weight on what Mr and Mrs W have said.

How the Supplier sold and/or marketed Fractional Club

The Lender has said that if I am prepared to rely on Mr and Mrs W's testimony, I need to equally rely on the contemporaneous documentation provided which includes information recorded from the point of sale, which is more reliable, and it points to some sales notes which do not reference the products being sold as an investment. But I cannot see that this actually supports the argument that they were *not* sold in that way. This is a note by the sales agent, compiled post sale, to record how the sale went. Given that the sales agent would likely have known that they were not allowed to sell Fractional Club to customers as an investment, I would be very surprised to see it recorded on the sales notes that it was sold in that way, and that Mr and Mrs W had bought it as an investment. And a record that Mr and Mrs W were *"happy with everything"* does not provide any insight into how the product was sold, or their motivation to purchase, only that they were happy with it.

But in addition, the Lender seems to have overlooked the section of the PD where I deal with the contemporaneous documentation of both sales, which, as the Lender states, Mr and Mrs W signed at the Time(s) of Sale.

In the PD I said:

"There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of either Fractional Club 1 or 2 as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs W, the financial value of their share in the net sales proceeds of either Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork[10] that state that Fractional Club membership was not sold to Mr and Mrs W as an investment.

For example, in the Member's Declaration document given to Mr and Mrs W at both sales to read and sign, there are 15 statements. These include:

> *"5. We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that [the Supplier] makes no representation as to the future price or value of the Fraction."*

[10] The wording contained in the contemporaneous paperwork was the same for both sales, so it is only set out once in this decision.

And the Standard Information form, for example, stipulated the following on page 8 under the heading "Primary Purpose":

> *"The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for direct purposes of a trade in nor as an investment in real estate. [The Supplier] makes no representation as to the future price or value of the Allocated Property or any Fractional rights."*

When read on their own and together, these disclaimers go some way to making the point that the purchase of Fractional Rights shouldn't be viewed as an investment. But they weren't to be read on their own. They had to be read in conjunction with what else the Standard Information Form had to say, which included the following disclaimer:

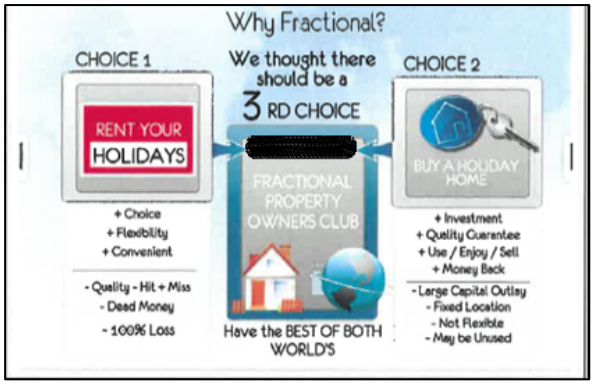
> *"**11. Investment advice***
>
> *The Vendor, any sales or marketing agent and the Manager and their related businesses (a) are not licenced investment advisors authorized by the Financial Services Authority to provide investment or financial advice; (b) all the information has been obtained solely from their own experience as investors and is provided as general information only and as such it is not intended for use as a source of investment advice and (c) all purchasers are advised to obtain competent advice from legal, accounting and investment advisors to determine their own specific investment needs; (d) no warranty is given as to any future values or returns in respect of an Allocated Property."*

This disclaimer seems to have been aimed at distancing the Supplier from any investment advice that was given by its sales agents, telling customers to take their own investment advice, and repeating the point that the returns from membership of the Fractional Club weren't guaranteed.

Yet I think it would be fair to say that, while a prospective member who read the disclaimer in question might well have thought that they would be wise to seek professional investment advice in relation to membership of the Fractional Club, rather than rely on anything they might have been told by the Supplier, it wouldn't have done much to dissuade them from regarding membership as an investment. In fact, I think it would have achieved rather the opposite.

It's also difficult to explain why it was necessary to include such a disclaimer in the Standard Information Form if there wasn't a very real risk of the Supplier marketing and selling membership of the Fractional Club as an investment given the difficulty of articulating the benefit of fractional ownership in a way that distinguishes it from other timeshares from the viewpoint of prospective members."

I remain of the opinion that the contemporaneous documentation, whilst requiring Mr and Mrs W to sign to say specifically that Fractional Club was *not* sold as an investment, would have done little to dissuade them from thinking that it was, especially after a sales process for which the sales staff were trained using the following slide:



Again, this slide titled “Why Fractional?” indicates that sales representatives would have taken Mr and Mrs W through three holidaying options along with their positives and negatives:

(1) “Rent Your Holidays”

(2) “Buy a Holiday Home”

(3) The “Best of Both Worlds”

It was the first slide in the 2011 Fractional Training Manual to set out any information about Fractional Club membership, and I think it suggests that sales representatives were likely to have made the point to Mr and Mrs W that membership combined the best of (1) and (2) – which included choice, flexibility, convenience and, significantly, **an investment** they could use, enjoy and sell before getting money back. (bold my emphasis).

The Lender has said that in my PD I have erred in conflating the two meanings of the word ‘return’, and that if a customer was told that some money would be ‘returned’ upon the sale of the Allocated Property, that would not be a breach of Regulation 14(3). And I agree. I recognise that it was possible to market and sell Fractional Membership without breaching the relevant prohibition in Regulation 14(3). For instance, simply telling a prospective customer very factually that a fractional membership included a share in an allocated property, and that they could expect to receive some money back on the sale of that property, but less than what they put in, would not breach Regulation 14(3).

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

So, in my view, if a supplier *implied* to consumers that future financial returns (in the sense of possible profits) from a timeshare were a good reason to purchase it, I think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment. And I acknowledge again that the Supplier, within the sales documentation, made efforts to avoid specifically describing Fractional Club membership as an ’investment’ or quantifying to prospective purchasers, such as Mr and Mrs 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. But, as I set out in my PD, I thought the Supplier, during the sales presentations, most likely did position both Fractional Club 1 and 2 as investments, and I've seen nothing to dissuade me that this was the case.

Were the credit relationships between the Lender and Mr and Mrs W rendered unfair?

The Lender says that it disagrees that Mr and Mrs W were motivated to make the Fractional Club purchases for the investment element. It says the reason they made both of the purchases was for the holidays that the memberships offered, and it has pointed to Mr and Mrs W's reservation history to support this. But I don't think the Lender has sufficiently taken account of what I said in my PD about this. I said:

"On my reading of Mr and Mrs W's testimony, the prospect of a financial gain from both of the Fractional Club membership purchases was an important and motivating factor when they decided to go ahead. That doesn't mean they were not interested in holidays – their timeshare ownership history and own testimony demonstrates that they quite clearly were, which is not surprising given the nature of the products at the centre of this complaint.

But, their motivation to purchase Fractional Club 1 is set out in their statement, where they say (plausibly in my view):

> *"The biggest selling point made, however, was that as we would become part owners of an actual property this was an investment and if we subsequently decided to sell then we would make a profit from the sale providing that property prices had risen, which of course they normally did. We were assured that we could choose to sell the ownership at any time or again if we wished could leave it to our children as part of their inheritance."*

So, as I'm satisfied that Fractional Club 1 membership was marketed and sold to them at the Time of Sale 1 as something that offered them more than just holiday rights, and given what they have said about the sale, on the balance of probabilities, I think their purchase of Fractional Club 1 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 their existing membership.

And with that being the case, I think the Supplier's breach of Regulation 14(3) at Time of Sale 1 was material to the decision to purchase Fractional Club 1 that they ultimately made.

As regards their purchase of Fractional Club 2, I can see that they didn't immediately go ahead with the purchase, as they say it involved a further financial outlay. And it was only when, two days later, the Supplier offered the membership to them at a reduced price, and gave them some additional points and a free 7-day accommodation voucher, that they agreed to go ahead.

The Lender may point to this as evidence that their motivation to purchase the second membership was for the holidays it provided, but I don't think it does. This is because the evidence is clear in my view, that both memberships were sold and/or marketed as investments. And as I'm satisfied that it is most likely that Mr and Mrs W decided to trade in their Vacation Club membership for Fractional Club 1 for the potential profit it offered, I see no reason why they would have traded that membership in, and bought Fractional Club 2, only six-weeks later, for different reasons, when the sales process, and the way the sale was framed, was likely to have been very similar.

So, as Mr and Mrs W say (again, plausibly in my view) that Fractional Club 2 membership was marketed and sold to them at the Time of Sale 2 as something that offered them more than just holiday rights, on the balance of probabilities, I think their motivation was the same

as the previous sale, which took place only six-weeks earlier. I think their purchase was motivated by their share in the new Allocated Property and the possibility of an increased profit from an apparently more valuable property."

The Lender has also pointed to the fact that in 2017 Mr and Mrs W, via another PR, wrote to the Supplier in an attempt to terminate the timeshare agreement. No specific mention was made in this letter that the product was sold as an investment, which the Lender suggests shows that Mr and Mrs W's motivation was to exit the timeshare, not because they felt it had been mis-sold. But I'm not persuaded by this. It seems that Mr and Mrs W engaged the PR due to being unhappy with their Fractional Club membership, and the initial relinquishment letter was the first step in the PR's process. And in any case, the complaint here is about an unfair credit relationship with the Lender under Section 140A of the CCA, which is not a complaint they could have brought against the Supplier.

So, whilst I accept it is *possible* that Mr and Mrs W would have purchased their Fractional Club memberships even if the Supplier hadn't led them to believe that there was the prospect of a financial gain from them, I don't think that's *probable* based on what I've seen. And as Mr and Mrs W say (plausibly in my view) that the Fractional Club memberships were marketed and sold to them at the Time(s) of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I remain persuaded that:

- their purchase of Fractional Club 1 was motivated by their share in the Allocated Property when it was sold, as that share and profit was one of the defining features of membership that marked it apart from their existing Vacation Club membership; and
- as regards their purchase of Fractional Club 2, I think their purchase was motivated by their share in the new Allocated Property and the possibility of an increased profit from an apparently more valuable property.

And with that being the case, I remain satisfied that the Supplier's breach of Regulation 14(3) at both Time of Sale 1 and Time of Sale 2 was material to the decisions to purchase Fractional Club 1 and Fractional Club 2 that they ultimately made.

Conclusion

Given the facts and circumstances of this complaint, I still think the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs W under both Credit Agreement 1 and Credit Agreement 2, and the related Purchase Agreement(s) 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.

Putting things right

In response to my PD, the Lender made no comment on my proposed methodology of redress, other than to say that the points value of the holidays Mr and Mrs W took using their Fractional Club 2 membership was greater than they could have taken with their existing Vacation Club membership. But they have not provided any evidence to support this, nor have they, as requested in the PD, set out their proposed calculations for any deductions for the market values of the holidays taken using the fractional memberships. So, I consider the following remains fair and reasonable in the circumstances:

Fair Compensation

Having found that Mr and Mrs W would not have agreed to purchase either Fractional Club 1 or Fractional Club 2 membership at the Time(s) 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 relationships between the Lender and the Consumer were 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 either the Fractional Club 1 or Fractional Club 2 memberships (i.e., not entered into the Purchase Agreement 1 or 2), and therefore not entered into the Credit Agreement 1 or 2, provided Mr and Mrs W agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs W were existing Vacation Club members, and their membership was traded in against the purchase price of the Fractional Club 1 membership. Under their Vacation Club membership, they had a number of Vacation Club Points. And, like Fractional Club membership, they had to pay annual management charges as Vacation Club members. So, had Mr and Mrs W not purchased Fractional Club 1 membership, they would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr and Mrs W from the Time of Sale 1 as part of their Fractional Club 1 (and then Fractional Club 2) membership(s) should amount only to the difference between those charges and the annual management charges they would have paid as ongoing Vacation Club members.

In this case, Mr and Mrs W entered into two separate credit agreements which ran concurrently, so the redress I am directing reflects this.

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

Fractional Club 1

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

(2) The Lender can deduct:

- The value of any promotional giveaways that Mr and Mrs W used or took advantage of when purchasing Fractional Club 1

(3) In addition to (1), the Lender should also refund the difference between Mr and Mrs W's Fractional Club 1 annual management charge paid on or after the Time of Sale 1 and what their Vacation Club annual management charges would have been had they not purchased Fractional Club 1 membership.

(4) Simple interest* at 8% per annum should be added to each of the Net Repayments (points 1,2 & 3 above) from the date each one was made until the date the Lender settles this complaint.

Fractional Club 2

(5) The Lender should refund Mr and Mrs W's repayments to it under Credit Agreement 2, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.

(6) The Lender can deduct:

- The value of any promotional giveaways that Mr and Mrs W used or took advantage of when purchasing Fractional Club 2.

(7) In addition to (5), the Lender should also refund the difference between Mr and Mrs W's Fractional Club 2 annual management charges paid on or after the Time of Sale 2 and what their Vacation Club annual management charges would have been

had they not purchased Fractional Club 1 or 2 memberships.

(8) Simple interest* at 8% per annum should be added to each of the Net Repayments (points 5,6 & 7 above) from the date each one was made until the date the Lender settles this complaint.

In addition:

(9) The Lender should remove any adverse information recorded on Mr and Mrs W's credit files in connection with Credit Agreement 1 and Credit Agreement 2 reported within six years of this decision.

(10) If Mr and Mrs W's Fractional Club 2 membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club 2 membership.

*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/or Mrs W a certificate showing how much tax it's taken off if they ask for one

My final decision

I uphold this complaint and direct Shawbrook Bank Limited to calculate and pay fair compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W and Mrs W to accept or reject my decision before 15 July 2025.

Chris Riggs
Ombudsman