DRN-5634946

The complaint

Mrs G's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) being party to unfair credit relationships with her 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.

The purchases and credit agreements to which this complaint relates were taken in the joint names of Mrs G and Mr G. However, Mr G sadly died before this complaint was made, so while I will refer to both of them throughout this complaint, Mrs G is the eligible complainant here.

What happened

Between 2011 and 2019, Mrs G and the late Mr G made multiple timeshare purchases from a timeshare provider (the 'Supplier'), some of which were purchased with cash, and others which were purchased using finance. Each purchase involved the trading in of their existing 'points' towards the new membership. Four of these purchases were made with fixed-term loan agreements from the Lender in their joint names (highlighted in bold below), and it is these four which are the subject of this complaint.

Mrs G and the late Mr G's timeshare purchases include the following:

- 9 October 2011 – Purchase of a Trial Membership for £3,995 – finance from another lender.
- **6 May 2012 (the 'Fractional 1') – Purchase price of £24,745. 1,494 fractional points bought ('Time of Sale 1') using finance of £10,000 ('Credit Agreement 1') from the Lender – settled via a lump sum payment on 4 February 2013.**
- **4 February 2013 – (the 'Fractional 2') Purchase price of £12,160. 2,241 fractional points bought (the 'Time of Sale 2') using finance of £12,160 ('Credit Agreement 2') from the Lender – settled through consolidation 15 March 2015.**
- 22 October 2013 – Purchase 3,260 fractional points costing £11,624, paid with cash. (This membership was subsequently split, with 1,660 of its points traded in at the next purchase.)
- **15 March 2015 – (the 'Signature Collection') Purchase price of £15,633. 2,330 fractional points bought (the 'Time of Sale 3') using finance of £27,804 ('Credit Agreement 3') from the Lender– balance remains outstanding.**
- 13 March 2016 to 3 December 2018 – three further purchases of Signature Collection memberships, each trading in the previous fractional points towards the purchase. Paid for either by debit card payment or finance from another lender.
- **6 November 2019 (the 'Emerald Club') - Purchase price of £70,791, bought ('Time of Sale 4') using finance of £12,399 ('Credit Agreement 4') from the Lender – balance remains outstanding.**

Fractional 1,2 and Signature Collection were purchases of timeshares which were asset backed - which meant they gave Mrs G and the late Mr G more than just holiday rights. They also included a share in the net sales proceeds of a property named on the purchase agreement (the 'Allocated Property') after their membership term ends.

Emerald Club was a points-based timeshare membership which was not asset backed. It gave Mrs G and the late Mr G a certain number of 'points' each year which they could use for accommodation at the Supplier's portfolio of resorts. From what I understand, Mrs G and the late Mr G traded in all of their existing Signature Collection membership points towards the purchase of the Emerald Club.

Mrs G – using a professional representative (the 'PR') – wrote to the Lender on 30 November 2021 (the 'Letter of Complaint') to complain about:

- Misrepresentations by the Supplier at all 4 times of sale giving her claims against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
- The Lender being party to unfair credit relationships under all 4 Credit Agreements and related Purchase Agreements for the purposes of Section 140A of the CCA.

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

Mrs G says that the Supplier made a number of pre-contractual misrepresentations at the times of sale – namely that the Supplier:

- Told them that the purchase of the timeshare(s) would mean they would own a "fraction" of a property at a resort of the Supplier, which was untrue.
- Told them the purchase was an excellent investment, and the product(s) were highly valuable as they would be ever appreciating in price, which is untrue.
- Told them that they were buying an interest in a specific piece of "real property" when that was not true.
- Told them that the Supplier's holiday resorts were exclusive to its members when that was not true.
- Told them the products could be sold at any time and they would make a profit from the proceeds, which was untrue.

Mrs G says that she has a claim against the Supplier for each of the purchases in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, she has like claims against the Lender, who, with the Supplier, is jointly and severally liable to Mrs G.

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

The Letter of Complaint set out several reasons why Mrs G says that the credit relationships between her and Mr G and the Lender were unfair to her under Section 140A of the CCA. In summary, they include the following:

- The contractual terms setting out (i) the duration of their timeshare membership(s) and/or (ii) the obligation to pay annual management charges for the duration of their membership(s) were unfair contract terms.
- The Supplier's sales presentations at the times of sale included the misrepresentations outlined above, and also misleading actions and/or misleading omissions, meaning that Mrs G and the late Mr G were unable to make a reasonably informed decision to

purchase on each occasion.

- The Supplier failed to provide Mrs G and the late Mr G with key information regarding their purchase(s).
- The Supplier failed to provide sufficient information in relation to the memberships' ongoing costs.
- The decisions made by the Lender to provide finance were irresponsible because;
    i. The money lent to them under the Credit Agreement(s) was unaffordable for them;
    ii. No meaningful affordability checks or assessments were made as to the affordability of the loans;
    iii. No choice of finance companies was given to Mrs G and the late Mr G; and
    iv. No reasonable steps were taken to ensure the loans were suitable for Mrs G and the late Mr G.

The Lender initially dealt with Mrs G's concerns as a claim under Section 75 of the CCA, which it rejected, and said some of Mrs G's claims were time-barred under the Limitation Act 1980 (the 'LA'). Mrs G did not accept this, and the PR complained to the Lender, who in response, on 19 October 2023, said it was not in a position to provide Mrs G with a final response, and advised her that she was able to refer her complaint to our Service if she wished to.

The PR, on Mrs G's behalf, did so. Her complaint was assessed by an Investigator at our Service who, when considering each of the sales separately, thought that some of the complaints about the sales had been made too late under the rules by which this Service must operate. And the aspects of Mrs G's complaint that she considered had been made in time, she didn't think ought to be upheld.

Mrs G didn't agree with the Investigator, so the matter came to me to decide initially whether our Service had jurisdiction to consider Mrs G's complaints.

On 30 September 2024 I issued a decision setting out which aspects of Mrs G's complaint I considered to be in the jurisdiction of this Service – this followed a provisional decision I issued earlier which the PR did not reply to. I said that Mrs G's complaints that the Lender was a party to an unfair debtor-creditor relationship, as defined by Section 140A of the CCA, arising from Credit Agreements 1 and 2 had been made too late, so I did not have the power to consider those complaints. But I thought her remaining complaints about (1) the credit relationships arising from Credit Agreements 3 and 4, and (2) the complaint that her claims made under Section 75 of the CCA had not been properly dealt with, had been made in time and could be considered.

Since then, the PR has accepted what I said about our power to consider the credit relationship arising out of Credit Agreement 1, but disputes what I said about Credit Agreement 2. The PR said that as the outstanding balance of Credit Agreement 2 was consolidated by the lending from Credit Agreement 3, the credit relationship, and the associated unfairness, was perpetuated. The PR said this meant the complaint about Credit Agreement 2 had been made in time.

The merits of Mrs G's complaints

I went on to issue a provisional decision in which I considered the merits of the aspects of Mrs G's complaint that I thought were in the jurisdiction of this Service.

In summary, I said:

- In relation to Mrs G's claims under Section 75 of the CCA, the Lender would have had a defence to the claims relating to Fractional 1, 2 and the Signature Collection under the LA. And as far as Time of Sale 4 was concerned, as the value of the purchase was in excess of £30,000 I didn't think Section 75 of the CCA applied to Mrs G's claim.
- In relation to Mrs G's complaints of unfair credit relationships with the Lender entered into at Time of Sale 3 and Time of Sale 4, I didn't think either complaint ought to be upheld.

The Lender accepted my provisional decision on the merits of Mrs G's complaint without further comment. But the PR, on Mrs G's behalf, did not, and in addition to its continuing arguments relating to this Service's jurisdiction, it made submissions regarding my provisional decision not to uphold Mrs G's complaints.

As a result of the PR's submissions, and my reconsideration of all of the evidence submitted in this complaint, I remained of the opinion that Mrs G's complaint about Time of Sale 2 and its associated Credit Agreement 2 had been made too late and so was not in the jurisdiction of this Service, and her complaints in relation to their purchase of the Emerald Club at Time of Sale 4 ought not to be upheld.

I did, however, change my mind on the merits of Mrs G's complaint of an unfair credit relationship relating to their purchase of the Signature Collection, at Time of Sale 3, and the associated Credit Agreement 3. I thought this complaint ought to be upheld because, having reconsidered everything, I thought the Supplier had sold and/or marketed the Signature Collection membership to Mrs G and the late Mr G as an investment, in breach of Regulation 14(3) of the Timeshare Regulations. And the impact of this breach rendered the associated Credit Relationship under Credit Agreement 3 unfair to Mrs G under Section 140A of the CCA.

So I set out my thoughts in a second provisional decision (the 'PD2'). In this I said:

"What I've provisionally 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.

But before I set out my current thoughts on the merits of Mrs G's complaint, I will briefly deal with the PR's response to my decision on jurisdiction.

Can I consider a complaint about Credit Agreement 2?

The question of our Service's jurisdiction over Mrs G's complaint of unfairness under Section 140A of the CCA relating to Credit Agreement 2 remains disputed by the PR.

In brief, in the provisional decision I found that the complaint made by her about there being an unfair debtor-creditor relationship arising out of Credit Agreement 2 was made too late under the rules that set out the time limits that apply to making complaints. Here, I thought that Mrs G complained more than six years from when the relationship arising from Credit Agreement 2 ended and more than three years from when she knew, or ought reasonably to have known, that she had cause for complaint.

The PR, in response to my provisional decision, said the credit relationship between Mrs G and the late Mr G and the Lender resulting from Credit Agreement 2 had not ended, as the outstanding balance had been consolidated into Credit Agreement 3. In other words, it

argued, for the purposes of considering the time limits for making a complaint about whether the credit relationship that came about from Credit Agreement 2 was unfair under Section 140A of the CCA, as the credit relationship had been carried on in the new loan (which was still current), the associated credit relationship also remained. So, the PR argued, Mrs G had made her complaint in time and that this Service could consider its merits.

But having considered this point carefully, I don't agree. I am satisfied that the credit relationship formed between Mrs G and the late Mr G and the lender at the Time of Sale 2 ended when the outstanding balance of Credit Agreement 2 was cleared, even though this was cleared by a consolidating loan from the same Lender. That was a new agreement, with new terms, so created a new relationship.

So, I remain satisfied that Mrs G's complaint regarding the unfairness of her credit relationship with the Lender resulting from Credit Agreement 2 has been made too late and so is not in the jurisdiction of the Financial Ombudsman Service.

The remainder of Mrs G's complaint

I have reconsidered everything in light of Mrs G's submissions following my provisional decision.

It appears all parties have accepted my provisional findings not to uphold Mrs G's complaint about the Lender's handling of her Section 75 claims of misrepresentation relating to what happened at Times of Sale 1-4 for the reasons I have given previously. I see no purpose in repeating those reasons here, but for clarity, I do not think the Lender was unfair and unreasonable in not accepting Mrs G's claims under Section 75 of the CCA. If Mrs G does not agree with this, then she can say so in response to this provisional decision.

But, having reconsidered everything, I now think that Mrs G's complaint of unfairness in the credit relationship she (and Mr G) had with the Lender resulting from Credit Agreement 3 ought to be upheld, as I think the resulting credit relationship is unfair to Mrs G for the purposes of Section 140A of the CCA. But I remain satisfied that the credit relationship Mrs G has with the lender resulting from Credit Agreement 4 is not unfair, and so her complaint about that should not be upheld.

I will now go on to explain my provisional findings on the merits of Mrs G's complaints, but as I have made clear previously, 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, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

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

Mrs G's submissions to this Service

In addition to the letter of complaint, and the relevant documentation relating to each sale, Mrs G has submitted a detailed statement, signed and dated 25 June 2021, chronologically setting out her recollections of each sale made by the Supplier.

When considering how much weight I can place on Mrs G's statement, I am assisted by the judgement in the case of Smith v Secretary of State for Transport [2020] EWHC 1954 (QB).

At paragraph 40 of the judgment, Mrs Justice Thornton helpfully summarised the case law

on how a court should approach the assessment of oral evidence. Although in this case I have not heard direct oral evidence, I think this does set out a useful way to look at the evidence Mrs G has provided. Paragraph 40 reads as follows:

> *"At the start of the hearing, I raised with Counsel the issue of how the Court should assess his oral evidence in light of his communication difficulties. Overnight, Counsel agreed a helpful note setting out relevant case law, in particular the commercial case of Gestmin SPGS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) (Leggatt J as he then was at paragraphs 16-22) placed in context by the Court of Appeal in Kogan v Martin [2019] EWCA Civ 1645 (per Floyd LJ at paragraphs 88-89). In the context of language difficulties, Counsel pointed me to the observations of Stuart- Smith J in Arroyo v Equion Energia Ltd (formerly BP Exploration Co (Colombia) Ltd) [2016] EWHC 1699 (TCC) (paragraphs 250-251). Counsel were agreed that I should approach Mr Smith's evidence with the following in mind:*
>
> a. *In assessing oral evidence based on recollection of events which occurred many years ago, the Court must be alive to the unreliability of human memory. Research has shown that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts (Gestin and Kogan).*
> b. *A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence (Kogan).*
> c. *The task of the Court is always to go on looking for a kernel of truth even if a witness is in some respects unreliable (Arroyo).*
> d. *Exaggeration or even fabrication of parts of a witness' testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony (Arroyo).*
> e. *The mere fact that there are inconsistencies or unreliability in parts of a witness' evidence is normal in the Court's experience, which must be taken into account when assessing the evidence as a whole and whether some parts can be accepted as reliable (Arroyo).*
> f. *Wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, may be neither reliable nor even truthful, the difficulty of discerning where the truth actually lies, what findings he can properly make, is often one of almost excruciating difficulty yet it is a task which judges are paid to perform to the best of their ability (Arroyo, citing Re A (a child) [2011] EWCA Civ 12 at para 20)."*

From this, and from my own experience, I find that inconsistencies in evidence are a normal part of someone trying to remember what happened in the past. So, I am not surprised that there are some errors and confusion in what Mrs G said happened and what other evidence shows. The question to consider, therefore, is whether there is a core of acceptable

evidence from her that the errors and confusion have little to no bearing on, or whether such inconsistencies are fundamental enough to undermine, if not contradict, what she says about what the Supplier said and did to market and sell the various memberships as investments.

So, for example, I do not find it surprising that there appears to be some confusion, when it comes to Fractional 1 and 2, about which sale was which. There were, after all, multiple sales over the course of a number of years, and confusing what occurred in two sales, which took place only nine months apart and some eight or nine years before the statement was written does not, in my view, significantly impact the core of acceptable evidence. But, as I go on to explain, there are some errors in the statement which do call into question the amount of weight I can place on it.

In my previous provisional decision, I said that I thought Mrs G appeared to have made no mention of the Time of Sale 3. In her statement Mrs G set out a sale as 'Purchase 3 – Fractional Ownership October 2013', in which she describes what I have referred to as Time of Sale 1, and a further purchase made in October 2013 (which is not the subject of this complaint), and then moves on to what she calls 'Purchase 4 – Fractional at the Signature Collection 2016' (which is also not the subject of this complaint). So, on my initial reading of her statement, I thought the purchase of Signature Collection, which the records indicate occurred on 15 March 2015, and which was financed by a point-of-sale loan by the Lender, had not been referred to in Mrs G's statement at all.

But having reconsidered it afresh, I think I have been mistaken in my understanding of what she has set out. I will explain.

Mrs G starts by describing the purchase of their trial membership in 2011. She then moves on to what she calls "Purchase 2 – Fractional Ownership 2012". In this, which I think is clear, she is referring to the purchase she and Mr G made on 6 May 2012 (Fractional 1). And in talking about what happened in May 2012 she says:

"They offered a free week in [the Supplier's resort] in Spain which we accepted and were approached there using high pressure, having placed us in the best accommodation."

This I think clearly relates to the late Mr G and Mrs G's first holiday after purchasing the trial membership. I think this as the Supplier routinely provided a 'free' week as part of the trial, with an obligation on the customers to attend a 'presentation' during the week. So, in this part of her statement, Mrs G is talking about attending that presentation, and it is clear that she and the late Mr G were not yet fractional members. So, I am satisfied she is talking about the sales process at Time of Sale 1 when she says:

> *"At the meeting we were told of the various benefits of becoming fractional owners:*
>
> 1. *Becoming Fractional Owners meant that we would own an interest in property we would be purchasing actual bricks and mortar which we could sell when we wanted as it attracted a great resale opportunity due to its high demand amongst its new and existing customers.*
> 2. *Due to it being an interest in property it was a valuable asset to have.*
> 3. *We would have access to exclusive 5 star holidays for much less than we would pay for holidays of that quality on the open market.*
> 4. *The fractional owners club attracted points which could be used in exchange for luxury holidays and rewards. These points could be exchanged for holidays anywhere within the supplier's portfolio of results.*

5. *[The Supplier's] resorts were exclusive to members only and were not available to the general public.*
6. *[The Supplier] had a wide range of destinations and resorts so we wouldn't have a problem booking holidays.*
7. *The property would be sold in 10 years time and the profits from the sale proceeds will be split amongst all of the fractional owners of that property.*
8. *It was not a timeshare and was in fact something better than a timeshare product. I was mostly interested in the investment side of the memberships and the fact that we could book luxury holidays for cheaper."*

This is clearly relating to Time of Sale 1 and their purchase of Fractional 1, because from what she has said she is referring to her first purchase of fractional membership, because she talks about "Becoming Fractional Owners…"

In her statement, Mrs G then goes on with a further heading "Purchase 3 – Fractional Ownership October 2013".

She initially describes taking out a loan for a timeshare on 5 February 2013, which is most likely, given the date (albeit an error of one day), referring to Time of Sale 2. But other than saying it was purchased, and financed by a credit agreement, she does not describe the purchase of Fractional 2 and Time of Sale 2 at all.

She then describes making a further Fractional Club purchase on 22 October 2013 which does not form part of this complaint.

The next purchase she describes is headed "Purchase 4 – Fractional at the Signature Collection 2016".

When I initially considered this part of Mrs G's statement, given the date she had used in the heading I thought she was referring to a 2016 purchase which did not form part of this complaint. But I think I was mistaken here, as I believe Mrs G has made an error in the heading, and it should read 2015. I think this because when I've considered what she has written, I think it can only be about the first occasion that she and Mr G bought the version of fractional membership called the Signature Collection. And that occurred in 2015 at Time of Sale 3. She says (bold, my emphasis):

> *"On holiday using our membership, we received a telephone call with the appointed owner and went for a free breakfast. We were then taken to the sales department where another meeting took place, we were approached by a representative who invited us to a meeting regarding updates being made to the club which we were interested in hearing about.*
>
> *At this meeting we were again told of all the benefits fractional ownership had to offer. We were further told that the [Supplier's]* ***Signature Collection would be much more to our liking*** *as it was more luxurious and offered better accommodation and facilities. It was also much more likely to sell in the future given* ***it was a more luxurious membership and properties were much nicer than the one we currently owned.***
>
> *This was particularly attractive as we were interested in the investment side of owning a fractional membership and we liked the idea of having better holidays. Again, we were told it would be cheaper to purchase this membership over purchasing holidays on the open market, so it was good value for money too."*

The parts highlighted can only be referring to Mrs G and the late Mr G's first purchase of the Signature Collection, and that was at Time of Sale 3. So, I think I was mistaken when I said

in my first provisional decision that Mrs G had not provided any evidence relating to that sale. I now think she has, and it is contained in her witness statement under the heading "Purchase 4 – Fractional at the Signature Collection 2016".

As I said previously, Time of Sale 4 is referred to by Mrs G in her statement as 'Purchase 10 – Emerald Membership November 2019'. In respect of this sale, she said:

> *"On the 6th November 2019 my husband and I purchased more fractional points which afforded us an Emerald membership which was a more luxurious membership with better facilities, better accommodation and overall a better holiday experience. The purchase price of this membership was £12,399. The initial purchase price of the membership was £70,791 but we traded in our other memberships which had a value of £58,890 plus legal and admin fees of £499 which gave us the remaining sum of £12,399. We took out a loan with [the Lender] in joint names.*
>
> *The maintenance fees now stand at 4,024 euros per year and are too much for me to afford by myself. I was under the impression they were only 1,000 euros.*
>
> *At every meeting we attended, the representatives repeated the benefits listed at paragraph 21[1] above and emphasised the fact that purchasing further fractional memberships was considered an upgrade and that each purchase meant that we could sell our timeshare for more money and make a bigger profit. Each property was more luxurious than the previous one and was more valuable.*
>
> *We liked the idea of getting better holidays of better quality, but we also had in mind the investment side of it and it has come to my disappointment that it is highly unlikely that the properties would ever be sold by [the Supplier] as [the Supplier] themselves own a fractional week of each property and do not have to agree to the sale of the property as all fractional owners need to agree to the sale. This, of course, was not mentioned to us at the meetings and we were led to believe that we would have no problem selling our timeshares, as we had upgraded to much better-quality properties. Also, we were not told that all members of the unit had to agree to sell. We thought that we could sell our fractional share at any time, this was the impression made to us. [The Supplier] owned a fraction too, if it didn't agree to a sale then we wouldn't be able to.*
>
> *I believe we were heavily blind sighted by the 'benefits' of purchasing the timeshares and were led to believe that, whilst meanwhile we would benefit from very high-standard accommodation and holidays, we would be able to sell the timeshares in 15-years and make a profit from the sale proceeds. I didn't quite realise just how much of a financial burden we were getting ourselves into at the time. It has only come to my attention after the death of my husband, and I cannot believe the amount of money we have spent on our timeshares."*

Mrs G's complaints that she is party to unfair credit relationships with the Lender as a result of Time of Sale 1, 2, 3 and 4 are separate and distinct complaints. I have already explained that I think that Mrs G's complaint about the unfair credit agreements arising from Credit Agreements 1 and 2 had been made too late and were therefore not in the jurisdiction of the Service. As such I am unable to consider the merits of the complaint about what happened at Time of Sale 1 and 2. But I will go on to consider whether I think the Lender was party to an unfair credit relationship with Mrs G relating to Time of Sale 3 (Credit Agreement 3) and Time of Sale 4 (Credit Agreement 4).

---

[1] As said previously, this appears likely to be an error as paragraph 21 makes no reference to any benefits of fractional ownership.

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

In this part of the decision, I am assessing the fairness of the credit relationships between Mrs G and the Lender relating to Credit Agreement 3 and 4.

Section 140A of the CCA is relevant law, so I do have to consider it. And the CCA states I also need to consider related agreements. Because the outstanding balance of Credit Agreement 2 was consolidated when Credit Agreement 3 was incepted, and because the Lender provided the finance for both purchases, Purchase Agreement 2 and Credit Agreement 2 became related agreements to Credit Agreement 3.

Section 140C of the CCA says this:

> *(4) References in sections 140A and 140B to an agreement related to a credit agreement (the 'main agreement') are references to –*
>
> *a. A credit agreement consolidated by the main agreement;*
> *b. a linked transaction in relation to the main agreement or to a credit agreement within paragraph (a);*[2]
>
> *…*
>
> (7) *For the purposes of this section a credit agreement (the 'earlier agreement') is consolidated by another credit agreement (the 'later agreement') if –*
>
> *a. The later agreement is entered into by the debtor (in whole or in part) for purposes connected with debts owed by virtue of the earlier agreement; and*
>
> *b. At any time prior to the later agreement being entered into the parties to the earlier agreement included –*
>
> *i. The debtor under the later agreement; and*
>
> *ii. The creditor under the later agreement…*

So, 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 Purchase Agreement 2 and Credit Agreement 2) 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. (bold my emphasis)*

So, in the particular circumstances of this case, in determining what is fair and reasonable in all the circumstances of the case, and considering whether the credit relationships between Mrs G and the Lender are unfair, what happened at Time of Sale 2 is relevant when considering the fairness of the relationship between the Lender and Mrs G under Credit Agreement 3.

---

[2] Both the Fraction 2 and Signature Collection purchase agreements are linked transactions – see s.19 CCA.

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as "a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]". And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to "finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mrs G and the late Mr G's Fractional 1 and 2 memberships, the Signature Collection and the Emerald Club membership, were each conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

Antecedent negotiations under Section 56 cover both the acts and omissions of the Supplier, as Lord Sumption made clear in Plevin, at paragraph 31:

"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.' […] Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."

And this was recognised by Mrs Justice Collins Rice in Shawbrook & BPF v FOS at paragraph 135:

"By virtue of the deemed agency provision of s.56, therefore, acts or omissions 'by or on behalf of' the bank within s.140A(1)(c) may include acts or omissions of the timeshare company in 'antecedent negotiations' with the consumer".

In the case of Scotland & Reast, the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that "negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law" before going on to say the following in paragraph 74:

"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose

of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[3]

So, the Supplier is deemed to be the Lender's statutory agent for the purpose of the pre-contractual negotiations.

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in Patel (which was recently approved by the Supreme Court in the case of Smith), that determining whether or not the relationship complained of was unfair had to be made "having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination" – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in Plevin (at paragraph 17):

"Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with […] whether the creditor's relationship with the debtor was unfair."

Instead, it was said by the Supreme Court in Plevin that the protection afforded to debtors by Section 140A is the consequence of all of the relevant facts.

I have considered the entirety of each of the two credit relationships (Credit Agreement 3 and 4) between Mrs G and the Lender along with all of the circumstances of the complaint, and in doing so I have also considered related agreements. And as I've said, I currently think the credit relationship relating to Credit Agreement 3 is unfair to Mrs G for the purposes of Section 140A, but I do not think the credit relationship relating to Credit Agreement 4 is likely to have been rendered unfair.

When coming to those conclusions, and in carrying out my analysis, I have looked at:

1. *The Supplier's sales and marketing practices at Time of Sale 2 (as the Purchase Agreement 2 and Credit Agreement 2 are related agreements) and Times of Sale 3 and 4 - which includes the available training material that I think is likely to be relevant to the sale;*
2. *The provision of information by the Supplier at Times of Sale 2, 3 and 4, 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 Times of Sale; and*
4. *The inherent probabilities of the sales given their circumstances.*

I have then considered the impact of the above on the fairness of the credit relationships between Mrs G and the Lender.

<u>The sale of Fractional 2</u>

As I've already said, I'm satisfied that under the rules that this Service must follow, Mrs G's

---

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

complaint of unfairness under Section 140A of the CCA regarding the sale of Fractional 2 and the associated Credit Agreement 2 is not in the jurisdiction of this Service as it was made too late.

However, as I've also said, as the outstanding balance of Credit Agreement 2 was consolidated by a loan from the same Lender under Credit Agreement 3, the Purchase Agreement 2 and Credit Agreement 2 become related agreements to Credit Agreement 3. This means I can consider if there was any unfairness to the credit relationship between the Lender and Mrs G which was perpetuated in the credit relationship under Credit Agreement 3.

But having considered what I've been told about Time of Sale 2, I am simply not persuaded that Fractional 2 was misrepresented in the way that has been alleged in the Letter of Complaint. And I am not persuaded that the credit relationship between Mrs G and the late Mr G and the Lender was rendered unfair to them for any of the reasons alleged. There simply isn't the evidence to support what has been set out in the Letter of Complaint.

The Letter of Complaint set out several reasons why the Supplier misrepresented the Fractional 2 membership, all of which I set out at the start of this decision. But beyond the bare allegation in the Letter of Complaint, Mrs G has said very little in her testimony about what happened at Time of Sale 2, and the allegations set out in the Letter of Complaint have not been expanded on at all.

And the same goes for the reasons that allegedly caused the credit relationship between Mrs G and the late Mr G and the Lender to be rendered unfair, which again were set out at the start of this decision.

I have considered the Purchase Agreements and other contractual documents relating to this sale. It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mrs G and the late Mr G when they purchased the Fractional 2 membership at the Time of Sale 2. But the PR says that the Supplier failed to provide them with all of the information they needed to make an informed decision, specifically around the membership's ongoing costs.

But other than the bare allegation, I'm not persuaded by the evidence submitted that this was the case. Mrs G has simply not said anything in her statement in this regard. And this was, after all, their second fractional purchase, so it is likely that Mrs G and the late Mr G would have been aware of the need to pay annual management charges. And these were set out in the standard contractual documentation.

So, while it's possible the Supplier didn't give Mrs G and the late Mr G sufficient information, in good time, on the above elements of their membership in order to satisfy its regulatory responsibilities at the Time of Sale 2, I don't think it is probable.

I have also considered the allegation that there were unfair contractual terms relating to Time of Sale 2, specifically in relation to the duration of membership and the obligation to pay management charges for that duration.

To conclude that a term in the Purchase Agreement 2 rendered the credit relationship between Mrs G and the late Mr G and the Lender unfair to them, I'd have to see that the term was unfair under the CRA, and that the term was actually operated against Mrs G and the late Mr G in practice.

In other words, it's important to consider what real-world consequences, in terms of harm or prejudice to Mrs G and the late Mr G, flowed from such a term, because those

consequences are relevant to an assessment of unfairness under Section 140A. For example, the judge in Link Financial v Wilson [2014] EWHC 252 (Ch) attached importance to the question of how an unfair term had been operated in practice: see [46].

Having considered everything that has been submitted, it seems unlikely to me that the contract term(s) cited by the PR led to any unfairness in the credit relationship between Mrs G and the late Mr G and the Lender for the purposes of Section 140A of the CCA. I say this because I cannot actually see how they have been operated in a way that is unfair. It is also important to note that the contract that the PR says caused an unfairness was only in existence for about nine months, and the PR also hasn't explained why exactly they feel these term(s) cause an unfairness in any event. I will consider this point in further detail later in this decision in regard to the Emerald Club membership.

The PR also says that the right checks weren't carried out before the Lender lent to Mrs G and the late Mr G at the Time of Sale 2. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend on either occasion (and I make no such finding), I would have to be satisfied that the money lent to Mrs G and the late Mr G was actually unaffordable, before also concluding that they lost out as a result, and then consider whether the credit relationship with the Lender was unfair to them for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for them.

<u>Was Fractional 2 sold as an investment?</u>

I have also considered if I think it likely that the Supplier breached Regulation 14(3) of the Timeshare Regulations when it sold Fractional 2 to Mrs G and the late Mr G.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling membership of the Fractional Club as an investment. This is what the provision said at the Time of Sale 2:

"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 the PR, in the Letter of Complaint, when considering the misrepresentations it says were made at the Time(s) of Sale, says that the Supplier did sell Fractional 2 membership as an investment. So that is what I've considered next.

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.

Mrs G and the late Mr G's share in the Allocated Property relating to Fractional 2 clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional 2 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 <u>as an investment</u>. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

In other words, the Timeshare Regulations did not ban products such as Fractional 2. They just regulated how such products were marketed and sold. To conclude, therefore, that

Fractional 2 membership was marketed or sold to Mrs G and the late Mr G as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

There is competing evidence in this complaint as to whether Fractional 2 membership was marketed and/or sold by the Supplier at the Time of Sale 2 as an investment in breach of regulation 14(3) of the Timeshare Regulations.

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of Fractional 2 as an 'investment' or quantifying to prospective purchasers, such as Mrs G and the late Mr G, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional 2 membership was not sold to Mrs G and the late Mr G as an investment. So, it's possible that Fractional 2 membership wasn't marketed or sold to them as an investment in breach of Regulation 14(3).

On the other hand, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional 2 membership as an investment. So, I accept that it's equally possible that Fractional 2 membership was marketed and sold to Mrs G and the late Mr G as an investment in breach of Regulation 14(3).

However, whether or not there was a breach of the relevant prohibition by the Supplier is not ultimately determinative of the outcome in this part of the complaint for reasons I will come on to shortly. And with that being the case, even though I am unable to make a formal finding on this issue given the jurisdictional restrictions, it is actually not necessary for me to do so either.

If Fractional 2 was sold as an investment, was the resulting credit relationship rendered unfair?

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.

And in light of what the courts had to say in Carney and Kerrigan, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mrs G and the late Mr G and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement 2 and the Credit Agreement 2 is an important consideration.

But as I've already said, there was no suggestion in Mrs G's initial recollections of the sales process at the Time of Sale 2 that the Supplier led them to believe that the Fractional 2 membership was an investment from which they would make a financial gain, nor was there any indication that they were induced into the purchase on that basis. Mrs G has said very little at all about what happened at Time of Sale 2, so I am unable to conclude that their motivation to make the purchase was the potential for a financial gain.

On balance, therefore, even if the Supplier had marketed or sold the Fractional 2 membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded, from the evidence provided, that their decision to purchase Fractional 2

membership at the Time of Sale 2 was motivated by the prospect of a financial gain (i.e., a profit) as set out in the Letter of Complaint. And for that reason, I do not think the credit relationship between Mrs G and the late Mr G and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

So, it follows that I do not think that there was any unfairness in the related agreements which was perpetuated into Credit Agreement 3.

Signature Collection (Time of Sale 3) – did the Supplier breach Regulation 14(3) of the Timeshare Regulations?

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this aspect of the complaint. And having done that, I currently think that this part of the complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Signature Collection membership to Mrs G and the late Mr G as an investment, which, in the circumstances of this complaint, rendered the credit relationship between Mrs G and the Lender unfair to her for the purposes of Section 140A of the CCA.

As I've said before in this decision, 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 Mrs G's complaint about the sale of Signature Collection at the Time of Sale 3, it isn't necessary to make formal findings on all of them. This is because, even if those other aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mrs G in the same or a better position in respect of their purchase of Signature Collection, than she would be if the redress was limited to those other aspects.

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

The Lender does not dispute, and I am satisfied, that Mrs G and the late Mr G's Signature Collection membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Mrs G and the late Mr G's share in the Allocated Property relating to Signature Collection clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But again, the fact that Signature Collection 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 membership being considered here. They just regulated how such products were marketed and sold.

To conclude, therefore, that Signature Collection membership was marketed or sold to Mrs G and the late Mr G as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Signature Collection membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

But, as I've set out earlier in this decision, Mrs G says that the Supplier did exactly that at the Time of Sale 3. In her statement she said she was told by the Supplier that the property within the Signature Collection was:

> *"…much more likely to sell in the future given it was a more luxurious membership and properties were much nicer than the one we currently owned.*
>
> *This was particularly attractive as we were interested in the investment side of owning a fractional membership and we liked the idea of having better holidays."*

And this sale needs to be considered in the context of Mrs G's evidence as a whole. After the trial membership, all of the subsequent memberships Mrs G and the late Mr G had purchased from the Supplier were fractional, and this was their third 'fractional' membership. All of the previous fractional memberships included an investment element of an Allocated Property. And Mrs G has said that the earlier memberships had been positioned as investments. For example, she has described being told by the Supplier at Time of Sale 1 that the Allocated Property provided 'a great resale opportunity', and it would be in 'high demand', and be 'a valuable asset'. All of this lends credence to what Mrs G says happened when they were sold Signature Collection membership at the Time of Sale 3 – that it was an upgraded Allocated Property that was much more likely to sell in the future, and more likely to sell for more than they purchased it for.

So, Mrs G alleges, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale 3 because it promoted the profitable resale aspect of fractional ownership, meaning that:

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

(2) *It was implied by the Supplier that they would get their money back or more during the sale of the Allocated Property.*

There is evidence relating to the sale of Signature Collection memberships indicating that the Supplier made efforts to avoid specifically describing its membership as an 'investment' or quantifying to prospective purchasers, such as Mrs G and the late Mr G, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Signature Collection membership was not sold as an investment.

For example, the Member's Declaration document states:

> *"We understand that the purchase of our Fractional Rights 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 Fractional Rights."*

And in the Information Statement, it states:

> *"Fractional Rights have been designed to be used and enjoyed and not bought with the expectation or necessity of future financial gain." And: "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 Suite or any Fractional rights."*

When read on their own and together, these disclaimers convey 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 Information Statement had to say, which included the following disclaimer:

> *"The Vendor, any sales or marketing agent and the Manager and their related businesses (a) are not licensed investment advisers authorised by the Financial Conduct Authority or any relevant authority to provide investment or financial advice; (b) all information has been obtained solely from their own experiences 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 advisers to determine their own specific investment needs; (d) no warranty is given as to any future values or returns in respect of any Suite."*

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 from the sale of the Allocated Property 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 Signature Collection, 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.

And it is also difficult to explain why it was necessary to include such a disclaimer if there wasn't a very real risk of the Supplier marketing and selling membership of the Signature Collection as an investment. That risk seems an obvious one, given the difficulty of articulating the benefit of fractional ownership otherwise than as an investment, in a way that distinguishes it from other timeshares from the viewpoint of prospective members.

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 Mrs G's allegation that the Supplier breached Regulation 14(3) at the Time of Sale 3, including (1) that membership of the Signature Collection was expressly described as an "investment" and (2) that membership of the Signature Collection 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 3, sold or marketed membership of the Signature Collection as an investment, i.e. told Mrs G and the late Mr G or led them to believe during the marketing and/or sales process that membership of the Signature Collection 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 constituted a breach of Regulation 14(3).*

And for reasons I'll now come on to, I think the answer to both of these questions is 'yes'.

<u>How the Supplier marketed and sold the Signature Collection membership</u>

Mrs G and the late Mr G took out a type of membership from the Supplier at Time of Sale 3 called 'Signature Collection' 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 to sell Signature Collection memberships. That included a training manual from 2015 that set out slides that were shown to customers alongside guidance for sales staff to use when presenting the slides. This document was titled "2015 Spain Fractionals at Signature Suite Collection Sales Training Manual for FPOC and Vacation Club Owners". Given that was the same year in which Signature Collection membership was sold, and Mrs G and the late Mr G were already what was called 'FPOC Owners' (i.e. they already had a fractional membership at the time), I think it's likely that they would have been given a sales presentation based on this manual or something very similar.

The presentation for Signature membership explained that the membership was different, as unlike their Fractional 2 membership, members had preferential rights to stay in the Allocated Property with which their membership was associated. This property was also said to be more luxurious than the previous properties tied to fractional memberships. Other than that, the membership worked in a similar way to earlier fractional memberships.

Within the manual, there is a second set of slides titled 'Presentation for Vacation Club owners'.[4] This referred to existing customers of the Supplier whose membership did not have a 'fractional' element. These slides had a section called 'FPOC', which had some slides with information about the Supplier and how Fractional Membership came to be designed and sold.

One of the slides read as follows[5]:

I think this slide compares the features between two of the Supplier's products – Vacation Club, which was a traditional timeshare product with no 'fractional' element, and CLC estates, which was set up for customers to buy an overseas property and then 'rent' it back to the Supplier for an income.

[4] At page 94 onwards
[5] Page 106 of the manual

The next slide reads:

Signature Collection membership (a type of Fractional Property Owners Club) is here described as being the Best Of Both Worlds, incorporating the flexibility of Vacation Club and the investment element, quality and money back of the CLC Estate. So, the word 'investment' was used when describing Signature membership to prospective customers in 2015. And it was clearly said that Signature Collection membership combined the best of the two choices, including that it was an investment that could be used or sold with money back.

I am not sure Mrs G and the late Mr G would have been shown this specific slide as they were not 'Vacation Club owners' at that time, having already been Fractional Club owners since 2012. However, I think these slides are indicative of the way in which the Supplier trained and told its sales staff to sell memberships. In other words, at around the Time of Sale 3, the Supplier told its sales staff to specifically compare Signature Collection membership to a product (CLC Estates) that was explicitly sold as an investment.

I acknowledge that there was no comparison between the expected level of financial return and the purchase price of Signature Collection membership. However, if I were to only concern myself with express efforts to quantify to Mrs G and the late Mr G 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)).'"[6] *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.*

---

[6] 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

Mrs G says, in her own words, that the Supplier positioned membership of the Signature Collection as an investment to them. And as I've said before, the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Signature Collection membership and, in turn, how they would have probably framed the sale of it to prospective members – including Mrs G and the late Mr G.

Here, at the time Signature Collection was being sold to Mrs G and the late Mr G, the sales representatives were told, when selling Signature Collection to existing Vacation Club members, to directly compare it to an investment. Although, for the reasons set out above, I do not think Mrs G and the late Mr G would have been shown the slide using the word 'investment', as I've said, I think it is indicative of how the product was presented to all prospective customers in reality – I do not think it plausible that sales representatives would have used the investment element of membership to sell to one class of customers (Vacation Club members) and not to another (existing fractional owners such as Mrs G and the late Mr G).

Given that, and given Mrs G's own testimony that the sales representative did so, I think it's more likely than not that the Supplier's sales representative led them to believe that membership of the Signature Collection was an investment that may lead to a financial gain (i.e., a profit) in the future.

And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

Signature Collection – What was the effect of the breach of Regulation 14(3) on Mrs G and the late Mr G's purchasing decision?

Having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale 3, I now need to consider what impact that breach had on Mrs G and the late Mr G at Time of Sale 3, before going on to consider the fairness of the credit relationship between Mrs G and the Lender under Credit Agreement 3.

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.

And as before, in light of Carney and Kerrigan, it also seems to me that if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mrs G and the Lender that is unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led her and the late Mr G to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On my reading of Mrs G's testimony, the prospect of a financial gain from Signature Collection membership was an important and motivating factor when they decided to go ahead with their purchase. That doesn't mean they were not interested in holidays - her own testimony demonstrates that they quite clearly were, which is not surprising given the nature of the product at the centre of this complaint. But Mrs G says (plausibly in my view) that Signature Collection membership was marketed and sold to them at the Time of Sale 3 as something that offered them more than just holiday rights. In her testimony, when describing what they were told about the quality and marketability of Allocated Property 3 she said they were told it was:

> *"…much more likely to sell in the future given it was a more luxurious membership and properties were much nicer than the one we currently owned."*

And when describing what they thought about this:

> *"This was particularly attractive as we were interested in the investment side of owning a fractional membership and we liked the idea of better holidays."*

So, on the balance of probabilities, I think their purchase was motivated by their share in the Allocated Property and the possibility of an increased profit over what was likely from their existing Fractional 2 membership.

Mrs G has not said or suggested, for example, that they would have pressed ahead with the purchase in question had the Supplier not led them to believe that Signature Collection membership was an appealing and improved investment opportunity. And as they faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from membership of the Signature Collection, I don't think that they would have pressed ahead with their purchase regardless.

Taking into account all of the above, I think the Supplier's breach of Regulation 14(3) when selling the Signature Collection at the Time of Sale 3 was material to the decision they ultimately made.

Conclusion – Signature Collection membership

Given the facts and circumstances of this aspect of the complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mrs G under the Credit Agreement 3 and related Purchase Agreement 3 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 part of her complaint.

The Supplier's sales & marketing practices at the Time of Sale 4

Mrs G has said her credit relationship with the Lender associated with the purchase of the Emerald Club at Time of Sale 4 is unfair to her for the reasons I set out at the start of this decision.

And unlike the sale of the Signature Collection, as I've set out, Mrs G has included her recollections of the sale of the Emerald Club in her statement, the relevant passages I have included above.

But there is little in the statement which supports the allegations of unfairness.

The PR says it has identified a number of terms or groups of terms in the Purchase Agreement(s) and other documents related to the Supplier's timeshare memberships, which it says are unfair terms under either the UTCCR and/or the CRA. It has given some reasons why it thinks these terms are unfair or have the potential to operate in an unfair way. As I've said before, the Supreme Court made it clear in Plevin that it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A of the CCA. The extent to which such issues render a credit relationship unfair must also be determined according to their impact on the complainant. So, it's not enough to assert that some of the Supplier's terms were unfair under the relevant regulations or could potentially operate in an unfair way. It needs to be shown that significant harm has been, or will be, caused by the inclusion of the allegedly unfair terms.

Having considered the other terms highlighted by PR, it is unclear in some cases what impact it thinks the terms have had, or will have, on Mrs G. For example, the terms seem to

relate to membership of fractional products, which she no longer has. And the PR has complained that some of the Supplier's terms are not in 'plain and intelligible language'. However, I've not seen how these clauses identified by the PR have caused, or will cause unfairness to Mrs G. Given the lack of evidence of actual unfairness, now or in the future, flowing from these terms, I'm unable to say that it has rendered the credit relationships between Mrs G and the Lender, unfair.

In addition, the PR has said that it is unfair that the Supplier has wide-ranging powers to cancel Mrs G's Emerald Club membership, for example for non-payment of maintenance fees or minor breaches of the Purchase Agreement. But no evidence has been supplied that the Supplier has used its powers in this way for Mrs G, and my understanding is that in practice the Supplier does not exercise its ability to cancel memberships in the event of the kind of breaches PR has described, so it appears unlikely these terms will cause unfairness in the future. From what I have seen Mrs G's Emerald Club membership has been suspended, but not cancelled.

There is also no direct evidence of the alleged misrepresentations made by the Supplier in respect of Time of Sale 4, and Mrs G has not explained how these misrepresentations related to Time of Sale 4 in any event. It seems inherently unlikely that the Supplier would have positioned Emerald Club in the same way as they did the Fractional memberships or Signature Collection, because there was a fundamental difference between them – it was not asset backed, and there was no Allocated Property to sell. As such, from the evidence provided and the particular circumstances, I am not persuaded that that there were misrepresentations, or misleading actions and/or misleading omissions by the Supplier at Time of Sale 4.

I am also not persuaded that there was likely to have been an information failing by the Supplier here. I have seen a copy of the Purchase Agreement 4, Credit Agreement 4 and the Emerald Club pricing agreement, all of which have been provided to this Service by Mrs G. So, it follows that she and the late Mr G must have been given these by the Supplier at the Time of Sale 4. It may be that Mrs G says these were provided after they agreed to make the purchase, but this was the 10th purchase she and the late Mr G had made from the Supplier, many of which had been purchased with the aid of loans. So, it follows that it is likely that Mrs G and the late Mr G were aware of how timeshare memberships worked, and how the Supplier sold them. So, I cannot see how, even if the above sales documentation was not provided to them until after they had agreed to make the purchase, this would have caused unfairness in Mrs G's associated credit relationship with the Lender.

I can also see the price of the first year's annual management charge in relation to the Emerald Club was, as set out by Mrs G in her statement, €4,024. This figure was included in both the Purchase Agreement 4 and the pricing sheet, so I am not persuaded that the Supplier was likely to have said any other figure, such as the €1,000 that Mrs G is now saying.

The PR has said that the income declared by Mrs G and the late Mr G at the Time of Sale 4, along with their ages meant that the loan was unaffordable and irresponsibly leant. But no evidence of Mrs G and the late Mr G's actual financial situation at the time the loan was agreed has been submitted to this Service, so even if the Lender did not complete the required checks at the time it agreed to lend (and I make no such finding), I am not currently persuaded that the credit agreement was unaffordable for Mrs G and the late Mr G in any event.

Was the Emerald Club membership marketed and sold at Time of Sale 4 as an investment in breach of Regulation 14(3) of the Timeshare Regulations?

The Lender does not dispute, and I am satisfied, that Mrs G and the late Mr G's membership of the Emerald Club met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations, and as I set out before, Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling timeshare membership as an investment.

But in the Letter of Complaint, and in Mrs G's statement, she says that the Supplier did exactly that at the Time of Sale 4. So, that is what I have considered next, using the same definition of the term "investment" as before.

To conclude that their membership of the Emerald Club was marketed or sold to Mrs G and the late Mr G 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 the memberships to them as an investment, i.e. told them or led them to believe, at the time of sale, that the membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

I accept that it has been a feature of some traditional timeshares (such as fractional memberships) that consumers could benefit from a share of the sales proceeds of a relevant shared property. However, the main emphasis of the Emerald Club, seems to have been much more on securing long-term rights of accommodation for members rather than creating a property investment. There is no indication in Mrs G's statement of how she was either told, or led to believe, that she would make a profit from the purchase of the Emerald Club.

In relation to their purchase of the Emerald Club, Mrs G has said:

> *"On the 6th November 2019 my husband and I purchased more fractional points which afforded us an Emerald membership which was a more luxurious membership with better facilities, better accommodation and overall a better holiday experience. The purchase price of this membership was £12,399. The initial purchase price of the membership was £70,791 but we traded in our other memberships which had a value of £58,890 plus legal and admin fees of £499 which gave us the remaining sum of £12,399. We took out a loan with [the Lender] in joint names."*

This, in my view, is likely to be an accurate description of the nature and cost of her particular membership of the Emerald Club, albeit Mrs G appears to have confused the Emerald Club points with Fractional Points. But there is no suggestion here that there was any implied or suggested profit to be made from the purchase.

However, Mrs G's statement then goes on to say:

> *"At every meeting we attended, the representatives repeated the benefits listed at paragraph 21[7] above and emphasised the fact that purchasing further fractional memberships was considered an upgrade and that each purchase meant that we could sell our timeshare for more money and make a bigger profit. Each property was more luxurious than the previous one and was more valuable."*

But as I said, the Emerald Club, towards which Mrs G and the late Mr G traded in their existing fractional points, worked very differently to the fractional memberships they'd held. The main emphasis was holiday rights. So, I think it is likely that Mrs G has confused what

[7] Again, this appears likely to be an error as paragraph 21 makes no reference to any benefits of fractional ownership.

she may have been told before, regarding the fractional memberships, with the sales process for the Emerald Club. And as I've said, I can't see that it is likely that the Supplier would have positioned Emerald Club in the same way as they did the fractional memberships, as they were very different products.

I do agree that Mrs G seems to suggest here that they were told that the same benefits of fractional membership was emphasised to them at every sales meeting they attended. But again, I'm not persuaded that it is likely Emerald Club membership would have been positioned in this way. I think, on balance, given the number of meetings they went to, the number of purchases they made, and the fact that the majority of these were fractional products, it is likely that Mrs G has made an error here, and has made the incorrect assumption that Emerald Club worked in a similar way to the fractional products. But I can't see that this misunderstanding of how Emerald Club worked, would have been caused by anything said (or not said) by the Supplier at the Time of Sale 4.

Therefore, I am not persuaded that the Supplier likely sold or marketed membership of the Emerald Club as an investment. So, I am not persuaded that it is more likely than not that the Supplier breached Regulation 14(3) of the Timeshare Regulations at Time of Sale 4 when it sold Mrs G and the late Mr G their membership of the Emerald Club.

But even if I am wrong to conclude that, on this occasion, membership was unlikely to have been sold in that way, and if I were to conclude that it was marketed in such a way as to have given Mrs G and the late Mr G the impression that there was an investment element to it, given what I have already said about Mrs G's recollections of the sales process at the Time of Sale 4, I am not currently persuaded that would make a difference to the outcome in this complaint anyway. I do not think it would have rendered her credit relationship with the Lender unfair to them.

In my consideration of this point, I have again paid close regards to the Supreme Court's judgment in Plevin, and what the courts had to say in Carney and Kerrigan.

If I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mrs G and the Lender that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3)[8] led her and the late Mr G to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

But as I've already said, there is no suggestion in Mrs G's recollections of the sales process at the Time of Sale 4 that the Supplier led them to believe that the Emerald Club membership was an investment from which they would make a financial gain, nor was there any indication that they were induced into the purchase on that basis. Indeed, in her statement Mrs G says, in relation to their motivation to make the purchase of the Emerald Club:

> *"On the 6th November 2019 my husband and I purchased more fractional points which afforded us an Emerald membership which was a more luxurious membership with better facilities, better accommodation and overall a better holiday experience."*

On balance, therefore, even if the Supplier had marketed or sold the Emerald Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations (and as I've said, I'm not persuaded that it did), I am not persuaded that Mrs G and the late

---

[8] which, having taken place during its antecedent negotiations with Mrs G and the late Mr G, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender

Mr G's decision to purchase Emerald Club membership at the Time of Sale 4 was motivated by the prospect of a financial gain (i.e., a profit) anyway. On the contrary, I think the evidence suggests they would have pressed ahead with their purchase for the improved holiday experience, whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mrs G and the Lender is unfair to her, even if the Supplier had breached Regulation 14(3).

The broker not being correctly regulated or authorised

In response to my provisional decision the PR has said that the broker who arranged the Credit Agreement 4 was not regulated or authorised to do so by the Financial Conduct Authority (the 'FCA'), and therefore the loan is unenforceable.

Having looked at the Credit Agreement 4, it is correct when PR says that the Credit Agreement 4 does not name a credit intermediary that was authorised and regulated by the FCA to broker credit. It just includes the intermediary's address. But that does not mean the credit agreement was, in fact, arranged by an unauthorised credit broker.

Indeed, the address is, as I understand, the first line of the Supplier's address in Spain. And as the Supplier was authorised and regulated by the FCA to broker credit, I'd find it surprising if the Credit Agreement 4 was arranged by another business that wasn't authorised or regulated by the FCA to do so. Indeed, that seems to me to be inherently unlikely given the circumstances.

Section 140A: Time of Sale 4 - Conclusion

In conclusion therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Mrs G, associated with the purchase of the Emerald Club at Time of Sale 4, is unfair to her for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of Mrs G's complaint on that basis.

Did the unfairness caused by the purchase of the Signature Collection end when it was traded in for a further purchase?

On 13 March 2016 Mrs G and the late Mr G traded in all of their fractional points to make a further Signature purchase ('Signature Collection 2'). This cost them £21,115 but after the trade in value of £10,400 attributed to their fractional points by the Supplier, they ended up paying £10,715. This was paid for by a loan from a different provider. But Credit Agreement 3 remained and ran concurrently with this new loan.

Four further fractional membership purchases were made by Mrs G and the late Mr G up until May 2019, and on each occasion, they purchased additional fractional points whilst rolling up their existing points. Each of these further purchases were funded either by cash or with loans from other providers.

Then, as I've said, Mrs G and the late Mr G traded in their Fractional Club membership, and all of the associated fractional points accrued since 2012, into their purchase of Emerald Club. This had a purchase price of £70,791 but Mrs G and the late Mr G were given a trade in allowance by the Supplier of £58,890.

As a result of the purchases following Mrs G and the late Mr G's purchase of Signature Collection, it is necessary to consider whether the unfairness caused to Mrs G's credit relationship with the Lender resulting from Credit Agreement 3 continued, and if it did continue, what were the ongoing consequences.

While the Supplier gave Mrs G and the late Mr G £10,400 credit for their 2,330 fractional points held within their Signature Collection membership, this credit wasn't the equivalent of cash. It was a deduction from a starting price set by the Supplier itself for Mrs G and the late Mr G's upgrade to Signature Collection 2. And as there is no information to indicate what the market value was of the Allocated Property connected to their subsequent purchase of Signature Collection 2, there is no evidence that the starting price of that 'upgrade' represented the objective value of the benefits under the new purchase agreement, as opposed to a commercial opening position from which the Supplier would and could profitably offer deductions or discounts. And as £10,400 was less than the purchase price originally attached to their Signature Collection purchase, it cannot be said that the upgrade to Signature Collection 2 on 16 March 2016 improved Mrs G and the late Mr G's position financially.

However, I have thought about the extent to which responsibility for the situation after their purchase of Signature Collection 2 must be attributed to the Supplier and the Lender. As the credit agreement associated with the purchase of Signature Collection 2 was from a different provider, I cannot see it would be fair and reasonable to hold the Lender responsible for any aspect of its sale (nor could I see how the Lender could be legally responsible). So, I do not think that the Lender should have to answer for the financial consequences specifically associated with the additional fractional points Mrs G and the late Mr G purchased in March 2016 when taking out Signature Collection 2.

Formally, the agreement Mrs G and the late Mr G entered into in March 2016 was a new contract that superseded the old one. But I think the purpose of this upgrade was to continue and supplement their existing Signature Collection membership.

With all of that being the case, I therefore think that the upgrade was really just a top-up of Mrs G and the late Mr G's fractional points by rolling over those that they had and providing them, as members of the Signature Collection 2, with enough points to enable them to take holidays in better and more luxurious accommodation, and also holding an interest in the net sales proceeds of a different Allocated Property.

And as the function of the Supplier's £10,400 credit was to roll over Mrs G and the late Mr G's existing fractional points into their upgrade, I'm not persuaded that the purchase of Signature Collection 2 ended the unfairness to Mrs G and the late Mr G (and now Mrs G in her own right) in the credit relationship (under Credit Agreement 3) with the Lender. I think their original purchase of the Signature Collection, and its associated Credit Agreement 3 with the Lender had ongoing financial consequences for them, which continued the unfair relationship with the Lender. And for that reason, it is my view that the Lender is still answerable for them.

And I think this is the case up until Mrs G and the late Mr G's purchase of the Emerald Club, which as I've said, I do not think caused an unfairness in the credit relationship under Credit Agreement 4. So, I think there was no additional unfairness arising from Credit Agreement 4, but this purchase did nothing to reverse the existing unfairness to Mrs G under Credit Agreement 3."

PD2 – conclusion

After considering everything that had been submitted, I thought one aspect of Mrs G's complaint ought to be upheld. That being her allegation of an unfair credit relationship with the Lender under Credit Agreement 3. I thought the Supplier had sold and/or marketed the Signature Collection membership to Mrs G and the late Mr G as an investment, in breach of Regulation 14(3) of the Timeshare Regulations. And the impact of this breach rendered the associated Credit Relationship under Credit Agreement 3 unfair to Mrs G under Section

140A of the CCA.

I then set out in the PD2 how I thought the Lender should calculate and pay fair compensation to Mrs G:

"Putting things right

I have above set out why I think the relationship between Mrs G and the Lender arising out of Credit Agreement 3 was unfair under Section 140A of the CCA. In summary, that was because I did not think Mrs G and the late Mr G would have agreed to purchase the Signature Collection membership at the Times of Sale 3 were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender).

When determining what fair and reasonable redress looks like, the starting point is what unfairness there is present in the relationship arising out of Credit Agreement 3, taken together with its related agreements.

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

(1) The Lender should refund Mrs G and the late Mr G's repayments to it under the Credit Agreement 3 and cancel any outstanding balance if there is one.

(2) In addition to (1), the Lender should also refund the annual management charges Mrs G and the late Mr G paid as a result of their Fractional Club 3 membership from the date that they took out Signature Collection until Time of Sale 4.*

(3) The Lender can deduct

i. *The value of any promotional giveaways that Mrs G and the late Mr G used or took advantage of which relate to the Signature Collection between the Time of Sale 3 and 4; and*

ii. *Between the Time of Sale 3 and 4, the market value of the holidays** Mrs G and the late Mr G took using Signature Collection if the Points value of the holiday(s) taken amounted to more than the total number of Fractional Points they would have been entitled to use at the time of the holiday(s) as Fractional 2 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 Mrs G and the late Mr G took a holiday worth 2,550 Fractional Points after the Time of Sale 3 and they would have been entitled to use a total of 2,500 Fractional Points under Fractional 2 at the relevant time, any deduction for the market value of that holiday should relate only to the 50 additional Fractional Points that were required to take it. But if they would have been entitled to use 2,600 Fractional Points under Fractional 1, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

(the 'Net Repayments')

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

(5) The Lender should remove any adverse information recorded on Mrs G's credit file in connection with Credit Agreement 3.

(6) Mrs G and the late Mr G traded in their entire holding of fractional points when they purchased their Emerald Membership, and Mrs G still retains that membership, so has the benefit of it should she wish to use it. But this Emerald Club membership was bought

with the help of the fractional points she and Mr G received with their Signature Collection membership. So, it would be fair and reasonable to say that Mrs G's current Emerald Club membership points should be reduced to proportionately reflect the number of fractional points from the Signature Collection which were traded in. So, the Lender should determine how many Emerald Club points Mrs G and the late Mr G would have received if they had only traded in their fractional points (disregarding the additional payment she made on its purchase) and ask the Supplier to deduct from this number those which relate solely to the Signature Collection points traded in. The Lender can then ask to the Supplier to reduce Mrs G's current Emerald Club points to reflect this deduction.

**Mrs G and the late Mr G, having purchased their first Fractional Club membership in May 2012, and then after they made their Purchase of Fractional Club 2, they bought a subsequent membership in October 2013. But the Lender is only responsible for the unfairness arising out of Credit Agreement 3 in relation to the management charges caused by the fractional points acquired through the Signature Collection after Time of Sale 3. I think the simplest way to work this out is to refund a proportion of the charges levied between Time of Sale 3 and Time of Sale 4 (when I think the unfairness I found ended), expressed as the number of fractional points acquired through the Signature Collection divided by the total number of fractional points held at the time the management charge was levied ('the Proportional Management Charges').*

***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 Mrs G and the late Mr G took using their Fractional Points, deducting the relevant Proportional Management Charges as worked out above (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.*

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

The responses to PD2

The PR, on behalf of Mrs G, asked for full disclosure of the contemporaneous documentation and account statements relating to all the purchases, but then made no further representations.

The Lender did not agree that any aspects of Mrs G's complaint ought to be upheld, and submitted a comprehensive response, which I have summarised below.

It began by addressing the witness testimony from Mrs G. It said:

- the testimony included vague and brief allegations, and was inconsistent and contained factual inaccuracies, which ultimately distorted the actual events surrounding the Time of Sale 3.
- There is no evidence that Mrs G 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.

It said Mrs G's claims were unsubstantiated:

- Mrs G's statement saying that they were *"interested in the investment side…"* lacks detail

and is generic. No further information or clarity is provided about how the product was allegedly sold as an investment, and this is because the recollection is incorrect.

- If Signature Collection membership was bought as an investment, then why did Mrs G and the late Mr G not challenge the subsequent trade-in values given by the Supplier which were decreases in value.
- Why, if the Signature Collection and the subsequent fractional purchases were bought as investments, were they traded in in their entirety for a points-based product (the Emerald Club) that wouldn't provide them with any share of the proceeds of sale. The memberships were purchased for the better holiday experiences they provided.
- The action of trading in the Signature Collection fractions for a points-based membership shows the purchase at Time of Sale 3 cannot have been motivated by the prospect of a profit, as this action was the direct opposite of this aim.
- None of the contemporaneous sales notes refer to any of the purchases being sold as an *"investment" and* simply confirm they *"like good holidays and quality."*

It then moved on to Mrs G and the late Mr G's motivations for the purchases. It said:

- It is clear from the majority of the contemporaneous sales notes, and Mrs G's own testimony that the motivations for their purchase was that they loved holidays. Why else would they have given up their fractional rights to move to the points-based product (Emerald Club).

The Lender then addressed what it said it had identified as factual inaccuracies in the testimony and said it was prepared for Mrs G by the PR, rather than being her own recollection. It said these inconsistencies evidenced that the PR had taken a templated approach to the witness testimony and had heavily influenced it, and the veracity and reliability of the testimony should be fully considered before a final decision is made, because:

- The length of the membership term was incorrect – the Letter of Complaint states it was 15 years and Mrs G says it was 10 years. It is actually 19 years.
- Mrs G says they were subjected to *"high pressure"* sales tactics, and the representatives were very *"pushy".* She has not elaborated on this.
- Mrs G and the late Mr G were invited to 15 presentations between 2011 and 2019, and purchased at 10 of these, so were very familiar with what to expect.
- Mrs G's claim that her *"husband dealt with all [their] finances"* is unsupported by the sales notes and reality. The compliance officer always discussed the finance with both Mrs G and the late Mr G, and on one occasion in 2017 Mrs G cancelled a purchase as she was going to be made redundant.

The Lender then addressed the reliance I had placed on the testimony from Mrs G. It said:

- The pertinent point of *Smith v Secretary of State for Transport [2020] EWHC 1954 (QB)* was that little if any reliance at all ought to be put on witnesses' recollection of what was said in meetings and conversation, and to base factual findings on inferences drawn from the documentary evidence and known probable facts. There is no documentary evidence to support that Signature Collection was sold as an investment, and there is clear documentary and contemporaneous evidence that it was not sold in this way.
- There is clearly a lack of a *"core of acceptable evidence"* from Mrs G.
- It is unsafe to rely on testimony prepared by the PR.

- If the Ombudsman is prepared to rely on Mrs G'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.

Against the above information, the Lender said it is not credible that Mrs G and the late Mr G were assured that they would receive *a "profit",* nor is it credible that their motivation for the Signature Collection membership purchase was the investment element, as opposed to their future holiday needs.

The Lender then went on to consider how the PD2 dealt with the breach(es) of Regulation 14(3) of the Timeshare Regulations. It said, in summary:

- The PD2 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 Mrs G and the late Mr G would have been informed of the return, would have queried the decrease in trade-in values, and would have been reluctant to trade-in their fractional points for non-fractional. This has not been alleged in either the Letter of Complaint or the testimony.
- The documentation in relation to the Signature Collection sale (including the training material) is unobjectionable and does not breach Regulation 14(3). The disclaimers, contrary to how the Ombudsman infers, actually evidence compliance with 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.

Next, it made submissions regarding the legal test applied in the PD2 when assessing if the relationship is unfair. It said:

- 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 PD2 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.

- Mrs G and the late Mr G'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.

And finally, as regards the proposed redress in the PD2, it argued that any unfairness associated with the credit relationship under Credit Agreement 3 ended when all of Mrs G and the late Mr G's Signature points were traded in for the Emerald Club at Time of Sale 4. It thought this because if Mrs G and the late Mr G hadn't had the Signature points to trade in, it was likely that they would have purchased the Emerald Club with cash and/or another form

of lending.

The Lender concluded by saying that there is no clear, compelling evidence that the Signature Collection membership was sold to Mrs G and the late Mr G with the intention of financial gain.

As the deadline for responses to my PD2 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:

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

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

Section 56: Antecedent Negotiations

Section 75: Liability of Creditor for Breaches by a Supplier

Sections 140A: Unfair Relationships Between Creditors and Debtors

Section 140B: Powers of Court in Relation to Unfair Relationships

Section 140C: Interpretation of Sections 140A and 140B

Case Law on Section 140A

Of particular relevance to the complaint in question are:

1. The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') remains the leading case.
2. The judgment of the Court of Appeal in the case of *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')* sets out a helpful interpretation of the deemed agency and unfair relationship provisions of the CCA.
3. *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*') – in which the High Court held that determining whether or not the relationship complained of was unfair had to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"*, which was the date of the trial in the case of an existing relationship or otherwise the date the relationship ended.
4. The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*') – which approved the High Court's judgment in *Patel*.
5. *Deutsche Bank (Suisse) SA v Khan and others* [2013] EWHC 482 (Comm) – in

   Hamblen J summarised – at paragraph 346 – some of the general principles that apply to the application of the unfair relationship test.

6. *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 (‘*Carney*’).
7. *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) (‘*Kerrigan*’).
8. *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) (‘*Shawbrook & BPF v FOS*’).

My Understanding of the Law on the Unfair Relationship Provisions

Under Section 140A of the CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor’s behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms “antecedent negotiations” and “negotiator”. As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as *“a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]”*. And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to *“finance a transaction between the debtor and a person (the ‘supplier’) other than the creditor […] and “restricted-use credit” shall be construed accordingly.”*

So, the negotiations conducted by the Supplier during the sale of the timeshare(s) in question was/were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were “any other thing done (or not done) by, or on behalf of, the creditor” under s.140A(1)(c) CCA.

Antecedent negotiations under Section 56 cover both the acts and omissions of the Supplier, as Lord Sumption made clear in *Plevin*, at paragraph 31:

“[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are “deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity”. The result is that the debtor’s statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor’s agent.’ […] *Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor’s responsibility would be engaged only by its own acts or omissions or those of its agents.”*

And this was recognised by Mrs Justice Collins Rice in *Shawbrook & BPF v FOS* at paragraph 135:

"*By virtue of the deemed agency provision of s.56, therefore, acts or omissions 'by or on behalf of' the bank within s.140A(1)(c) may include acts or omissions of the timeshare company in 'antecedent negotiations' with the consumer*".

In the case of *Scotland & Reast*, the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that "*negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law"* before going on to say the following in paragraph 74:

"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[9]

So, the Supplier is deemed to be Lender's statutory agent for the purpose of the pre-contractual negotiations.

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in *Patel* (which was recently approved by the Supreme Court in the case of *Smith),* that determining whether or not the relationship complained of was unfair had to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"* – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in *Plevin* (at paragraph 17):

"Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with […] whether the creditor's relationship with the debtor was unfair."

Instead, it was said by the Supreme Court in *Plevin* that the protection afforded to debtors by Section 140A is the consequence of all of the relevant facts.

<u>The Law on Misrepresentation</u>

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

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

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.[10]

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

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[11] (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

The Consumer Rights Act 2015[12] (the 'CRA')

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

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

County Court Cases on the Sale of Timeshares

1. *Hitachi v Topping* (20 June 2018, Country Court at Nottingham) – claim withdrawn following cross-examination of the claimant.
2. *Brown v Shawbrook Bank Limited* (18 June 2020, County Court at Wrexham)
3. *Wilson v Clydesdale Financial Services Limited* (19 July 2021, County Court at Portsmouth)

[11] Applicable to Time of Sale 1,2 and 3
[12] Applicable to Time of Sale 4

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 the PD2, I still uphold Mrs G's complaint for the reasons set out in the extract of my PD2 above. But I will address the matters that the Lender raised in response. In doing so, I note again that my role as an Ombudsman is not to address every single point that has been made. 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.

Mrs G's testimony

As previously set out, as part of Mrs G's original complaint to the Lender, the PR submitted a statement, signed and dated by Mrs G on 25 June 2021, which set out her recollections of her entire relationship with the Supplier and her and the late Mr G's purchase history.

The Lender, in its response to the PD2, has said it is unsafe for me to place much, if any reliance on this statement in my decision-making process. It says it was prepared by the PR and cannot be relied upon to accurately reflect what Mrs G remembers. But it is normal for statements to be prepared by professional representatives, and the fact that it was in this case does not, in my view, undermine its contents. The statement is lengthy, detailed and contains personal information that only Mrs G would know. And given that she has signed it, I am satisfied that it is a fair representation of what she has said.

The Lender has also pointed to what it said were inconsistencies and a lack of detail in the statement. But I am not persuaded that this means the testimony is unreliable.

The statement was written six years after the Time of Sale 3, and two years after their final purchase of the Emerald Club. So, I find it unsurprising that there are some things that are recalled which lack detail, and that there is some confusion about which sale is which. What I need to consider, is whether there is a core of acceptable evidence from Mrs G such that the gaps, errors or vague recollections have little to no bearing on whether her testimony can be relied on, or whether such gaps and errors are fundamental enough to undermine, if not contradict, what she says about what the Supplier said and did to market and sell the Signature Collection membership as an investment.

But as I said in the PD2, I don't think the errors in the statement fundamentally undermine what Mrs G says about how the Signature Collection membership was sold, nor their reasons for making the purchase. And having considered everything that the Lender has said in response, I remain of that opinion. Other than the error Mrs G has made when

referring to the term of the membership, the Lender hasn't identified any inaccuracies that I hadn't already considered. It seems that it just disagrees with what Mrs G has said. And I don't think that the particular error it has identified, even taken in conjunction with what I have already considered, means that I should disregard what she has said. And I note what the Lender has said about errors contained in the Letter of Complaint. But 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 Mrs G's recollection of events. I say this as it contains a level of detail that only Mrs G, as a party to the events, could have known, and also some very personal testimony about the late Mr G's health and subsequent death, and the financial problems she has since had to deal with. And importantly, Mrs G has also been clear as to their motivation to make the purchases.

So, whilst being mindful of the fact that the testimony was compiled some six years after the purchase of the Signature Collection, 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 Mrs G has said.

How the Supplier sold and/or marketed Signature Collection

The Lender has said that if I am prepared to rely on Mrs G'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. For example, sales notes following the Time of Sale 3 say *"Couple like good holidays and quality".* But I cannot see that this actually supports the argument that it was *not* sold as an investment. 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 memberships to customers as investments, I would be very surprised to see it recorded on the sales notes that Mrs G and the late Mr G's Signature Collection was sold in that way, and that they had bought it as an investment. These sales notes do not provide any insight into how the product was sold, or their motivation to purchase, only that they liked holidays, which is not in dispute.

And the PD2 did consider the contemporaneous documentation signed by Mrs G and the late Mr G when they agreed to purchase the Signature Collection membership, and the various disclaimers that Mrs G and the late Mr G signed were set out.

In response to the PD2, the Lender says these disclaimers show there was at no stage any representation as to the future price or value of the fractional share, and the 'advice disclaimer' that is referenced above would lead the consumer to understand that the product was *not* being sold to them as an investment. I agree that the disclaimer's aim seems to be to ensure purchasers didn't rely on what they were told as investment advice, or a warranty as to the future value of the Allocated Property. So, I agree with the Lender, in that the disclaimer, on its own, cannot be construed as a representation that the Signature Collection membership is an investment. But I still regard its contents as more relevant to the sale of an investment than a holiday product, because it says those making the timeshare sale obtained information "*from their own experience as investors*" and recommends purchasers seek advice from "*investment advisors*" about their "*investment needs*". But in any event, the disclaimer doesn't seem to have been focussed on by Mrs G or the late Mr G at the Time of Sale 3, so doesn't advance either side's case anyway.

I have also reconsidered what is said in *Smith v Secretary of State for Transport [2020]* EWHC 1954 (QB) in light of the Lenders response. The Lender says that the judge in this

case said that little if any reliance at all should be placed on witnesses' recollection of what was said in meetings and conversation, and you should base factual findings on inferences drawn from the documentary evidence and known probable facts. It went on to say there is no documentary evidence to support that Signature Collection was sold as an investment, and there is clear documentary and contemporaneous evidence that it was not sold in this way.

But as I've said, I do not agree that the sales notes it has provided are evidence that the Signature Collection was *not* sold as an investment, and the disclaimers referenced above were signed by both Mrs G and the late Mr G *after* they had been through a lengthy sales presentation, which, as I've said, would likely have presented the membership as an investment. As I said in the PD2:

"Here, at the time Signature Collection was being sold to Mrs G and the late Mr G, the sales representatives were told, when selling Signature Collection to existing Vacation Club members, to directly compare it to an investment. Although, for the reasons set out above, I do not think Mrs G and the late Mr G would have been shown the slide using the word 'investment', as I've said, I think it is indicative of how the product was presented to all prospective customers in reality – I do not think it plausible that sales representatives would have used the investment element of membership to sell to one class of customers (Vacation Club members) and not to another (existing fractional owners such as Mrs G and the late Mr G).

Given that, and given Mrs G's own testimony that the sales representative did so, I think it's more likely than not that the Supplier's sales representative led them to believe that membership of the Signature Collection was an investment that may lead to a financial gain (i.e., a profit) in the future.

And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations."

Having considered everything the Lender has submitted in response to the PD2, and having reconsidered everything, I remain persuaded that the Supplier breached Regulation 14(3) of the Timeshare Regulations at Time of Sale 3.

Was the credit relationship under Credit Agreement 3 rendered unfair?

The Lender says that it disagrees that Mrs G and the late Mr G were motivated to make the Signature Collection purchase for the investment element. It says the reason they made the purchase was for the holidays and luxury that the membership offered, and it has pointed to the sales notes and reservation history to support this. But I don't think the Lender has sufficiently taken account of what I said in my PD2 about this. I said:

"On my reading of Mrs G's testimony, the prospect of a financial gain from Signature Collection membership was an important and motivating factor when they decided to go ahead with their purchase. That doesn't mean they were not interested in holidays - her own testimony demonstrates that they quite clearly were, which is not surprising given the nature of the product at the centre of this complaint. But Mrs G says (plausibly in my view) that Signature Collection membership was marketed and sold to them at the Time of Sale 3 as something that offered them more than just holiday rights. In her testimony, when describing what they were told about the quality and marketability of Allocated Property 3 she said they were told it was:

> *"…much more likely to sell in the future given it was a more luxurious membership and properties were much nicer than the one we currently owned."*

And when describing what they thought about this:

> *"This was particularly attractive as we were interested in the investment side of owning a fractional membership and we liked the idea of better holidays."*

So, on the balance of probabilities, I think their purchase was motivated by their share in the Allocated Property and the possibility of an increased profit over what was likely from their existing Fractional 2 membership.

Mrs G has not said or suggested, for example, that they would have pressed ahead with the purchase in question had the Supplier not led them to believe that Signature Collection membership was an appealing and improved investment opportunity. And as they faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from membership of the Signature Collection, I don't think that they would have pressed ahead with their purchase regardless.

Taking into account all of the above, I think the Supplier's breach of Regulation 14(3) when selling the Signature Collection at the Time of Sale 3 was material to the decision they ultimately made."

As I've said, I don't think the sales notes cited by the Lender are much use to me when considering Mrs G and the late Mr G's motivation for the purchase. I think it would be very unlikely that the sales staff would record anything relating to their motivation other than the holidays it offered them.

The Lender has pointed to the fact that Mrs G and the late Mr G traded in all of their Signature Collection points for non-fractional Emerald Club points. It questions why they would have done this had they bought the Signature Collection as an investment. On the face of it, this is a reasonable point to make. In trading them in, Mrs G and the late Mr G lost any investment potential the Signature Collection had. But this needs to be looked at through the lens of Mrs G's statement, and what she and the late Mr G thought at the time. She clearly sets out that she and Mr G thought, incorrectly, that the Emerald Club worked in the same way as the Signature Collection, in that it too had an Allocated Property. As I've said, I can't see that the Supplier would have likely said anything to Mrs G and the late Mr G to make them think this, so this must have been an assumption that they carried over from their previous purchases. And as these previous purchases were *all* asset-backed, I can see how Mrs G and the late Mr G could have been under this misapprehension. So, I am not persuaded that what Mrs G and the late Mr G did at Time of Sale 4 shows that their previous purchase of the Signature Collection was *not* motivated by a potential profit.

So, whilst I accept it is *possible* that Mrs G and the late Mr G would have purchased their Signature Collection membership even if the Supplier hadn't led them to believe that there was the prospect of a financial gain from it, I don't think that's *probable* based on what I've seen. And as Mrs G says (plausibly in my view) that the Signature Collection membership was marketed and sold to them at the Time of Sale 3 as something that offered them more than just holiday rights, on the balance of probabilities, I remain persuaded that their purchase of the Signature Collection was motivated by their share in the Allocated Property when it was sold, as that share and profit from a better and more luxurious property was one of the defining features of membership that marked it apart from their existing Fractional Club membership.

And with that being the case, I remain satisfied that the Supplier's breach of Regulation 14(3) at Time of Sale 3 was material to the decision to purchase the Signature Collection membership that they ultimately made.

Conclusion

Fractional 1 and 2: The Lender was not unfair or unreasonable in declining the Section 75 claims, and the complaints under Section 140A of the CCA are outside of this Service's jurisdiction.

Emerald Club: I do not uphold the complaint under Section 140A of the CCA, nor the complaint about how the Lender dealt with the Section 75 claim.

Signature Collection: I uphold the complaint of an unfair credit relationship under Section 140A of the CCA.

My proposed redress methodology

The Lender, in response to PD2, said it did not think that any unfairness in the credit relationship with it, resulting from Mrs G and the late Mr G's purchase of the Signature Collection membership, continued after they traded in all of their Signature Collection points for the Emerald Club. It said this because the new membership was not fractional, and had Mrs G and the late Mr G not held the Signature Collection points, they would most likely have bought the additional Emerald Club points required anyway. So, it said that any redress should be capped at Time of Sale 4.

But I see little evidence to support this point. Mrs G and the late Mr G traded in all of their Signature Collection points against a purchase price of £70,791**.** This meant they had to pay £12,399 for their new membership. I think it highly unlikely that they would have been able to, or would have even wanted, to take additional finance to support the purchase price without the trade-in value. I think they purchased the number of Emerald Club points that they did because of the number of points they were able to trade in, including those from their Signature Collection membership.

So, I remain satisfied that the unfairness in the credit relationship associated with Credit Agreement 3 *did* continue following their purchase of the Emerald Club.

Putting things right

I have above set out why I think the relationship between Mrs G and the Lender arising out of Credit Agreement 3 was unfair under Section 140A of the CCA. In summary, that was because I did not think Mrs G and the late Mr G would have agreed to purchase the Signature Collection membership at the Times of Sale 3 were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender).

When determining what fair and reasonable redress looks like, the starting point is what unfairness there is present in the relationship arising out of Credit Agreement 3, taken together with its related agreements.

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

(1) The Lender should refund Mrs G and the late Mr G's repayments to it under the Credit Agreement 3 and cancel any outstanding balance if there is one.

(2) In addition to (1), the Lender should also refund the annual management charges Mrs G and the late Mr G paid as a result of their Fractional Club 3 membership from the date that they took out Signature Collection until Time of Sale 4*.

(3) The Lender can deduct

i. The value of any promotional giveaways that Mrs G and the late Mr G used or took advantage of which relate to the Signature Collection between the Time of Sale 3 and 4; and

ii. Between the Time of Sale 3 and 4, the market value of the holidays** Mrs G and the late Mr G took using Signature Collection if the Points value of the holiday(s) taken amounted to more than the total number of Fractional Points they would have been entitled to use at the time of the holiday(s) as Fractional 2 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 Mrs G and the late Mr G took a holiday worth 2,550 Fractional Points after the Time of Sale 3 and they would have been entitled to use a total of 2,500 Fractional Points under Fractional 2 at the relevant time, any deduction for the market value of that holiday should relate only to the 50 additional Fractional Points that were required to take it. But if they would have been entitled to use 2,600 Fractional Points under Fractional 1, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

(the 'Net Repayments')

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

(5) The Lender should remove any adverse information recorded on Mrs G's credit file in connection with Credit Agreement 3.

(6) Mrs G and the late Mr G traded in their entire holding of fractional points when they purchased their Emerald Membership, and Mrs G still retains that membership, so has the benefit of it should she wish to use it. But this Emerald Club membership was bought with the help of the fractional points she and Mr G received with their Signature Collection membership. So, it would be fair and reasonable to say that Mrs G's current Emerald Club membership points should be reduced to proportionately reflect the number of fractional points from the Signature Collection which were traded in. So, the Lender should determine how many Emerald Club points Mrs G and the late Mr G would have received if they had only traded in their fractional points (disregarding the additional payment she made on its purchase) and ask the Supplier to deduct from this number those which relate solely to the Signature Collection points traded in. The Lender can then ask to the Supplier to reduce Mrs G's current Emerald Club points to reflect this deduction.

*Mrs G and the late Mr G, having purchased their first Fractional Club membership in May 2012, and then after they made their Purchase of Fractional Club 2, they bought a subsequent membership in October 2013. But the Lender is only responsible for the unfairness arising out of Credit Agreement 3 in relation to the management charges caused by the fractional points acquired through the Signature Collection after Time of Sale 3. I think the simplest way to work this out is to refund a proportion of the charges levied between Time of Sale 3 and Time of Sale 4, expressed as the number of fractional points acquired through the Signature Collection divided by the total number of fractional points held at the time the management charge was levied ('the Proportional Management Charges').

**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 Mrs G and the late Mr G took using their Fractional Points, deducting the relevant Proportional Management Charges as worked out above (that correspond to the year(s) in

which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

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

My final decision

I uphold Mrs G's complaint that she is party to an unfair credit relationship with Shawbrook Bank Limited under Credit Agreement 3 for the purposes of Section 140A of the CCA.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs G to accept or reject my decision before 17 July 2025.

Chris Riggs
Ombudsman