DRN-5638666

The complaint

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

What happened

Since 2002 Mr and Mrs F had been members of a timeshare arrangement, the European Collection (the 'EC') from a timeshare provider (the 'Supplier'). Over this time, they bought a total of 10,000 EC points.

As EC members, every year they could use their points in exchange for holidays at the Supplier's holiday resorts. Different accommodation had different points values, depending on factors such as location, size, and time of year. So, for example, a larger apartment in peak season would cost more to a member in their points than a smaller apartment outside of school holiday periods.

On 4 June 2014 (the 'Time of Sale 1') Mr and Mrs F purchased membership of a different type of timeshare (the 'Fractional Club 1') from the Supplier. They entered into an agreement with the Supplier to buy 8,000 fractional points at a cost of £14,080 (the 'Purchase Agreement 1'), but after a £700 discount and converting 7,000 of their EC points (for which they were given a conversion rate of £1 per point), they ended up paying £6,380 for Fractional Club 1.

Mr and Mrs F paid for their Fractional Club 1 membership by taking finance of £6,380 from the Lender in their joint names (the 'Credit Agreement 1'). The balance of this loan was cleared by a lump-sum payment on 1 July 2015.

On 25 September 2015 Mr and Mrs F made a further purchase of 4,000 fractional points (the 'Fractional Club 2'). They entered into the 'Purchase Agreement 2' at a cost of £9,080, but after converting their remaining 3,000 EC points (for which they were given a conversion rate of £1 per point) they ended up paying £6,080 for their purchase of Fractional Club 2.

Mr and Mrs F paid for their Fractional Club 2 membership by taking finance of £6,080 from the Lender in their joint names (the 'Credit Agreement 2'). The balance of this loan was cleared by a lump-sum payment on 4 October 2016.

Both Fractional Club 1 & 2 memberships differed from their EC membership. The two significant differences were that they had a shorter membership term (14 years compared to an expiry date of 2054 for the EC membership), and they were also asset backed – which meant both memberships gave Mr and Mrs F more than just holiday rights. They each also included a share in the net sale proceeds of a property named on their Purchase Agreement(s) (the 'Allocated Property 1' and 'Allocated Property 2') after their membership terms end.

In September 2016 Mr and Mrs F made a purchase of 9,000 EC points for £8,161 and a VIP

experience holiday for £299. Both of these purchases were made with a credit card and do not form part of this complaint - they are included here for background purposes only.

Mr and Mrs F – using a professional representative (the 'PR') – wrote to the Lender on 21 January 2020 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at both Time(s) of Sale giving them claims against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. A breach of fiduciary duty by the Lender as it failed to disclose to Mr and Mrs F that it paid commission to the Supplier as a result of Credit Agreement 1 & 2.
3. The Lender being party to unfair credit relationships under Credit Agreement 1 & 2 and related Purchase Agreement 1 & 2 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

Mr and Mrs F says that the Supplier made a number of pre-contractual misrepresentations at both of the Time(s) of Sale – namely that the Supplier:

- Told them that Fractional Club 1 & 2 memberships were of some substance, but this is untrue as they are worthless.

- Told them that Fractional Club 1 & 2 memberships were "investments" which would increase in value and after a period of a few years they would be able to sell them at considerable profit.

Mr and Mrs F say that they have claims against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, they have like claims against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs F.

(2) A breach of the Lender's fiduciary duty

- Mr and Mrs F say the Lender breached its fiduciary duty when it failed to disclose to them that it would pay the Supplier commission for broking Credit Agreement 1 & 2.

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

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

- They were pressured into purchasing both Fractional Club 1 & 2 memberships by the Supplier.
- The payment of commission by the Lender to the Supplier was not disclosed to them.
- Membership of Fractional Club 1 & 2 is not worth what was paid for it.
- The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment, and there was no choice of finance providers offered.

The Lender dealt with Mr and Mrs F's concerns as a complaint and issued its final response letter on 3 February 2020, rejecting it on every ground.

Mr and Mrs F then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, upheld the

complaint on its merits.

The Investigator thought that the Supplier had marketed and sold both Fractional Club 1 & 2 memberships as an investment to Mr and Mrs F at the Time(s) of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of each breach on their purchasing decisions, the Investigator concluded that both the credit relationships between the Lender and Mr and Mrs F were rendered unfair to them for the purposes of Section 140A of the CCA.

The Lender disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

The provisional decision

Having considered everything that had been submitted, I agreed with the outcome reached by the Investigator, but had expanded somewhat on the reasons for doing so. As such I set out my initial thoughts in a provisional decision (the 'PD') and invited both sides to submit and new evidence or arguments they wished me to consider before making my final decision. In my PD I began by setting out the legal and regulatory context that I thought was relevant. I then said:

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

And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling both Fractional Club 1 and 2 memberships to Mr and Mrs F as investments, which, in the circumstances of this complaint, rendered the credit relationships between them and the Lender unfair to them for the purposes of Section 140A of the CCA.

However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I recognise that there are a number of aspects to Mr and Mrs F's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the Lender was unfair when it declined the Section 75 claims and that it breached its fiduciary duty, because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs F in the same or a better position than they would be if the redress was limited to those other aspects.

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

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

1. *The Supplier's sales and marketing practices at the Time(s) of Sale;*
2. *The provision of information by the Supplier at the Time(s) of Sale, including the contractual documentation and disclaimers made by the Supplier;*
3. *Evidence provided by both parties on what was likely to have been said and/or done at the Time(s) of Sale; and*
4. *The inherent probabilities of the sales given their circumstances.*

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

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

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

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

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

But Mr and Mrs F say that the Supplier did exactly that at the Time(s) of Sale. As regards the Time of Sale 1 they say:

> *"In 2014 at Kenmore Club in Scotland we were presented and encouraged to purchase fractional points during the mandatory update session organised for every holiday…There were no additional differences between the points previously purchased and the fractional points apart from it being sold to us as an investment. It was only with the assurance that we could make some money from the investment that we bought further points. The certificate was 8,000 points with 2 weeks equivalent at value at Los Amigos resort in Spain, we were told it was apartment 40c which was a 1-bedroom property and we would be able to sell for profit at the end of the term."*

And as regards the Time of Sale 2, they say:

> *"In 2015 when on holiday in Malta, we were again encouraged to buy Fractional Points as an investment and as a result purchased 4,000 points for 1 week's equivalent value of apartment 1a a 1-bedroom apartment at Royal Oasis Club Pueblo Quinta."*

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

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

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

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

Mr and Mrs F's share in both Allocated Property(s) clearly 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 the Fractional Club memberships included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

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

To conclude, therefore, that Fractional Club 1 and/or 2 memberships were marketed or sold to Mr and Mrs F as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold either or both of the memberships 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 evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of either the Fractional Club 1 or 2 as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs F, the financial value of their share in the net sales proceeds of either Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork[1] for both sales that state that Fractional Club membership was not sold to Mr and Mrs F as an investment.

For example, the second page of the Purchase Agreement 1 and 2 was titled "Terms and Conditions", the first of which read:

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

Further, there was a document titled "Key Information", an extract of which read:

> *"Exact nature and content of the right(s):*
>
> ***...***
>
> *Between six to nine months before the Proposed Sale Date, [the Trustee] will appoint two independent valuers to value the Property and will then take steps to sell the Property at the best achievable market price. You must bear in mind that your […] Fractional Points (and the purchase price paid by you for those points) relates primarily to the acquisition by you of many years of wonderful holidays. We are sure that you will get a great deal of pleasure from your holidays. Your decision to purchase […] Fractional Points should not be viewed by you as a financial investment."*

Finally, there was another document titled "Customer Compliance Statement/Declaration to Treating Customers Fairly", which included the following:

> *"5. We understand that the purchase of our […] Fractional Points is an investment in our*

[1] As the disclaimers detailed were the same in the contemporaneous paperwork for both sales, I have only set them out once.

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

6. We understand that the Property referenced on our Purchase Agreement will be sold as soon as possible on or after the Proposed Sale Date. However, we realise that it may not be possible to source a buyer immediately, and that in the event that the sale is affected on or after the Proposed Sale Date, we will be required to pay our Dues each year until the Property is sold."

Mr and Mrs F ticked each and signed to say they understood both of these points for both sales.

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And there are a number of strands to Mr and Mrs F's allegation that the Supplier breached Regulation 14(3) at the Time of Sale 1 and 2, including (1) that membership of the Fractional Club 1 and 2 was expressly described as an "investment" and (2) that membership of the Fractional Club 1 and 2 could make them a financial gain and/or would retain or increase in value.

So, I have considered:

(1) *whether it is more likely than not that the Supplier, at the Time(s) of Sale, sold or marketed membership of the Fractional Club 1 and/or 2 as an investment, i.e. told Mr and Mrs F or led them to believe during the marketing and/or sales process that membership of the Fractional Club 1 and/or 2 was an investment and/or offered them the prospect of a financial gain (i.e., a profit); and, in turn*

(2) *whether the Supplier's actions constitute a breach of Regulation 14(3).*

And for reasons I'll now come on to, given the facts and circumstances of this complaint, I think the answer to both of these questions is 'yes', for both sales.

<u>How the Supplier marketed and sold the Fractional Club membership</u>

During the course of its dealing with complaints of a similar nature, this Service has seen some training material and some internal documents relating to the sale of Fractional Club by the Supplier. The Lender has also provided, in relation to other fractional timeshare complaints, witness statements from both previous and (at the time) existing employees of the Supplier setting out how its sales staff were trained to sell its products– all of which I have considered.

I recognise the amount of witness evidence that's been provided in support of the disclaimers in the paperwork I've referred to above. Indeed, I acknowledge what the witness statements say about the Supplier not referring to Fractional Club membership as an 'investment', not making any reference to the value of the Allocated Property and making every effort not to give customers, such as Mr and Mrs F, the impression that they were investing in something that would make them a profit.

However, I think the argument by the Lender on this issue runs the risk of taking too narrow a view of the prohibition against marketing and selling timeshares as an investment. When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that '[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment.

For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).” And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.

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

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

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

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

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

So, I’m not persuaded that the prohibition in Regulation 14(3) was confined to, for example, using the word ‘investment’ when promoting or selling a timeshare contract. I think that the prohibition may capture the promotion of investment features incorporated into a timeshare to persuade consumers to purchase, including leading a consumer to expect a financial gain from the timeshare. After all, Mrs Justice Collins Rice said in Shawbrook & BPF v FOS, at 76 (when discussing an ombudsman’s approach to Regulation 14(3)):

“[…] He was entitled in other words to be highly sensitive to the ***overt and covert*** *messaging – that is, the fine calibration of the encouragement given – by the seller in a case like this. There was nothing wrong with an approach which had the absolute prohibition in Reg.14(3) within the ombudsman's field of vision from the outset as he looked at the evidence for the true nature of the transaction that was done here. Indeed, he was required as a matter of law to do so.” (emphasis my own)*

Mr and Mrs F say in their testimony that the Supplier sold and/or marketed both Fractional Club 1 and 2 to them as investments. So, I've thought about how both Fractional Club 1 and 2 memberships would likely have been presented to Mr and Mrs F. Alongside the information I have about the sales and what this Service has been told about how the Supplier trained its staff, I've considered the inherent probability of the allegation when assessing whether I find that thing, or things, did or did not happen.

And I am satisfied I am able to do that. After all, in Onassis v. Vergottis [1968] 10 WLUK 101, Lord Pearce referred to the need to look at "probabilities", as well as contemporaneous documents and admitted or incontrovertible facts, when weighing the credibility of a witness's evidence (at p.431). In Armagas Ltd v. Mundogas SA (The Ocean Frost) [1986] 2 W.L.R. 1063, Goff LJ also referred to looking at "the overall probabilities" when ascertaining the truth (at p.57). And in Gestmin SGPS S.A. v. Credit Suisse (UK) Limited [2013] EWHC 3560, Leggatt J suggested (at para.22) that factual findings should be based on "inferences drawn from the documentary evidence and known or ***probable*** *facts" (my emphasis). Here, I think it is inherently more probable that a timeshare product with an investment element is sold in a way promoting that element, and therefore risking a breach of Regulation14(3), compared with the sale of a product without the possibility of a monetary return.*[2]

As I've already set out, as regards what happened at both Time(s) of Sale, Mr and Mrs F have submitted testimony which they say sets out their recollections of events.

I am aware that the testimony provided is not signed or dated, so there is no definitive proof as to when it was written. But I can't see why I shouldn't rely on what has been said here. The substance of the testimony is consistent with what has been set out in the Letter of Complaint, and it seems to be written in Mr and Mrs F's own words. So, while I am aware that it is possible that it was written after the Letter of Complaint, I don't think that is probable. I am satisfied that I can place weight on what is set out in the testimony.

In relation to Time of Sale 1, Mr and Mrs F said in their testimony:

> *"In 2014 at Kenmore Club in Scotland we were presented and encouraged to purchase fractional points during the mandatory update session organised for every holiday…There were no additional differences between the points previously purchased and the fractional points apart from it being sold to us as an investment. It was only with the assurance that we could make some money from the investment that we bought further points. The certificate was 8,000 points with 2 weeks equivalent at value at Los Amigos resort in Spain, we were told it was apartment 40c which was a 1-bedroom property and we would be able to sell for profit at the end of the term."*

Here Mr and Mrs F seem to be saying that the Supplier was originally presenting the conversion of their EC to fractional as a like-for-like conversion, and the only difference between the memberships was the investment element. They then go on to say that due to the assurances from the Supplier that they would make money from the purchase, they agreed to purchase additional fractional points.

And as regards their purchase of Fractional Club 2, they say:

> *"In 2015 when on holiday in Malta, we were again encouraged to buy Fractional Points as an investment and as a result purchased 4,000 points for 1 week's equivalent value of apartment 1a a 1-bedroom apartment at Royal Oasis Club Pueblo Quinta."*

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[2] This is different to saying that it is more likely than not that a product with an investment element is sold as an investment, simply due to that investment element. For the avoidance of doubt, I make no such finding.

So here, Mr and Mrs F are saying that they were encouraged to purchase further fractional points as a further investment.

I acknowledge that the Lender has said that the Supplier included specific disclaimers to show that it didn't present Fractional Club as an investment – and I have set these out above. But it's ultimately difficult to explain why it was necessary to include such disclaimers if there wasn't a very real risk of the Supplier marketing and selling either of the Fractional Clubs 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.

Further, given the circumstances here, I think it unlikely that the Supplier would not have highlighted the possible returns available to Mr and Mrs F when selling Fractional Club 1 & 2 to them, given that they were existing members of the Supplier's EC at the Time of Sale – and converted all of their EC points into fractional points over the course of the two sales. I cannot see how the Supplier could have justified a price of over £6,000 to Mr and Mrs F for each sale when the Fractional Club(s) only provided a relatively modest increase (a little over 12% and 25% respectively) in holiday rights. I think it's therefore likely that the Supplier relied on other aspects of Fractional Club to promote its sale.

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

And Mr and Mrs F have said from the outset of their complaint that they were led to believe by the Supplier that Fractional Club 1 and 2 were investments that would lead to a profit when the associated Allocated Property was sold. I think that belief fits with what they did at both of the Time(s) of Sale – lay out a significant amount of money for only a 12% and 25% increase in holiday rights plus an interest in the sale proceeds of the Allocated Property.

As a result of all of the above, I am currently persuaded it is more likely than not that the Supplier's salesperson positioned both the Fractional Club 1 and 2 memberships at the Time(s) of Sale as an investment that may lead to a financial gain (i.e., a profit) in the future. So, I am currently satisfied that the Supplier breached Regulation 14(3) of the Timeshare Regulations at both Time of Sale 1 and 2.

<u>Were the credit relationships between the Lender and the Mr and Mrs F rendered unfair?</u>

Having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale 1 and 2, I now need to consider what impact each breach had on the fairness of the associated credit relationships between Mr and Mrs F and the Lender under the Credit Agreement 1 and 2 and related Purchase Agreement(s).

As the Supreme Court's judgment in Plevin makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

It also it seems to me in light of Carney and Kerrigan that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs F 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(s) and the Credit Agreement(s) is an important consideration.

On my reading of Mr and Mrs F's testimony, the prospect of a financial gain from Fractional Club 1 and 2 was an important and motivating factor when they decided to go ahead with both of the purchases. That doesn't mean they were not interested in holidays – their own testimony, purchase history and membership usage demonstrate that they quite clearly were. And that is not surprising given the nature of the product at the centre of this complaint.

But Mr and Mrs F were laying out a considerable sum to make the purchase of Fractional Club 1 and 2. And although on both occasions they did purchase some additional points which gave them some extra holiday rights, this wasn't a particularly significant increase (a little over 12% and 25%) and they paid over £6,000 on each occasions for these increases, significantly more than they would have likely paid had they just increased their EC points by the same amount.

So, I can't see the extra holiday rights as being a specific motivation for Mr and Mrs F to purchase Fractional Club 1 and 2. I say this because the extra points did not mean they would be able to access different accommodation than that they would have had access to if they had retained their EC points. The same stock of accommodation was available under both memberships. So, if it was additional holiday rights that Mr and Mrs F were looking for, they could have simply purchased 1,000 additional EC points at each time of sale to achieve the same upgrade. And, from what I have seen, achieving the additional holiday rights in this way would have cost them significantly less than £6,000 on each occasion.

As I said at the start of this decision, a difference between EC membership and Fractional Club membership was that the latter had a significantly shorter membership term. I have considered whether this reduced term was likely to have been a motivating factor in Mr and Mrs F's decision to switch their EC points into fractional points when they made their purchases. But I cannot see that this was a motivation for them. I've not seen any evidence which leads me to think that Mr and Mrs F were in any way unhappy with their EC membership or with the way it was working. And they went on to make a further purchase of 9,000 EC points (with the associated longer term) in September 2016, so it seems unlikely that the shorter membership term was of importance to them.

Conclusion

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

My proposed 'Fair Compensation'

In the PD I then set out what I considered to be a fair and reasonable way for the Lender to calculate and pay fair compensation to Mr and Mrs F, and invited the Lender to provide further evidence and arguments if it proposed to make deductions from the compensation to reflect the holidays Mr and Mrs F have taken using their Fractional Club 1 and 2 memberships. I said:

"*Fair Compensation*

Having found that Mr and Mrs F would not have agreed to purchase either Fractional Club 1 or Fractional Club 2 membership at the Time(s) of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationships between the Lender and Mr and Mrs F were unfair under section 140A of the CCA, I think it would be fair and reasonable to put them back in the position they would have been in had they not purchased either the Fractional Club 1 or Fractional Club 2 memberships (i.e., not entered into the Purchase Agreement 1 or 2), and therefore not entered into the Credit Agreement 1 or 2, provided Mr and Mrs F agree to assign to the Lender their 12,000 fractional points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs F, at Time of Sale 1 and 2 were existing EC members, and 7,000 of their EC points were traded in against the purchase price of the Fractional Club 1 membership, and their remaining 3,000 EC points were traded in towards their purchase of Fractional Club 2.

Under their EC membership, they had to pay annual management charges as EC members, so had Mr and Mrs F not purchased Fractional Club 1 or 2 membership, they would have always been responsible to pay an EC annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr and Mrs F from the Time of Sale 1 as part of their Fractional Club 1, and then from when they bought Fractional Club 2 membership, should amount only to the difference between those charges and the annual management charges they would have paid as ongoing EC members, holding 10,000 EC points.

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

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

(1) The Lender should refund Mr and Mrs F's repayments to it under the Credit Agreement 1, including any sums paid to settle the debt.

(2) The Lender can deduct:

- *The value of any promotional giveaways that Mr and Mrs F used or took advantage of when purchasing Fractional Club 1; and*
- *The market value of the holiday(s)* Mr and Mrs F took using their initial 8,000 fractional points (between Time of Sale 1 and Time of Sale 2) if the points value of the holiday(s) taken amounted to more than the 10,000 EC Points they would have been entitled to use at the time of the holiday(s) as ongoing EC 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.*

  But if they would have been entitled to take that holiday using their existing EC Points, there shouldn't be a deduction for the market value of the relevant holiday. If the Lender proposes to make a deduction for the value of the holiday taken under Fractional Club 1, it should clearly set out the reasons for doing so, with its calculations, in response to this provisional decision.

(3) In addition to (1), the Lender should also refund the difference between the annual management charges Mr and Mrs F paid between Time of Sale 1 until Time of Sale 2, and what their EC annual management charges would have been with 10,000 EC points.

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

(5) The Lender should refund Mr and Mrs F's repayments to it under the Credit Agreement 2, including any sums paid to settle the debt.

(6) The Lender can deduct:

- *The value of any promotional giveaways that Mr and Mrs F used or took advantage of when purchasing Fractional Club 2; and*
- *The market value of the holiday(s)* Mr and Mrs F took after the Time of Sale 2 using their 4,000 fractional points if the points value of the holiday(s) taken amounted to more than the 10,000 EC points they would have been entitled to use at the time of the holiday(s) as ongoing EC 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.*

  But if they would have been entitled to take that holiday using their 10,000 EC points, there shouldn't be a deduction for the market value of the relevant holiday. And if any holiday taken after Mr and Mrs F's subsequent purchase of an additional 9,000 EC points was worth more than 19,000 EC points, the Lender can make a deduction proportionate to the additional points the holiday(s) would have required. If the Lender proposes to make a deduction for the value of any holiday taken after the Fractional Club 2 purchase, it should clearly set out the reasons for doing so, with its calculations, in response to this provisional decision.

(7) In addition to (5), the Lender should also refund the difference between the annual management charges Mr and Mrs F paid after Time of Sale 2, and what their EC annual management charges would have been with 10,000 EC points. This refund should be capped at the time Mr and Mrs F made their subsequent purchase of 9,000 EC points in September 2016.

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

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

(10) I understand that Mr and Mrs F's points may have been relinquished. If that is not the case, and Mr and Mrs F's fractional points are still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property(s) for the Lender (or assign these rights to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club 1 and Fractional Club 2 memberships.

**I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Mr and Mrs F took using their Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage. If the Lender proposes to deduct more than the relevant annual management charge, it should set out its reasons for doing so, and its calculations, in response to this provisional decision.*

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

The responses to the provisional decision

Mr and Mrs F accepted the PD with no further comment.

The Lender also responded, disagreeing with my provisional findings. It provided witness statements from both previous and (at the time) existing employees of the Supplier setting out how its sales staff were trained to sell all its products, and how Fractional Membership in particular was sold to both new and existing members.

In the Lender's response to the PD, it continually referred to the products sold as being 'FPOC2', which was a fractional product sold by a different timeshare provider. However, this is clearly an error, so I will address its response as if it is referring to the correct Supplier[3] and the correct fractional memberships.

In addition to submitting the statements, it began by addressing the witness testimony from Mr and Mrs F that I had relied upon. It said the testimony was unsigned, undated, vague, brief, inconsistent and contains factual inaccuracies which distort the events surrounding the sales. It said the reliability of the testimony is questioned because:

- The testimony is unsigned and undated, and it is unclear why the Ombudsman has relied on it, but won't rely on the contemporaneous sales documentation, some of which has been signed by Mr and Mrs F.
- There is no evidence that Mr and Mrs F enquired with the Supplier about what would have happened with their fractional ownership and any potential profit when their claim was submitted. This casts doubt on their motivation for the sale.
- The claims made are generic and lack detail. They have failed to provide any clarity on how the product(s) were sold as an investment, and this is because the recollection is incorrect.
- References made by Mr and Mrs F to being able to sell may be nothing to do with the Allocated Property but instead refer to the 're-sale' market of timeshare agreements.
- It is incorrect for the Ombudsman to conclude that the investment element was an important and motivating factor for the purchases. The real motivation was the holidays they offered.
- The Letter of Complaint contains a number of allegations which are not supported or mentioned in the testimony, and are demonstrably incorrect. These must be considered, along with how they impact the veracity and reliability of the witness testimony. These factual inaccuracies include:
    - The Letter of Complaint alleges Mr and Mrs F *"were forced to endure a half-day presentation".*
    - Fractional Club was presented to Mr and Mrs F as something that would secure them *"exclusive accommodation and cheaper holidays".*
    - Mr and Mrs F were subject to a number of *"high pressure sales presentation(s)".*
- These incorrect allegations contained within the Letter of Complaint, and which are not

[3] For the avoidance of doubt, the Supplier of the fractional timeshare memberships which are the subject of this complaint was Diamond Resorts.

supported by Mr and Mrs F in the testimony, are designed to distort the relationship between the Supplier and Mr and Mrs F to paint a picture that they endured hardship during the presentations and were mis-sold the purchases.

- In any event, they had a 14-day cooling off period, which they did not use, and haven't provided a reasonable explanation for not doing so.
- These factual inaccuracies suggest that the PR has manufactured the testimony by using a templated format, which is not specific to the actual facts of the matter.
- If the Ombudsman is prepared to rely on Mr and Mrs F's testimony, the Ombudsman needs to equally rely on the contemporaneous documentation from the point of sale.
- It is unsafe to rely on the witness testimony, which has not been prepared by the customers.
- The allegations made are generic and hold no merit.

Against the above information, the Lender said it is not credible that Mr and Mrs F were assured that they *"would make a profit",* nor is it credible that their motivation was the investment element, as opposed to their future holiday needs. The Ombudsman has to take into account the significant inaccuracies/inconsistencies in Mr and Mrs F's recollections when assessing its overall reliability.

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

- The PD errs in conflating the two meanings of the word 'return' – a 'return' on investment (the measure of profit) and being told some money would be 'returned' upon the sale (no connotation of investment or profit). The customer being told that some money would be 'returned' upon sale of the Allocated Property does not breach Regulation 14(3).
- Selling an investment requires a finding of a representation by the seller that the reason, or significant reason for the purchase is the prospect of a financial gain/profit, and the corresponding motive on the part of the consumer. Referring to the prospect of a residual return does not satisfy this test. If this was an investment, then Mr and Mrs F would have been informed of the return. This has not been alleged in either the Letter of Complaint or the testimony.
- The documentation (including the training material) in relation to the Fractional Club sale is unobjectionable and does not breach Regulation 14(3). The sales documentation includes disclaimers which evidences 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.

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

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

- Mr and Mrs F's circumstances and their motivations for the purchases meant the actual sale processes did not have a material impact on their decisions to purchase. Therefore, the credit relationships were fair.

The Lender concluded by saying that there is no clear, compelling evidence that the Fractional Club(s) were sold to Mr and Mrs F with the intention of financial gain.

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

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

The following is the legal and regulatory context that I think is relevant to this complaint:

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."[4]

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

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

untrue statement of existing fact or law made by one party (or his agent for the purposes of passing on the representation, acting within the scope of his authority) to another party that induced that party to enter into a contract.

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

However, a mere statement of opinion, rather than fact or law, which proves to be unfounded, isn't a misrepresentation unless the opinion amounts to a statement of fact and it can be proved that the person who gave it, did not hold it, or could not reasonably have held it. It also needs to be shown that the other party understood and relied on the implied factual misrepresentation.

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

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

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

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

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

The Timeshare Regulations were introduced to implement EC legislation, Directive 122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts (the '2008 Timeshare Directive'), with the purpose of achieving 'a high level of consumer protection' (Article 1 of the 2008 Timeshare Directive). The EC had deemed the 2008 Timeshare Directive necessary because the nature of timeshare products and the commercial practices that had grown up around their sale made it appropriate to pass specific and detailed legislation, going further than the existing and more general unfair trading practices legislation.[5]

[5] 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 (the 'UTCCR')

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

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

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

County Court Cases on the Sale of Timeshares

1. *Hitachi v Topping* (20 June 2018, Country Court at Nottingham) – claim withdrawn following cross-examination of the claimant.
2. *Brown v Shawbrook Bank Limited* (18 June 2020, County Court at Wrexham)
3. *Wilson v Clydesdale Financial Services Limited* (19 July 2021, County Court at Portsmouth)
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, and having read and considered all of the statements and sales documentation, along with the reasons the Lender gave for why it disagreed with my PD, I remain satisfied that this complaint should be upheld for the reasons set out above in the extract of my PD. I think it is more likely than not that the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling both Fractional Club 1 and 2 memberships to Mr and Mrs F as investments at the Times of Sale. And, in the circumstances of this complaint, these breaches rendered the credit relationships between them and the Lender unfair to them for the purposes of Section 140A of the CCA.

I will also deal with the matters raised by the Lender in response, but in doing so, I note again that my role as an Ombudsman is not to address every single point that has been made in response. Instead, it is to decide what is fair and reasonable, on the balance of probabilities, 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 believe are the salient points.

Mr and Mrs F's testimony

Much of the Lender's response to the PD set out reasons why it didn't think Mr and Mrs F's testimony was reliable. The Lender says that the statement is unsigned and undated, and the claims made are generic and lack detail. But I am not persuaded that this means the testimony is unreliable.

I am aware that the testimony provided is not signed or dated, so there is no definitive proof as to when it was written. But I can't see why I shouldn't rely on what has been said here. The substance of the testimony is consistent with what has been set out in the Letter of Complaint, and it seems to be written in Mr and Mrs F's own words.

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

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

So, having considered the testimony, I am persuaded that it is likely to be a reliable recollection of events. I say this as it contains a level of detail that only Mr and Mrs F, as parties to the events, could have known, such as what they were thinking and how the Supplier convinced them to purchase additional points at Time of Sale 1. And they have also been clear as to their motivation to make the purchases.

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

How the Supplier sold and/or marketed the Fractional Club(s)

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

However, as I said above, I think the argument by the Lender on this issue runs the risk of taking too narrow a view of the prohibition against marketing and selling timeshares as an investment. As I said in my PD, and I maintain now, when the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that:

"'[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3))."

And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.

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

But I acknowledge again that the Supplier, within the sales documentation, made efforts to avoid specifically describing Fractional Club membership as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs F, 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.

In response to my PD, 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 Fractional Club is an investment. But in any event, the disclaimers don't seem to have been focussed on by Mr and Mrs F at the Time(s) of Sale, so doesn't advance either side's case anyway.

I also recognise the amount of witness evidence that's been provided in support of the disclaimers in the paperwork I've referred to above, both previously and in response to the PD. Indeed, I acknowledge what the witness statements say about the Supplier' sales representatives being trained to not refer to Fractional Club membership as an 'investment', to not make any reference to the value of the Allocated Property and making every effort to not give customers, such as Mr and Mrs F, the impression that they were investing in something that would make them a profit.

However, as I said before, deciding what happened in practice is often not as simple as looking at the contemporaneous paperwork. Especially when such paperwork was produced and signed *after* potential customers, such as Mr and Mrs F, had already been through a lengthy sales presentation. So, it is important to balance it with what I think it is likely that Mr and Mrs F were told at the Time(s) of Sale about Fractional Club membership. And as I've said, having considered what Mr and Mrs F have said in their statement, and having considered it in light of the statements provided by the Lender, I am satisfied that I can rely on their testimony in this regard.

Mr and Mrs F's statement is regarding their specific sales, and what they say they remember being told by their particular salesperson on each occasion. So, whilst I can see the training the Supplier's staff were given set out that Fractional Club membership should not be referred to as an 'investment', and that no reference as to the value of the Allocated Property should be made, the statements from the Lender don't assist me greatly when thinking about what happened on these particular occasions.

Mr and Mrs F say, as regards Time of Sale 1:

> *"In 2014 at Kenmore Club in Scotland we were presented and encouraged to purchase fractional points during the mandatory update session organised for every holiday…There were no additional differences between the points previously purchased and the fractional points apart from it being sold to us as an investment. It was only with the assurance that we could make some money from the investment that we bought further points. The certificate was 8,000 points with 2 weeks equivalent at value at Los Amigos resort in Spain, we were told it was apartment 40c which was a 1-bedroom property and we would be able to sell for profit at the end of the term."*

And as regards their purchase of Fractional Club 2, they say:

> *"In 2015 when on holiday in Malta, we were again encouraged to buy Fractional Points as an investment and as a result purchased 4,000 points for 1 week's equivalent value of apartment 1a a 1-bedroom apartment at Royal Oasis Club Pueblo Quinta."*

It seems clear to me that Mr and Mrs F are saying that the Supplier, at Time of Sale 1 and Time of Sale 2, sold the Fractional Club memberships to them as Investments. And it also seems clear that they are saying that these investments afforded them then opportunity to *"make some money".*

As a result of all of the above, I remain satisfied that the Supplier, at Time of Sale 1 and Time of Sale 2, sold the Fractional Club memberships as investments in breach of Regulation 14(3) of the Timeshare Regulations.

<u>Were the credit relationships between the Lender and Mr and Mrs F rendered unfair?</u>

The Lender says that it disagrees that Mr and Mrs F were motivated to make the Fractional Club purchases for their investment elements. But it hasn't provided any evidence as to what it considered was their motivation.

And having considered everything again, I remain persuaded that Mr and Mrs F were motivated to purchase the Fractional Club 1 and Fractional Club 2 memberships by their share in the Allocated Property(s) and the possibility of a profit, as that share was one of the defining features of the memberships that marked them apart from their existing EC membership. And I don't think they would have gone ahead with their purchases had it not been for the Supplier's breaches of Regulation 14(3).

I think this as Mr and Mrs F say (plausibly in my view) that both Fractional Club 1 and 2 were marketed and sold to them at the Time(s) of Sale as something that offered them more than just holiday rights, and I remain unpersuaded by the Lender's argument that the shorter membership terms were likely a motivating factor. And I also cannot see that the purchase of the additional holiday rights was a significant motivation for them, as they could have achieved this increase by simply purchasing more EC points for less money. So, it seems common sense that the potential financial return associated with the Fractional Club 1 and 2 was an important factor in the sale.

And Mr and Mrs F have been consistent during the course of this complaint that the potential investment returns were a central part of their reason to make the purchases. And with that being the case, I think the Supplier's breach of Regulation 14(3) at each Time of Sale was material to each purchasing decision they ultimately made, and as a result rendered the associated credit relationships with the Lender unfair to Mr and Mrs F.

Conclusion

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

Putting things right

In response to my PD, the Lender made no comment on my proposed methodology of redress, and it did not say, when requested to do so, that it proposed to make any deductions to the calculated redress for the value of holidays Mr and Mrs F took using their Fractional Club 1 and Fractional Club 2 memberships. So, I consider the following is fair and reasonable in the circumstances:

Fair Compensation

Having found that Mr and Mrs F would not have agreed to purchase either Fractional Club 1 or Fractional Club 2 membership at the Time(s) of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationships between the Lender and Mr and Mrs F were unfair under Section 140A of the CCA, I think it would be fair and reasonable to put them back in the position they would have been in had they not purchased either the Fractional Club 1 or Fractional Club 2 memberships (i.e., not entered into the Purchase Agreement 1 or 2), and therefore not entered into the Credit Agreement 1 or 2, provided Mr and Mrs F agree to assign to the Lender their 12,000 fractional points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs F, at Time of Sale 1 and 2 were existing EC members, and 7,000 of their EC points were traded in against the purchase price of the Fractional Club 1 membership, and their remaining 3,000 EC points were traded in towards their purchase of Fractional Club 2.

Under their EC membership, they had to pay annual management charges as EC members, so had Mr and Mrs F not purchased Fractional Club 1 or 2 membership, they would have always been responsible to pay an EC annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr and Mrs F from the Time of Sale 1 as part of their Fractional Club 1, and then from when they bought Fractional Club 2 membership, should amount only to the difference between those charges and the annual management charges they would have paid as ongoing EC members, holding 10,000 EC points.

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

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

Credit Agreement 1

(1) The Lender should refund Mr and Mrs F's repayments to it under the Credit Agreement 1, including any sums paid to settle the debt.

(2) The Lender can deduct:

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

(3) In addition to (1), the Lender should also refund the difference between the annual management charges Mr and Mrs F paid between Time of Sale 1 until Time of Sale 2, and what their EC annual management charges would have been with 10,000 EC points.

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

Credit Agreement 2

(5) The Lender should refund Mr and Mrs F's repayments to it under the Credit Agreement 2, including any sums paid to settle the debt.

(6) The Lender can deduct:

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

(7) In addition to (5), the Lender should also refund the difference between the annual management charges Mr and Mrs F paid after Time of Sale 2, and what their EC annual management charges would have been with 10,000 EC points. This refund should be capped at the time Mr and Mrs F made their subsequent purchase of 9,000 EC points in September 2016.

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

In addition:

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

(10) I understand that Mr and Mrs F's points may have been relinquished. If that is not the case, and Mr and Mrs F's fractional points are still in place at the time of this decision,

as long as they agree to hold the benefit of their interest in the Allocated Property(s) for the Lender (or assign these rights to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club 1 and Fractional Club 2 memberships.

*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 this complaint and direct that Shawbrook Bank Limited should calculate and pay fair compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F and Mrs F to accept or reject my decision before 21 July 2025.

Chris Riggs
Ombudsman