DRN-5780391

The complaint

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

What happened

Since 1991 Mrs M had been a member of a timeshare arrangement, the European Collection (the 'EC') from a timeshare provider (the 'Supplier'). Over the course of this membership, she bought a total of 13,000 EC points.

As an EC member, every year she could use her 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 points than a smaller apartment outside of school holiday periods.

On 28 October 2013 (the 'Time of Sale') Mrs M purchased membership of a different type of timeshare (the 'Fractional Club') from the Supplier. She entered into an agreement with the Supplier to buy 16,500 fractional points (the 'Purchase Agreement'), and after trading in her 13,000 EC points (for which she was given a conversion rate of £1 per point), she ended up paying £11,924 for Fractional Club membership.

Fractional Club membership differed from her EC membership. The two significant differences were that it had a shorter membership term (15 years compared to an end date of 2054 for the EC membership), and it was also asset backed – which meant the membership gave Mrs M more than just holiday rights. It also included a share in the net sale proceeds of a property named on her Purchase Agreement (the 'Allocated Property') after her membership term ends.

Mrs M paid for her Fractional Club membership by making a deposit payment, and for the balance by taking finance of £9,539 from the Lender (the 'Credit Agreement').

Mrs M – using a professional representative (the 'PR') – wrote to the Lender on 23 August 2018 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving her a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

As these concerns haven't changed since they were first raised, and as both sides are familiar with them, it isn't necessary to repeat them in detail here beyond the summary above.

The Lender dealt with Mrs M's concerns as a complaint, and issued its final response letter

on 4 October 2018, rejecting it on every ground.

Mrs M 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 Fractional Club membership as an investment to Mrs M at the Time of Sale in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'). And given the impact of that breach on her purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mrs M was rendered unfair to her 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. I thought this complaint ought to be upheld as the credit relationship between Mrs M and the Lender had been rendered unfair by a breach of Regulation 14(3) of the Timeshare Regulations by the Supplier. I set out my initial thoughts in the form of a provisional decision (the 'PD') and invited both parties to submit any new evidence or arguments that they wished me to consider before making my final decision. In my PD I said:

"The legal and regulatory context

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

The legal and regulatory context that I think is relevant to this complaint is no different to that shared in several hundred ombudsman decisions on very similar complaints. And with that being the case, it is not necessary to set it out here. But if either side would like me to confirm what I think that context is, they can let me know in response to this provisional decision.

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.

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 Fractional Club membership to Mrs M as an investment, which, in the circumstances of this complaint, rendered the credit relationship between her and the Lender unfair to her 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 Mrs M's complaint, it isn't necessary to make formal findings on all of them because, even if one or more of those aspects ought to succeed, the redress I am

currently proposing puts Mrs M in the same or better position than she would otherwise be in.

Mrs M's testimony

As part of Mrs M's submissions to this service, the PR has provided a statement dated 20 March 2018. So, I have considered how much weight I can place on this statement when assessing the merits of Mrs M's complaint.

The statement was compiled only five months prior to the Letter of Complaint being sent to the Lender, and the statement was probably prepared as part of the PR's case preparation. Indeed, the Letter of Complaint plaint is generally consistent with the contents of the statement, which leads me to think that the statement was used to inform the Letter of Complaint.

But the statement was, in my view, clearly prepared and written by the PR, and taken during a telephone call with Mrs M. For example, I can see that Mrs M has seen the initial draft and has made handwritten notes to parts of it which she thought were inaccurate.

So, I am mindful of the risk that Mrs M may have been guided through the process, and the associated risk that what has been written may not be her own specific recollections, but I think that risk is low, as I can see she has had the opportunity to see and correct the statement. It also contains personal information about the Time of Sale that only Mrs M would have known, such as her personal experiences whilst on the holidays, so I have no doubt that Mrs M had a significant input into its contents. It is also not unusual for statements to be prepared on complainants' behalf by professional representatives. Taking everything into account I am satisfied that it is a record of Mrs M's recollections of the Time of Sale.

When considering how much weight I can place on Mrs M'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 M have 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 she 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 her ability (Arroyo, citing Re A (a child) [2011] EWCA Civ 12 at para 20)."*

The question to consider, therefore, is whether there is a core of acceptable evidence from Mrs M. And having considered her testimony, whilst being mindful that memories can fade over time, I am satisfied that I am able to place weight on and rely on what she has said.

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

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

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

I have then considered the impact of these on the fairness of the credit relationship between Mrs M 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 Mrs M's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling 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 Mrs M says that the Supplier did exactly that at the Time of Sale – saying the following during the course of this complaint:

> *"They also told me that after the 15 years, they would actually sell the property and that I would get all my money back. They also said that this was something like property ownership because instead of just having normal points, I would actually have points in something I could touch, which was tangible and that I could actually make money on, like normal property."*

Mrs M alleges, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because:

(1) *There were two aspects to her Fractional Club membership: holiday rights and a profit on the sale of the Allocated Property; and*

(2) *She was told by the Supplier that she would get her money back or more during the sale of Fractional Club membership.*

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

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

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Mrs M 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 her as an investment, i.e. told her or led her to believe that Fractional Club membership offered her the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

There is evidence in this case that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mrs M, the financial value of her 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 standard contemporaneous paperwork that state that Fractional Club membership was not sold to Mrs M as an investment.

For example, on the second page of the Purchase Agreement, titled "Terms and Conditions", the first 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, a document titled "Key Information", an extract of which read:

*"**Exact nature and content of the right(s):***

…

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

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

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

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

These documents were all signed by Mrs M as having been read.

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork, and it is important to note that these documents would have been given to Mrs M to sign after she had been through the sales presentation, and after she had agreed to purchase the Fractional Club membership on the basis of the presentation and what she had been told by the Supplier. And there are a number of strands to Mrs M's allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that membership of the Fractional Club was expressly described as an "investment" and (2) that membership of the Fractional Club could make her a financial gain and/or would retain or increase in value.

So, I have considered:

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

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

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

How the Supplier marketed and sold the Fractional Club membership

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. And following the Investigator's view, the Lender has also 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 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 Mrs M, the impression that she was investing in something that would make her a profit. I also note that the Lender has highlighted that Mrs M has said "I could actually make money" and said this shows there was no promise of a profit given.

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 she 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 she confer in the sale proceeds of real property unattached to any right to stay in it, and the prospect she 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 her 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)*

And as regards the disclaimers which I have set out above, 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 membership as an investment, given the difficulty of articulating the benefit of fractional ownership in a way that distinguishes it from other timeshares from the viewpoint of prospective members. This is especially true when customers, such as Mrs M, was an existing member of a non-fractional timeshare membership and had been for several years, and who had increased her holiday rights by buying further non-fractional points on a number of occasions. So, I think it's reasonable to assume there was likely some discussion at the Time of Sale as to why she should purchase this new type of membership in particular. In other words, some discussion of why Mrs M ought to purchase the Fractional Club in the way that she did.

Mrs M says in her testimony that the Supplier sold and/or marketed Fractional Club membership to her as an investment. So, I've thought about how the membership would likely have been presented to Mrs M. 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 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 that promotes that element, and therefore risking a breach of Regulation14(3), compared with the sale of a product without the possibility of a monetary return.[1]

As I've already set out, as regards what happened at the Time of Sale, Mrs M has submitted testimony which she says sets out her recollections of events. And as I've said, I am currently satisfied that I am able to place weight on what she has said occurred at the Time of Sale.

The testimony sets out her entire relationship with the Supplier from her initial purchase of EC points. And from her testimony it seems that Mrs M was concerned that her EC membership would be held in perpetuity and would be transferred to her family.

In relation to the Time of Sale, Mrs M said in her testimony:

> *"I had previously purchased [the Supplier] European Collection points in the late 90's and early 2000's, and the representative in 2013 told me that they were all in perpetuity. They made it clear that that meant that the points would pass on to my family when I died and I was really scared about that and I really didn't want that to happen He told me that if I bought fractional points then there would be a guaranteed end date and that, as of the date written in the contract, I would not be liable for it anymore and I would just not have a timeshare anymore, and I would avoid the whole perpetuity malarkey."*

She then went on:

> *"They also told me that after the 15 years, they would actually sell the property and that I would get all my money back. They also said that this was something like property ownership because instead of just having normal points, I would actually have points in something I could touch, which was tangible and that I could actually make money on, like normal property.*
>
> *I therefore converted all of my points that I held at that time to fractional points and bought an additional 3,500 fractional points to total 16,500 fractional points."*

Here Mrs M is saying that she was told she would at least get her money back, and that there was a chance that she could make a profit, and has compared it to owning property.

The Lender may say in response to this provisional decision, that it is not a breach of Regulation 14(3) to merely describe the nature of the product and how it worked, and I agree. It may also say that Mrs M, in purchasing extra fractional points, gained additional holiday rights. But in the circumstances of this complaint, it wouldn't have made much sense if the Supplier included this feature in the product without relying on it to promote the sale, given Mrs M paid a large sum for a relatively modest increase in holiday rights.

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 it 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.

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[1] 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.

Further, I find it fanciful that the Supplier would not have highlighted the possible returns available to Mrs M when selling Fractional Membership to her given that she already had a substantial number of EC points. And as Mrs M was laying out a considerable sum to make the purchase, I think it's clear that she expected to get a significant sum back. After all she bought 3,500 additional points and therefore some extra holiday entitlement, but I think it is a fair assumption that she would have been able to purchase the additional 3,500 points as EC points for considerably less cost, so it seems common sense that the return was an important factor in the sale. It is also important to note that the fractional points did not provide access to a different portfolio of resorts – the same stock was available to both EC and Fractional Club members. Further, Mrs M has said from the outset of her complaint that she was led to believe she would get at least her money back at the end of the agreement. I think that belief fits with what she did at the Time of Sale – make a significant purchase for only a modest increase in holiday rights plus an interest in the sale proceeds of the Allocated Property.

Mrs M, in both her statement and in her Letter of Complaint, has been specific in what she says about how the Fractional Club was sold to her. She has said that it was positioned as an investment in property from which she would get her money back and a possible profit upon the sale of the Allocated Property. And given her circumstances, I am persuaded it is more likely than not that the Supplier's salesperson positioned Fractional Club membership as an investment that may lead to a financial gain (i.e., a profit) in the future, whether explicitly or implicitly. So, I am currently satisfied that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale.

<u>Was the credit relationship between the Lender and the Consumer rendered unfair?</u>

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

As the Supreme Court's judgment in Plevin[2] 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 seems to me in light of Carney[3] and *Kerrigan[4], that if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mrs M and the Lender that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led her to enter into the Purchase Agreement and the Credit Agreement is an important consideration.*

The Lender has pointed to Mrs M's usage of her memberships and has suggested that this means that access to holidays was a significant driver in her purchasing decision. I am not saying here she was not interested in holidays. Her own testimony and her purchasing and reservation history demonstrates that she quite clearly was, which is unsurprising given the nature of the product at the centre of this complaint. But Mrs M says that Fractional Club membership was marketed and sold to her at the Time of Sale as something that offered her more than just holiday rights, and I am persuaded by this. After all, as I've said. Mrs M had increased her holding of EC points prior to her purchase of Fractional Club, resulting in the improved benefits of the increased points holding. So, if it was improved holiday rights she

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[2] *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61
[3] *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958
[4] *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169

was looking to achieve, I cannot see why she wouldn't have just increased her holding of EC points as she had done previously. After all, the change from EC to Fractional Club did not provide access to a different portfolio of resorts, nor improved access to the accommodation. So the holidays she took as a Fractional Club member would likely have been available to her if she'd remained as an EC member.

So, in my view, there had to be some other benefit which motivated her purchase which was specific to fractional membership. As I've said, it is clear that Mrs M was concerned that her EC membership could be passed on to her family, and she didn't want that to happen. So, it seems that Mrs M was attracted to the Fractional Club by both the reduced membership term, and the potential profit upon the sale of the Allocated Property.

So, I agree that the reduced membership term was likely to have been attractive to Mrs M. But I don't think the reduced term was the reason for her purchase, so I don't think she would have pressed ahead for this reason alone.

I think this because at the Time of Sale Mrs M was approaching her 60th birthday. Under the terms of the Supplier's exceptional circumstances policy[5] Mrs M would have been able to relinquish her EC membership when she turned 75, which was in a little over 15 years' time. And importantly, she would have been able to do so without having to pay anything. So given the Fractional Club had a membership term which was the same length, and at which point she would have been able to relinquish her existing EC membership for no financial outlay, I do not think this would have been a significant motivation for her, especially as she had to pay over £11,000 to achieve this. I've also not seen anything which suggests there was any reduction in the annual management charge for Fractional Club when compared to what she was having to pay for the EC membership, especially when considering the additional £11,924 cost of it.

So, I think the prospect of a financial gain at the end of her membership term was likely to have been a significant and important factor in Mrs M's purchasing decision. And Mrs M has said as much (plausibly in my view) in her statement. Therefore, on the balance of probabilities, I think her purchase was motivated by her share in the Allocated Property and the possibility of a profit, as that share was one of the defining features of membership that marked it apart from her existing membership. Mrs M has not said or suggested, for example, that she would have pressed ahead with the purchase in question had the Supplier not led her to believe that Fractional Club membership was an appealing investment opportunity. And as she faced the prospect of borrowing and repaying a substantial sum of money while subjecting herself to long-term financial commitments, had she not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I have not seen enough to persuade me that she would have pressed ahead with her purchase regardless.

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

Conclusion

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

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[5] Set out in the EC Relinquishment Fact Sheet.

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 Mrs M. I said:

Fair Compensation

Having found that Mrs M would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under Section 140A of the CCA, I think it would be fair and reasonable to put Mrs M back in the position she would have been in had she not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement. This is on the proviso that Mrs M agrees to assign to the Lender her fractional points or hold them on trust for the Lender if that can be achieved.

Mrs M was an existing European Collection member, and her membership was traded in against the purchase price of Fractional Club membership. Under her European Collection membership, she had 13,000 European Collection Points. And, like the Fractional Club membership, she had to pay annual management charges as a European Collection member. So, had Mrs M not purchased Fractional Club membership, she would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mrs M from the Time of Sale as part of her Fractional Club membership should amount only to the difference between those charges and the annual management charges she would have paid as an ongoing European Collection member.

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

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

(2) In addition to (1), the Lender should also refund the difference between Mrs M's Fractional Club annual management charges paid after the Time of Sale and what her European Collection annual management charges would have been had she not purchased Fractional Club membership.

(3) The Lender can deduct:

i. *The value of any promotional giveaways that Mrs M used or took advantage of; and*

ii. *The market value of the holidays* Mrs M took using her Fractional Points if the Points value of the holiday(s) taken amounted to more than the total number of European Collection points she would have been entitled to use at the time of the holiday(s) as an ongoing European Collection member. 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 M took a holiday worth 2,550 fractional points and she would have been entitled to use a total of 2,500 European Collection points 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 she would've been entitled to use 2,600 European Collection Points, for instance,

there shouldn't be a deduction for the market value of the relevant holiday.

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

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

(5) The Lender should remove any adverse information recorded on Mrs M's credit file in connection with the Credit Agreement reported within six years of this decision.

(6) If Mrs M's Fractional Club membership is still in place at the time of this decision, as long as she agrees to hold the benefit of her interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify her against all ongoing liabilities as a result of her Fractional Club membership.

**I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Mrs M took using her 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 her usage.*

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

The responses to the provisional decision

Mrs M accepted what I had said in the PD with no further comment.

The Lender did not accept it, and sent a comprehensive response setting out why it thought the complaint ought not to be upheld.

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

- Two versions of the testimony have been submitted – one without annotations and one with. The more recent annotated version suggests the Letter of Complaint was compiled without Mrs M's first-hand experience having been gained.
- There is doubt which should be addressed regarding whether Mrs M had ever seen the testimony that supposedly led to the Letter of Complaint.
- There is doubt about when the original testimony was produced and sent to Mrs M to review and consider.
- The testimony was not provided to the Lender until 16 November 2023, despite being dated 20 March 2018, so it was submitted after the Judicial Review. This raises concerns regarding Mrs M's recollections being embellished by the PR.
- It isn't clear why the Ombudsman has relied upon unsigned testimony but won't rely on the contemporaneous notes and/or the documents from the Time of Sale, some of which have been signed by Mrs M.

[6] This seems to be an error on the Lenders part because, as has been set out, the testimony is dated 20 March 2018.

- There is no evidence that Mrs M enquired with the Supplier about what would have happened with her fractional ownership and any potential profit when her claim was submitted. This casts doubt on her motivation for the sale.
- The contemporaneous documents make clear that Mrs M purchased the Fractional Club for a shorter term and because she wanted additional points for her own holiday usage. The system notes from the day state:
    - '*bu: done by K Brooks. V nice lady, fractional conv + additional 3500 pts, said no dependants, ties in with age, planning more hols further afield when retires in a few yrs time. Pre auth cc for dep, bal Shawbrook, funded by savings. m/feeslump sum payment increase comfortably affordable.'*

The Lender then highlighted what it considered to be an incorrect assumption made within the PD. It said:

- It is factually and legally incorrect to say that it is a fair assumption that Mrs M would have been able to purchase the additional 3,500 fractional points as EC points for considerably less cost. At the Time of Sale both EC points and fractional points were priced at £1.68 per point, so Mrs M would have been charged the same amount for each type of point.
- Fractional points had the added benefit of a short membership as well as receiving a share of the net sales proceeds of the sale.

The Lender said the claims made were not substantiated:

- The witness testimony lacks detail and is generic. It has limited reference to the breach in regulation being alleged, with just reference to her being able to *"make money".* No information has been provided to show how the membership was sold as an investment.

It summarised that it is not credible that Mrs M was assured she would *"make money"* nor is it credible that the purpose of her purchase of the Fractional Club membership was the pursuit of such an investment objective, as opposed to her motivation to purchase points to meet her future holiday needs. It said the Ombudsman has to take into account the significant inaccuracies/inconsistencies in Mrs M's recollections when assessing its overall reliability.

The Lender then went on to consider how the PD dealt with the breach 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 Mrs M 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).
- It is not acceptable to dismiss the disclaimers signed by Mrs M. If Mrs M was informed

that the product was an investment, it is difficult to understand why she then ticked and signed the disclaimers which confirmed otherwise.

- 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.

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

In conclusion, the Lender said that the outcome in the PD ought not to be maintained. It said there is no clear, compelling evidence that the Fractional Club membership was sold to Mrs M with the intention of financial gain, so the complaint ought to be rejected.

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

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 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 Fractional Club membership to Mrs M as an investment at the Time of Sale. And, in the circumstances of this complaint, that breach rendered the credit relationship between her and the Lender unfair to her 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.

Mrs M's testimony

Much of the Lender's response to the PD set out reasons why it didn't think Mrs M'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, but contrary to what the Lender says, it is dated. And, as I said in the PD, 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 Mrs M's own words. Mrs M was also asked to confirm, in response to a question by this Service, that the testimony reflected her recollections of the events in question. In response she sent the initial copy of the testimony on which she had made some handwritten notes where she had noted it needed to be changed. She has told us that this was done after it was initially written, but she was never sent the final version. I see no reason to doubt what she has said here, and this supports that it was originally written prior to the Letter of Complaint being compiled.

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 remain satisfied, in this particular case, that I am able to place weight on what Mrs M has said.

How the Supplier sold and/or marketed the Fractional Club

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 standard sales documentation, made efforts to avoid specifically describing Fractional Club membership as an 'investment' or quantifying to prospective purchasers, such as Mrs M, 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.

The Lender has said that these disclaimers actually evidence *compliance* with the regulations. But this paperwork was produced and the disclaimers were signed *after* potential customers, such as Mrs M, had already been through a lengthy sales presentation, and had already decided to make the purchase. So, it is important to balance it with what I think it is likely that Mrs M was told at the Time of Sale about Fractional Club membership.

Mrs M's statement is regarding her specific sale, and what she says she remembers being told by her particular salesperson. 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 this particular Time of Sale.

Mrs M says, as regards the Time of Sale:

> *"They also told me that after the 15 years, they would actually sell the property and that I would get all my money back. They also said that this was something like property ownership because instead of just having normal points, I would actually have points in something I could touch, which was tangible and that I could actually make money on, like normal property."*

It seems clear to me that Mrs M is saying that the Supplier, at the Time of Sale, sold the Fractional Club membership to her as an investment. And it also seems clear that she is saying that she was told this was an investment that she *"could actually make money on, like normal property."*

As a result of all of the above, and having considered all of the Lender's submissions in this regard, I remain satisfied that the Supplier, at the Time of Sale, sold the Fractional Club membership to Mrs M as an investment in breach of Regulation 14(3) of the Timeshare Regulations.

Was the credit relationship between the Lender and Mrs M rendered unfair?

The Lender says that it disagrees that Mrs M was motivated to make the Fractional Club purchase for the investment element. It says her motivation was the reduced membership term and the holidays it could provide.

But as I said in the PD, and I maintain now, I do not think that is the case. I think the evidence suggests that Mrs M was motivated to make the purchase because of the profit she was told she could make. And the Lender has not produced any new evidence in this regard; they have just disagreed with my assessment of the evidence.

As I set out, Mrs M was an existing EC member, and had increased her holding of EC points prior to her purchase of Fractional Club, resulting in the improved benefits of the increased EC points holding. So, if it was improved holiday rights she was looking to achieve, I cannot see why she wouldn't have just increased her holding of EC points as she had done previously. After all, the change from EC to Fractional Club did not provide access to a different portfolio of resorts, nor improved access to the accommodation. So the holidays she took as a Fractional Club member would likely have been available to her if she'd remained as an EC member, albeit perhaps with an additional 3,500 EC points.

In my PD I also said it appeared that Mrs M would have been able to buy the additional 3,500 EC points for significantly less cost than she paid for her Fractional Club membership. The Lender has said this was not the case, and it said that at the Time of Sale both EC points and fractional points were being sold at £1.68 per point. But I think the Lender has misunderstood the point I was making here. Mrs M converted her existing 13,000 EC points into fractional points, and was given a conversion value of £1 per point. She then paid £11,924 for her membership of the Fractional Club, which was significantly more than the £5,880 she would have needed to pay for the additional EC points. So, it follows there had to be some reason to make this switch.

As set out, it is clear that Mrs M was concerned that her EC membership could be passed on to her family, and she didn't want that to happen. So, it seems that Mrs M was attracted to the Fractional Club by both the reduced membership term, and the potential profit upon the sale of the Allocated Property.

So, I still agree that the reduced membership term was likely to have been attractive to Mrs M, but I maintain that I don't think the reduced term was the reason for her purchase, so I don't think she would have pressed ahead for this reason alone.

In the PD I set out that Mrs M's age at the Time of Sale meant that under the terms of the Supplier's exceptional circumstances policy[7] Mrs M would have been able to relinquish her EC membership when she turned 75, which was in a little over 15 years' time. And importantly, she would have been able to do so without having to pay anything. I said that given the Fractional Club had a membership term which was the same length, and at which point she would have been able to relinquish her existing EC membership for no financial outlay, I did not think this would have been a significant motivation for her, especially as she had to pay over £11,000 to achieve this. The Lender has not said anything in this regard in response to my provisional decision. I've also not seen anything which suggests there was any reduction in the annual management charge for Fractional Club when compared to what she was having to pay for the EC membership, especially when considering the additional £11,924 cost of it.

So, I remain persuaded that the prospect of a financial gain at the end of her membership term was likely to have been a significant and important factor in Mrs M's purchasing decision. And Mrs M has said as much (plausibly in my view) in her statement.

Therefore, on the balance of probabilities, I think her purchase was motivated by her share in the Allocated Property and the possibility of a profit, as that share was one of the defining features of membership that marked it apart from her existing membership. And I do not think she would have made the purchase had it not been for that share and the possibility of a profit.

And with that being the case, I am satisfied that the Supplier's breach of Regulation 14(3) was material to the decision she ultimately made.

Putting things right

In its response to the PD the Lender made no submissions regarding my proposed 'fair compensation'. As such, and having reviewed everything again, I see no reason why I should not direct the Lender to calculate and pay fair compensation to Mrs M in the way I set out in the PD. For clarity:

Fair Compensation

Having found that Mrs M would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under Section 140A of the CCA, I think it would be fair and reasonable to put Mrs M back in the position she would have been in had she not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit

[7] Set out in the EC Relinquishment Fact Sheet.

Agreement. This is on the proviso that Mrs M agrees to assign to the Lender her fractional points or hold them on trust for the Lender if that can be achieved.

Mrs M was an existing European Collection member, and her membership was traded in against the purchase price of Fractional Club membership. Under her European Collection membership, she had 13,000 European Collection Points. And, like the Fractional Club membership, she had to pay annual management charges as a European Collection member. So, had Mrs M not purchased Fractional Club membership, she would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mrs M from the Time of Sale as part of her Fractional Club membership should amount only to the difference between those charges and the annual management charges she would have paid as an ongoing European Collection member.

So, here's what I am directing the Lender to do to compensate Mrs M with that being the case – whether or not a court would award such compensation:

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

(2) In addition to (1), the Lender should also refund the difference between Mrs M's Fractional Club annual management charges paid after the Time of Sale and what her European Collection annual management charges would have been had she not purchased Fractional Club membership.

(3) The Lender can deduct:

   i. The value of any promotional giveaways that Mrs M used or took advantage of; and

   ii. The market value of the holidays* Mrs M took using her Fractional Points if the Points value of the holiday(s) taken amounted to more than the total number of European Collection points she would have been entitled to use at the time of the holiday(s) as an ongoing European Collection member. 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 M took a holiday worth 2,550 fractional points and she would have been entitled to use a total of 2,500 European Collection points 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 she would've been entitled to use 2,600 European Collection Points, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

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

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

(5) The Lender should remove any adverse information recorded on Mrs M's credit file in connection with the Credit Agreement reported within six years of this decision.

(6) If Mrs M's Fractional Club membership is still in place at the time of this decision, as long as she agrees to hold the benefit of her interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify her against all ongoing liabilities as a result of her Fractional Club membership.

*I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the

open market. So, if it isn't practical or possible to determine the market value of the holidays Mrs M took using her 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 her usage.

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

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 6 November 2025.

Chris Riggs
Ombudsman