DRN-5924979

The complaint

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

What happened

Mr and Mrs S were existing members of a timeshare arrangement, the European Collection (the 'EC') from a timeshare provider (the 'Supplier'). Over the course of their existing membership, they had bought a total of 5,000 EC points.

As EC members, every year Mr and Mrs S 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 points than a smaller apartment outside of school holiday periods.

On 18 February 2015 (the 'Time of Sale') Mr and Mrs S purchased membership of a different type of timeshare (the 'Fractional Club') from the Supplier. They entered into an agreement with the Supplier to buy 10,000 fractional points (the 'Purchase Agreement'), and after trading in their 5,000 EC points (for which they were given a conversion rate of £1 per point), they ended up paying £9,300 for the Fractional Club membership.

Fractional Club membership differed from their EC membership. The two significant differences were that it had a shorter membership term (14 years compared to an end date of 2054 for the EC membership), and it was also asset backed – which meant the membership gave Mr and Mrs S more than just holiday rights. It also included a share in the net sale proceeds of a property named on their Purchase Agreement (the 'Allocated Property') after their membership term ends.

Mr and Mrs S paid for their Fractional Club membership by taking finance of £9,300 from the Lender (the 'Credit Agreement') in their joint names.

Mr and Mrs S – using a professional representative (the 'PR') – wrote to the Lender on 4 February 2021 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay; and
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 Mr and Mrs S's concerns as a complaint and issued its final response

letter on 4 March 2021, rejecting it on every ground.

The PR, on Mr and Mrs S's behalf, then referred their complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, didn't think it should be upheld.

Mr and Mrs S 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, I thought Mr and Mrs S's complaint ought to be upheld, because the credit relationship between Mr and Mrs S and the Lender had been rendered unfair by a breach of Regulation 14(3) of the Timeshare Regulations[1] 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, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations') by marketing and/or selling Fractional Club membership to Mr and Mrs S as an investment. And, in the circumstances of this complaint, this breach rendered the credit relationship between them and the Lender unfair to Mr and Mrs S 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 S'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 Mr and Mrs S in the same or better position than they would otherwise be in.

[1] The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010

Mr S's testimony

As part of Mr and Mrs S's original submissions to this service on 21 March 2021, the PR provided a statement from Mr S dated 22 December 2020. This set out his recollections of their entire relationship with the Supplier, and all of the purchases they made. As regards the Time of Sale being considered here, Mr S says in the statement:

> *"In 2015, my wife and I were on holiday in Tenerife when we were invited to yet another meeting. This time, the reps began to talk to us about their new system of fractional ownership. We were told that with the new system, we were actually buying a fraction of the property - it was an investment. The fractions were sold to us in a completely different way than the points had been, the reps said that after 10 years, we would receive the money back from the sale of the property with an additional profit. Fractions were sold as a get out clause. When we first bought the timeshare, we were told of the perpetuity, but we thought it to be a good thing; maintenance fees were lower, and we thought our children might like it, but as time went on, the fees increased steadily, and we now think it's too much of a liability for our children. We were worried about leaving the timeshare for them to deal with, and so fractions seemed like a good idea based on what we had been told by the reps.*
>
> *[…]*
>
> *Therefore, on the 18th of February 2015, we traded our existing 5,000 points to fractions and we bought 5,000 more, bringing us to 10,000 fractional points. The cost for this was £9,300, and we paid with a loan from Shawbrook Bank."*

Mr S then went on to describe a further purchase of EC points he and Mrs S made in October 2017:

> *"Our final purchase was in 2017. We were at a meeting whilst on holiday in Benalmadena - we were only away for a few days on this occasion, not even a full week, but they still insisted we come to a meeting - and the reps told us that they had stopped selling fractional points. They said that we would be better buying the traditional points and we'd receive benefits from this such as being able to book earlier, before other members.*
>
> *As such, on the 27th of October 2017, we purchased 5,000 points for £7,900. We paid this with a […] credit card, £4,000 was paid on the 13th of November and the remaining £3,900 was paid on the 17th of November."*

I have considered how much weight I can place on Mr S's statement when assessing the merits of his and Mrs S's complaint.

The statement was dated two 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 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 appears to have been prepared and written by the PR, and was probably taken during a telephone call with Mr S. So, I am mindful of the risk that Mr S may have been guided through the process, and the associated risk that what has been written may not be his own specific recollections.

But I think that risk is low, as I can see the statement contains personal information about their entire purchasing history that only Mr and Mrs S would have known, so I have no doubt that Mr S 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 Mr S's recollections of the Time of Sale.

When considering how much weight I can place on Mr S'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 Mr S has provided. Paragraph 40 reads as follows:

a. *"In assessing oral evidence based on recollection of events which occurred many years ago, the Court must be alive to the unreliability of human memory. Research has shown that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts (Gestin and Kogan).*
b. *A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence (Kogan).*
c. *The task of the Court is always to go on looking for a kernel of truth even if a witness is in some respects unreliable (Arroyo).*
d. *Exaggeration or even fabrication of parts of a witness' testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony (Arroyo).*
e. *The mere fact that there are inconsistencies or unreliability in parts of a witness' evidence is normal in the Court's experience, which must be taken into account when assessing the evidence as a whole and whether some parts can be accepted as reliable (Arroyo).*
f. *Wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, may be neither reliable nor even truthful, the difficulty of discerning where the truth actually lies, what findings he can properly make, is often one of almost excruciating difficulty yet it is a task which judges are paid to perform to the best of their ability (Arroyo, citing Re A (a child) [2011] EWCA Civ 12 at para 20)."*

And having considered the statement, I feel able to place weight on its contents. I do so whilst being cognisant of the fact that memories can fade over time, and that inconsistencies in evidence are a normal part of someone trying to remember what happened in the past. So, I'm not surprised that there may be some inconsistencies between what Mr S says happened, and what other evidence shows. The question to consider, therefore, is whether there is a core of acceptable evidence from Mr S, such that the inconsistencies have little to no bearing on whether his testimony can be relied on, or whether such inconsistencies are fundamental enough to undermine, if not contradict, what he says about what the Supplier said and did to market and sell Fractional Club membership as an investment.

I don't, for example, find it in any way material that Mr S has mistakenly said that the Fractional Club had a 10-year membership term, when the contractual documentation says it is 14 years. Misremembering the duration is not, in my view, material to whether the membership was sold as an investment or not or whether the testimony can be relied on. Whilst this appears to be a mistake, I don't think it fundamentally undermines the crux of the statement, which sets out how the Supplier sold and/or marketed the Fractional Club to them as an investment.

So overall, I am satisfied that I can place weight on Mr S's testimony when considering what most likely happened at the Time of Sale.

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

Having considered the entirety of the credit relationship between Mr and Mrs S 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 Mr and Mrs S 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 Mr and Mrs S'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 Mr and Mrs S say that the Supplier did exactly that at the Time of Sale – saying:

> *"We were told that with the new system, we were actually buying a fraction of the property - it was an investment. The fractions were sold to us in a completely different way than the points had been, the reps said that after 10 years, we would receive the money back from the sale of the property with an additional profit."*

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

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

(2) *They were told by the Supplier that they would get their 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[2], 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 S's share in the Allocated Property 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 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 Mr and Mrs S as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

And 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 Mr and Mrs S, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the standard contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs S 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*

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[2] *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)

(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 all appear to have been signed by Mr and Mrs S 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 Mr and Mrs S to sign after they had been through the sales presentation, and after they had agreed to purchase the Fractional Club membership on the basis of the presentation and what they had been told by the Supplier. And there are a number of strands to Mr and Mrs S'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 them a financial gain.

So, I have considered:

(1) *whether it is more likely than not that the Supplier, at the Time of Sale, sold or marketed membership of the Fractional Club as an investment, i.e. told Mr and Mrs S or led them to believe during the marketing and/or sales process that membership of the Fractional Club 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'.

<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 Supplier has also provided witness statements from both previous and (at the time) existing employees setting out how its sales staff were trained to sell its products – all of which I have considered.

Alongside the information I have about the sales, and what this Service has been told about how the Supplier trained its staff, the Lender has highlighted two court judgements. The first

- Gallagher v Diamond Resorts - found that the Supplier's sales team member had gone through training which would have included a prohibition on selling Fractional Club as an investment. And the second - Brown & Brown v Shawbrook Bank Limited – concluded that the contractual and signed documents were very carefully drafted to make it clear that Fractional Club membership was not an investment in property, but an investment in holidays.

I've considered all of this when thinking about the inherent probability of Mr and Mrs S's allegation, and 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 S, 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)*

And in their case Mr and Mrs S state that the Supplier told them that they could expect to get their money back plus any profit on the sale of the Allocated Property.

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 Mr and Mrs S, were existing members of a non-fractional timeshare, and who had previously increased their holiday rights by buying further non-fractional points. So, I think it's reasonable to assume there was likely some discussion at the Time of Sale as to why they should purchase this new type of membership in particular. In other words, some discussion about why Mr and Mrs S ought to purchase the Fractional Club in the way that they did.

Mr S says in his testimony that the Supplier sold Fractional Club to them in a completely different way to the sales presentations relating to the EC membership, and says that it presented Fractional Club membership to them as an investment. So, I've thought about how the membership would likely have been presented to Mr and Mrs S.

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.[3]*

The investment element of membership was plainly a major part of its rationale and

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[3] 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.

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 – again, it would not have made much sense if the Supplier included the feature 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 element i.e., the share in the net sale proceeds of the Allocated Property, and reduced membership term.

Further, I find it fanciful that the Supplier would not have highlighted the possible returns available to Mr and Mrs S when selling Fractional Club membership to them given that they already had a substantial number of EC points. And as Mr and Mrs S were laying out a considerable sum to make the purchase, I think it's clear that they expected to get a significant sum back. Further, Mr and Mrs S have said from the outset of their complaint that they were led to believe they would make a profit at the end of the agreement, and I think that belief fits with what they did at the Time of Sale.

> *"In 2015, my wife and I were on holiday in Tenerife when we were invited to yet another meeting. This time, the reps began to talk to us about their new system of fractional ownership. We were told that with the new system, we were actually buying a fraction of the property - it was an investment. The fractions were sold to us in a completely different way than the points had been, the reps said that after 10 years, we would receive the money back from the sale of the property with an additional profit."*

I again recognise what the Lender has said in regard to Gallagher v Diamond Resorts and Brown & Brown v Shawbrook Bank Limited. But whilst being cognisant of what was said, both of these cases were considered on their individual merits. And the statements provided from former employees of the Supplier, whilst giving a general overview of how salespersons were trained, don't help me in understanding what happened at Mr and Mrs S's particular sale. And in this regard Mr S, in both the statement and in their Letter of Complaint, has been specific in what he says about how the Fractional Club was sold to them. He has said that it was positioned as an investment from which they would get their money back plus an additional profit from the sale of the Allocated Property. And given their 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 Consumers 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 Mr and Mrs S and the Lender under the Credit Agreement and related Purchase Agreement.

As the Supreme Court's judgment in Plevin[4] 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.

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[4] *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61

It also seems to me in light of Carney[5] and Kerrigan[6], that if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs S and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

The Lender has pointed to Mr and Mrs S's usage of their Fractional Club membership, and I can see their Fractional Club points have been used for several holidays. So, the Lender suggests that this means that access to holidays was a significant driver in their purchasing decision. But I am not saying they were not interested in holidays. Mr S's own testimony and their purchasing and reservation history demonstrates that they quite clearly were, which is unsurprising given the nature of the product at the centre of this complaint.

But Mr S says that Fractional Club membership was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights, and I am persuaded by this. After all, Mr and Mrs S had increased their holding of EC points prior to their purchase of Fractional Club, resulting in the improved benefits of the increased points holding. So, if it was improved holiday rights that they were looking to achieve, I cannot see why they wouldn't have just increased their holding of EC points as they 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 they took as Fractional Club members would likely have been available to them if they'd remained as EC members, albeit with an additional 5,000 EC points.

So, in my view, there had to be some other benefit which motivated their purchase which was specific to fractional membership.

The Supplier and the Lender have said it was the reduced membership term from the Fractional Club that was the motivating factor when it came to Mr and Mrs S's decision to make the purchase. And I don't disagree that it was likely to have been a factor – indeed Mr S says so in his testimony:

> *"Fractions were sold as a get out clause. When we first bought the timeshare, we were told of the perpetuity, but we thought it to be a good thing; maintenance fees were lower, and we thought our children might like it, but as time went on, the fees increased steadily, and we now think it's too much of a liability for our children. We were worried about leaving the timeshare for them to deal with, and so fractions seemed like a good idea based on what we had been told by the reps."*

But contrary to what the Lender and Supplier have said here, I am not persuaded that the reduced membership term was the motivation which meant they would have made the purchase whether or not there was the potential for a profit. I think the two elements went hand in hand.

Indeed, in addition to Mr S's statement saying that Fractional Club was marketed to them as something that would provide them with a profit, and that the reduced membership term reduced the risk that their children could inherit the liability, the Supplier made a note setting out why Mr and Mrs S said they had made the purchase. This note, made on the day of the purchase said:

> *"**Members buying as gives them a shorter term with a monetary return**, asked if not sold in 2029 and they paid maintenance tor 2030 would they still get usage of points. I*

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[5] *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958
[6] *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169

confirmed they would, they were happy with this. No other qs at this time, and i have gone through KID PA 5BF and B. alt affordable for them, also know they have to pay maintenance on extra pts this year." (bold my emphasis)

This, I think sets out clearly Mr and Mrs S's motivations for making the purchase. It was a combination of the reduced membership term and the monetary return on the sale of the Allocated Property.

So, while I agree that Mr and Mrs S may have been concerned that their EC membership may be held in perpetuity, I am not persuaded that was the only reason for their purchase. I don't think they would have pressed ahead for this reason alone. It is also important to note that Mr and Mrs S went on to make a further purchase of 5,000 EC points in 2017, thus putting them back in the position of having a much longer membership term. This, in my view, also shows that it is unlikely that the lengthy membership term of the EC was a strong motivating factor.

I think the prospect of a financial gain at the end of their Fractional Club membership term was likely to have been a significant and important factor in Mr and Mrs S's purchasing decision. And Mr S has said as much (plausibly in my view) in his statement.

Therefore, on the balance of probabilities, in addition to the reduced membership term, I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit, as that share was one of the defining features of membership that marked it apart from their existing membership. Mr and Mrs S have not said or suggested, for example, that they would have pressed ahead with the purchase in question had the Supplier not led them to believe that Fractional Club membership was an appealing investment opportunity. And as they faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I don't think they would have pressed ahead with their purchase regardless.

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

Conclusion

Given the facts and circumstances of their complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs S 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."

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 S. I said:

"Fair Compensation

Having found that Mr and Mrs S 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 Mr and Mrs S back in the position they would have been in had they 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 Mr and Mrs S agree to assign to the Lender their fractional points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs S were existing EC members, and their EC points were traded in against the purchase price of Fractional Club membership. Under their EC membership, they had 5,000 EC points, and like the Fractional Club membership, they had to pay annual management charges as EC members. So, had Mr and Mrs S not purchased Fractional Club membership, they would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr and Mrs S from the Time of Sale as part of their Fractional Club membership should amount only to the difference between those charges and the annual management charges they would have paid as ongoing EC members with 5,000 EC points.

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

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

(2) In addition to (1), the Lender should also refund:

i. The difference between Mr and Mrs S's Fractional Club annual management charges paid after the Time of Sale and what their EC annual management charges would have been had they not purchased Fractional Club membership, and retained their 5,000 EC points.

(3) The Lender can deduct:

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

ii. *The market value of the holidays* Mr and Mrs S took using their fractional points if the points value of the holiday(s) taken amounted to more than the total number of EC points they would have been entitled to use at the time of the holiday(s) as ongoing EC members. However, their 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 Mr and Mrs S took a holiday worth 2,550 fractional points and they would have been entitled to use a total of 2,500 EC 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 they would have been entitled to use 2,600 EC 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 Mr and Mrs S's credit files in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr and Mrs S's Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their 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 Mr and Mrs S took using their fractional points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.*

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

The responses to the provisional decision

Mr and Mrs S 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 Mr and Mrs S that I had relied on. It said the testimony was vague, brief, inconsistent and contains factual inaccuracies which distort the events surrounding the sale. It said the reliability of the testimony is questioned because:

- The error in the testimony – that the membership term was 10 years – clearly demonstrates the Mr S cannot accurately recall what was said to him at the time of sale. And the duration of the timeshare membership is absolutely a material fact in the context of the allegation made. This significant error is a material fact that should be properly considered by the Ombudsman.
- The testimony was not provided until 17 October 2023. The Letter of Complaint, containing the allegations from the statement, was six years after the time of sale. When taking into account the time elapsed between the time of sale and allegation being made, the involvement of the PR and the clear error in the testimony, the Supplier's evidence of how the Fractional Club was sold should be preferred.
- The fact that Mr and Mrs S's motivation for purchase included the '*monetary return on the sale of the Allocated Property'* does not mean, nor is it evidence that Mr and Mrs S were sold the membership as an investment that would provide them with a financial gain or profit and that this was their motivation. It simply acknowledges that Mr and Mrs S were aware that the Fractional Club will result in a payment compared to their existing membership which does not.
- There is nothing inherent, in the Supplier advising Mr and Mrs S that they would receive their share in the net sales proceeds of the Allocated Property, which breaches Regulation 14(3) or that makes the purchase unfair.
- Mr and Mrs S paid a total of £9,800 for their original 5,000 EC points. The upgrade to the Fractional Club and the purchase of 5,000 additional fractional points cost them less - £9,300.
- In making the Fractional Club purchase, Mr and Mrs S doubled their annual points holding. They would simply not have been able to take the holidays they did had they not purchased the membership at the Time of Sale. So it is clear that if they hadn't purchased the Fractional Club, they would have purchased additional EC points. This needs to be factored into any consideration as to whether they would have completed the purchase in any event.
- There is no evidence that Mr and Mrs S 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 contemporaneous documents make clear that Mr and Mrs S purchased the Fractional Club for a shorter term and because they wanted additional points for their own holiday usage.
- There are no sale notes which reference the Fractional Club being an investment nor questions being asked by Mr and Mrs S about its future worth or sale.
- The witness statement has limited reference to the breach in regulation being alleged. There is no clarity on how it was sold as an investment. One would expect there to have been information regarding the likely return or mechanisms of how the agreement works, which has not been provided as the recollection is incorrect.
- It disagreed with the Ombudsman's conclusion that the witness testimony is safe, as it thought the Ombudsman hadn't fully considered all of the above points. It said extra consideration should be given to the veracity and reliability of witness testimony when this hasn't been prepared by the customer.
- The Ombudsman should give equal weight to the contemporaneous documentation prepared for the Fractional Club purchase at the point of sale, which is more reliable.
- Against the above information, it is not credible that the Fractional Club was bought in the pursuit of an investment objective, as opposed to meeting their future holiday needs and a shorter membership term.

The Lender then went on to address the contemporaneous documents from the sale:

- It was wrong of the Ombudsman to conclude that it is difficult to explain why the disclaimers were necessary if there wasn't a very real risk of the membership being sold as an investment.
- The inclusion of the disclaimers simply demonstrates that the Supplier takes its obligations seriously in seeking to highlight to the customer that they have not been told their purchase was a financial investment and to confirm they had not purchased for that reason. This was confirmed in *Brown & Brown v Shawbrook Bank Limited.*

The Lender then went on to consider how the PD dealt with the alleged 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 Mr and Mrs S 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 Mr and Mrs S. If Mr and Mrs S were informed that the product was an investment, it is difficult to understand why they

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.
- Mr and Mrs S's circumstances and their motivations for the purchase meant the actual sales process did not have a material impact on their 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 Mr and Mrs S 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 Mr and Mrs S as an investment at the Time of Sale. And, in the circumstances of this complaint, that breach rendered the credit relationship between them and the Lender unfair 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 to date. 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 S's testimony

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

I acknowledge, as I did in the PD, that there is an error in the testimony where Mr S describes the term of the membership as 10 years. But I don't think that this should mean the whole of the testimony should be considered unreliable and ought to be disregarded as a result. I understand the point that the Lender is making, in that the term of the membership is important if it was bought as an investment, but it is the way the membership was marketed and/or sold by the Supplier that is being considered here. Misremembering a detail within the overall description of the sales process is not, in my view, material to whether the membership was sold as an investment or not or whether the testimony can be relied on. As I said in the PD and I maintain now, whilst this appears to be a mistake, I don't think it fundamentally undermines the crux of the statement, which sets out how the Supplier sold and/or marketed the Fractional Club to them as an investment.

So I remain of the opinion that I am able to place weight on what Mr S said happened at the Time of Sale.

How the Supplier sold and/or marketed the Fractional Club

The Lender has said that the fact that Mr and Mrs S's motivation for the purchase included the '*monetary return on the sale of the Allocated Property'* (as recorded by the Supplier at the Time of Sale) does not mean, nor is it evidence that Mr and Mrs S were sold the membership as an investment that would provide them with a financial gain or profit and that this was their motivation. But that was not how the sale was described in Mr S's statement. He said:

> *"…we would receive the money back from the sale of the property with an additional profit."*

Given that the sales representative would likely have been aware that they should *not* sell and/or market the membership as something that would likely provide Mr and Mrs S with a profit, I am not surprised that was not how it was recorded by them. I find Mr S's statement more persuasive here.

The Lender has also pointed out that the price Mr and Mrs S paid for their original EC points was more than what they paid when purchasing their Fractional Club membership. It seems that it is suggesting that this was attractive to Mr and Mrs S. But I fail to see the relevance of the price the Supplier attached to points some 10 years earlier. It seems the price the Supplier set varied over time, as can be seen from Mr and Mrs S's purchase of EC points in 2017. And in any event, it is fair to say that should Mr and Mrs S have bought 5,000 EC points at the Time of Sale instead of the 5,000 fractional points, it is likely they would have paid less than £9,300 to do so.

So, I still think it's reasonable to assume there was likely some discussion at the Time of Sale as to why they should purchase this new type of membership in particular. In other words, some discussion about why Mr and Mrs S ought to purchase the Fractional Club in the way that they did.

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 in the PD, 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, 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 Mr and Mrs S, 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, and they were found not to breach the regulations in *Brown & Brown v Shawbrook Bank Limited*. But the judgement in that case was made on its own specific circumstances. And as I've said, this contemporaneous paperwork was produced and the disclaimers were signed *after* Mr and Mrs S had already been through a lengthy sales presentation, and had already decided to make the purchase on the basis of what they had seen and what they had been told. So, it is important to balance the disclaimers with what I think it is likely that Mr and Mrs S were told at the Time of Sale about Fractional Club membership.

And Mr S has set out (plausibly in my view) what he remembers about this.

> *"In 2015, my wife and I were on holiday in Tenerife when we were invited to yet another meeting. This time, the reps began to talk to us about their new system of fractional ownership. We were told that with the new system, we were actually buying a fraction of the property - it was an investment. The fractions were sold to us in a completely different way than the points had been, the reps said that after 10 years, we would receive the money back from the sale of the property with an additional profit."*

It seems clear to me that Mr S is saying that the Supplier, at the Time of Sale, sold the Fractional Club membership to them as an investment. He remembers that the fractional points were sold in a different way to how their existing points had been sold, which makes sense as they worked in a very different way. And it also seems clear that he is saying that they were told this was an investment: *"we would receive the money back from the sale of the property with an additional profit."*

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 Mr and Mrs S as an investment in breach of Regulation 14(3) of the Timeshare Regulations.

Was the credit relationship between the Lender and Mr and Mrs S rendered unfair?

The Lender says that it disagrees that Mr and Mrs S were motivated to make the Fractional Club purchase for the investment element. It says their motivation was the reduced membership term and the holidays it could provide. This means that it doesn't think the associated credit relationship would have been rendered unfair.

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 Mr and Mrs S were motivated to make the purchase because of the profit they were told they could make. The Lender has said that the absence of any sales notes recording that they were making the purchase for the investment potential shows that they weren't. But as I've said, the sales note records that they were interested in the '*return'* And the Lender has not produced any new evidence in this regard; they have just disagreed with my assessment of the evidence.

I think the evidence shows Mr and Mrs S's motivations for making the purchase. It was a combination of the reduced membership term and the monetary return on the sale of the Allocated Property, which Mr S has said was described by the Supplier as including an *"additional profit".*

And I repeat – Mr and Mrs S went on to make a further EC membership purchase only two years later, and this had the same much longer membership term as their previous holding. So, I do not think the term length was of a sufficient concern to them to mean they would have gone ahead with their Fractional Club purchase for that reason alone.

I remain persuaded, on the balance of probabilities, that their purchase was motivated by their share in the Allocated Property and the possibility of a profit, as that share was one of the defining features of membership that marked it apart from their existing membership. And I don't think they would have pressed ahead with their 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 they ultimately made, so I think it is fair and reasonable that I uphold this complaint.

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 Mr and Mrs S in the way I set out in the PD. For clarity:

Fair Compensation

Having found that Mr and Mrs S 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 Mr and Mrs S back in the position they would have been in had they 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 Mr and Mrs S agree to assign to the Lender their fractional points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs S were existing EC members, and their EC points were traded in against the purchase price of Fractional Club membership. Under their EC membership, they had 5,000 EC points, and like the Fractional Club membership, they had to pay annual management charges as EC members. So, had Mr and Mrs S not purchased Fractional Club membership, they would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr and Mrs S from the Time of Sale as part of their Fractional Club membership should amount only to the difference between those charges and the annual management charges they would have paid as ongoing EC members with 5,000 EC points.

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

(1) The Lender should refund Mr and Mrs S'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 Mr and Mrs S's Fractional Club annual management charges paid after the Time of Sale and what their EC annual management charges would have been had they not purchased Fractional Club membership, and retained their 5,000 EC points.

(3) The Lender can deduct:

- The value of any promotional giveaways that Mr and Mrs S used or took advantage of; and
- The market value of the holidays* Mr and Mrs S took using their fractional points if the points value of the holiday(s) taken amounted to more than the total number of EC points they would have been entitled to use at the time of the holiday(s) as ongoing EC members. However, their 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 Mr and Mrs S took a holiday worth 2,550 fractional points and they would have been entitled to use a total of 2,500 EC 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 they would have been entitled to use 2,600 EC 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 Mr and Mrs S's credit files in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr and Mrs S's Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their 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 Mr and Mrs S took using their fractional points, deducting the relevant annual management

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

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

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S and Mr S to accept or reject my decision before 2 December 2025.

Chris Riggs
Ombudsman