DRN-5929996

Financial Ombudsman Service

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

Since 1999 Mr and Mrs S had been members of a timeshare arrangement, the European Collection (the 'EC') from a timeshare provider (the 'Supplier'). Over the course of this membership, they bought a total of 80,000 EC points.

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

In March 2014 Mr and Mrs S converted 24,000 EC points into 24,000 fractional points. This was their first purchase of this type of points, and they paid £13,475 for this conversion, which they paid for by card.

Fractional points differed from their EC points. The two significant differences were that fractional points membership had a shorter membership term (15 years compared to an end date of 2054 for the EC membership), and they were also asset backed – which meant the fractional 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 after their membership term ends.

In June 2015 Mr and Mrs S converted a further 10,000 of their EC points into 10,000 fractional points, paying £12,700 by card to do so. This provided them further 'fractions' in a new allocated property.

At this point in time Mr and Mrs S held 46,000 EC points and 34,000 fractional points.

On 14 September 2015 (the 'Time of Sale' being considered here) Mr and Mrs S converted 8,000 of their EC points to 8,000 fractional points (hereon in known as the 'Fractional Club') from the Supplier. This conversion cost them £10,160 (the 'Purchase Agreement'). Like their existing fractional points, this also gave Mr and Mrs S more than just holiday rights. The Fractional Club 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 £10,160 from the Lender in their joint names (the 'Credit Agreement'). It is the purchase of the Fractional Club, and the associated Credit Agreement that is the subject of this complaint.

In April 2016 and September 2016 Mr and Mrs S made two further purchases of EC points,

taking their total holding of EC to 58,000 points.

Mr and Mrs S – using a professional representative (the 'PR') – wrote to the Lender on 16 June 2021 (the 'Letter of Complaint') to complain about what happened at the Time of Sale. They complained 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.
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 those 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, which it rejected on all grounds.

Mr and Mrs S then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, thought that the complaint should not 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 I made 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

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

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, which, in the circumstances of this complaint, rendered the credit relationship between them and the Lender unfair to them for the purposes of Section 140A of the CCA.

However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I recognise that there are a number of aspects to Mr and Mrs S's complaint, it isn't necessary to make formal findings on all of them. This includes the allegation that the Supplier made misrepresentations at the Time of Sale and the Lender ought to have accepted and paid the claim under Section 75 of the CCA, because, even if that aspect of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs S in the same or a better position than they would be if the redress was limited to misrepresentation.

Mr and Mrs S's testimony

As part of Mr and Mrs S's submissions to this service, the PR has submitted a statement. It is undated but the document provided shows that the statement was taken on 8 May 2019. This statement set out their entire relationship with the Supplier and their purchases.

As far as relevant to this complaint, they said:

> *"In June of 2015 we were on holiday, we were invited to an update meeting. When we attended it was clear that this was a sales presentation. They advised us there was a new system called fractional points and we were advised we would have the opportunity to get our money back after so many years with profit. We were advised we would partially own property and after the years were up we would have a guaranteed exit from the timeshare. We felt this meeting was very highly pressured. This was in relation to us having to make the decision on the day."*

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

The statement appears to have been compiled two years prior to the Letter of Complaint being sent to the Lender. 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 was, in my view, clearly prepared and written by the PR, and was probably compiled as a result of a telephone conversation with Mr and Mrs S. For example, there is repetition throughout when referring to the fractional points purchases. When setting out each purchase, they have used the same phrase – "They advised us there was a new system called fractional points and we were advised we would have the opportunity to get our money back after so many years with profit." There are also parts which have not been completed fully, and appear to have been left to be completed later when the specific details were known.

So, I am mindful of the risk that Mr and Mrs S may have been guided through the process, and the associated risk that what has been written may not be their own specific recollections. But it does contain personal information about the purchases that only Mr and/or Mrs S would have known, such as their personal experiences whilst on the holidays, so I have no doubt that Mr and Mrs 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 and Mrs S's recollections of the Time of Sale.

When considering how much weight I can place on Mr and Mrs 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 and Mrs S 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 they are retrieved. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts (Gestin and Kogan).*
> b. *A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence (Kogan).*
> c. *The task of the Court is always to go on looking for a kernel of truth even if a witness is in some respects unreliable (Arroyo).*
> d. *Exaggeration or even fabrication of parts of a witness' testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony (Arroyo).*
> e. *The mere fact that there are inconsistencies or unreliability in parts of a witness' evidence is normal in the Court's experience, which must be taken into account when assessing the evidence as a whole and whether some parts can be accepted as reliable (Arroyo).*
> f. *Wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, may be neither reliable nor even*

truthful, the difficulty of discerning where the truth actually lies, what findings he can properly make, is often one of almost excruciating difficulty yet it is a task which judges are paid to perform to the best of their ability (Arroyo, citing Re A (a child) [2011] EWCA Civ 12 at para 20)."

From this, and from my own experience, I find that inconsistencies in evidence are a normal part of someone trying to remember what happened in the past. But the question to consider, is whether there is a core of acceptable evidence from Mr and Mrs S, such that any inconsistencies or omissions have little to no bearing on whether their testimony can be relied on, or whether such inconsistencies are fundamental enough to undermine, if not contradict, what they say about what the Supplier said and did to market and sell Fractional Club membership as an investment.

And having considered their testimony, I don't think anything fundamentally undermines the crux of the statement, which sets out how Mr and Mrs S say the Supplier sold and/or marketed the Fractional Club to them as an investment.

In addition to the statement submitted, there is a 'Q&A' document that has been completed. This was a series of pre-populated questions which required a yes/no answer. Some of these questions were answered by a 'PTO' which was referring to a handwritten section from Mr and Mrs S. This says the following:

Diamond advised us to buy more fractional points, then we could have 50% points and 50% fractions as we would be able to sell them, DRI sales person alway said it was 5-star accomodation or above when they was talking to us and exclusive club. Which we found out later to our cost it was nothing of the sort other people getting holidays before DRI member'

There is nothing to suggest that this is not a note written by either Mr and Mrs S themselves, and it appears to be a note expanding on the yes/no nature of the questions, and setting out what they were advised by the Supplier at the Time of Sale.

Overall, I am satisfied that I can place weight on both Mr and Mrs S's testimony and the handwritten note 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, in summary, that they were told by the Supplier that Fractional Club membership was the type of investment that would provide them with the opportunity to get their money back with a 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, 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.

There is evidence in this complaint, 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 contemporaneous paperwork that state that Fractional Club membership was not sold 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, there was a document titled "Key Information", an extract of which would have 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.*

5. *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 points 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 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 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 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'.

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. 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.

But, it's ultimately difficult to explain why it was necessary to include such disclaimers if there wasn't a very real risk of the Supplier marketing and selling 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, especially when customers, such as Mr and Mrs S who were existing members, made the purchase and did not increase their holiday rights. And Mr and Mrs S had already held non-fractional timeshare memberships for several years and had increased their 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 they should purchase this different 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.

I think the argument by the Lender, that the Fractional Club was not described as an investment, 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 the Fractional Club provided them with the opportunity to get their money back with a profit on the sale of the Allocated Property.

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

The investment element of membership was plainly a major part of the rationale of the fractional points and, in this instance, is a justification for the price Mr and Mrs S paid. After all, they exchanged 8,000 EC points for the same number of fractional points, and paid an additional £10,160 to do so. So given there was no increase in holiday rights with the purchase, it seems likely that the additional cost was reflective of the Allocated Property element of the membership. 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 the 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 - after all they weren't buying any additional points and therefore not getting any extra holiday entitlement - so it seems common sense that the return was an important factor in the sale. Further, Mr and Mrs S have said from the outset of their complaint that they were led to believe they would get their money back plus a profit at the end of the agreement, and I think that belief fits with what they did at the Time of Sale.

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 and Mrs S, in both the statement and in their Letter of Complaint, have been specific in what they say about how the Fractional Club was sold to them. They have 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 their handwritten note sets out what they remember being told by the Supplier at the Time of Sale:

"[The Supplier] advised us to buy more fractional points, then we could have 50% points and 50% fractions ***as we would be able to sell them.****" (my emphasis)*

This, I think clearly sets out how the difference between EC points and fractional points was described by the Supplier when they were marketed to Mr and Mrs S. And their handwritten note sets out what they remember being told by the Supplier.

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

Given the particular circumstances of this sale, and from what they have said in both the statement and the handwritten note, 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.

Was the credit relationship between the Lender and the Consumers rendered unfair?

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[3] 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[4] and Kerrigan[5], 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 memberships and has suggested that this means that access to holidays was a significant driver in their purchasing decision. I am not saying here they were not interested in holidays. Their 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 and Mrs S say 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 on several occasions prior to their purchase of Fractional Club, resulting in the improved benefits of the increased points holding. And as I've said, the conversion of their EC points to fractional points at the Time of Sale, for which they paid £10,160 was on a 1-for-1 basis, and did not provide them with any additional holiday rights. And the change from EC to fractional points also 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 have been available to them if they'd remained as EC members.

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

As I've said, Fractional Club membership had a much-reduced membership term when compared to the EC. But I can't see this was a motivation for Mr and Mrs S, because they retained a large number of EC points, with the associated longer term. So, they will remain contracted to the Supplier after the Fractional Club membership ends and the Allocated Property is sold. So, I think the prospect of a financial gain at the end of their membership

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

term was likely to have been the significant and important factor in Mr and Mrs S's purchasing decision. And Mr and Mrs S have said as much (plausibly in my view) in their statement. Therefore, on the balance of probabilities, 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 EC 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 have not seen enough to persuade me that 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 this 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 Mr and Mrs S was unfair under Section 140A of the CCA, I think it would be fair and reasonable to put them back in the position they would have been in had they not purchased 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 Mr and Mrs S agree to assign to the Lender their 8,000 fractional points (those associated with this sale) or hold them on trust for the Lender if that can be achieved.

Mr and Mrs S were existing EC members, and 8,000 of their EC points were traded in against the purchase price of Fractional Club membership. Under their EC membership, they had to pay annual management charges as EC members. So, had Mr and Mrs S not converted 8,000 of their EC points into fractional points when they purchased the 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, if there is any, and the annual management charges they would have paid relating to their 8,000 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.

(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 (relating to 8,000 EC points) would have been had they not purchased Fractional Club membership.

(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 points they would have been entitled to use at the time of the holiday(s) as ongoing EC members. However, this deduction should be proportionate and relate only to the additional fractional points that were required to take the holiday(s) in question.*

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."*

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 absence of detail questioned the reliability of the testimony because:

- The testimony was not provided until 17 October 2023, which is after the Judicial Review[6]. The ombudsman should carry out further investigation as to the date of the statement if the complaint is to be resolved based on its contents.
- There do not appear to be any allegations in the testimony that relate specifically to the Time of Sale on 14 September 2025[7]. Instead the paragraph of testimony setting out their allegations in respect of their June 2015 purchase is copied and pasted so that this appears twice. This cannot be reasonably or rationally regarded as specific evidence relating to the 14 September 2015 sale being considered.
- Where Mr and Mrs S have described they were *"advised there was a new system called fractional points"* demonstrates the unreliability of the allegations as this was not a *'new system'* as this was their third purchase of fractional points.
- The word count documented on the testimony is 1,077 words, however the actual word count is 1,597. A number of paragraphs in the testimony appear to be in a different font/font size to the rest of the testimony. Accordingly, this testimony must be treated with caution and further investigation should be carried out if the complaint is to be resolved based on its contents.
- The statement is headed *'CLIENT STATEMENT by [Mrs S]'* but the first paragraph states: *"my name is [Mr S] …"* Has the statement been provided by Mrs S or Mr S?
- The evidence provided by the Supplier and the Lender contradicts what has been alleged by Mr and Mrs S and the PR. This evidence confirms that the Fractional Club was not sold as an investment and that the sales team did not engage in any discussion about the potential residual value of the Allocated Property.
- No specific allegation has been made by Mr and Mrs S about the fractional sale complained about. The Letter of Complaint was not sent until 16 June 2021, nearly six years after the Time of Sale and is not consistent with the testimony or with the handwritten note on the Q&A document.
- The ombudsman's dismissal of the testimony from the Supplier's sales team member, in favour of the testimony drafted by the PR which contains duplicated paragraphs, relating to other sales, and various other errors which undermine the credibility of the statement, is not reasonable or rational in its current form.

The PR then went on to highlight how there was an error in the testimony where Mr S had erred in saying that the membership term was 10 years, and not 14. It said that this error demonstrates that Mr S cannot recall what was said to him at the Time of Sale, and shows that the motivation for the purchase cannot have been the investment element if Mr S cannot remember how long the term was. The Lender also made reference to the Letter of Complaint being dated 4 February 2021. It said all of this meant the Supplier's evidence as to how the Fractional Club was sold should be preferred. But the Lender has clearly made an error here. There is no reference to the length of the term in Mr S's statement, so he has not made the error the Lender is pointing out. The Letter of Complaint was also not dated 4 February 2021 – it was sent on 16 June 2021. It is apparent that the Lender is referring to a complaint that has been made by a different consumer, and it has no bearing on my

[6] *Shawbrook & BPF v FOS*
[7] This is clearly a mistake by the Lender, and probably should read 2015

consideration of Mr and Mrs S's complaint about their Fractional Club purchase on 14 September 2015.

- The Lender provided copies of correspondence between Mr and Mrs S and the Supplier in 2022, where they were saying they had paid a significant amount of money to claims management companies, but the companies had not done as they had promised. The Lender said this shows that Mr and Mrs S's complaint had arisen as a result of them being cold-called by a claims management company who had persuaded them the Fractional Club had been mis sold to them.
- There is nothing in the handwritten Q&A document which provides evidence that the Fractional Club was sold as an investment which would provide a financial gain or profit.
- 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 the validity of this specific allegation.
- There is no reference to the Fractional Club being referred to as an investment nor questions being asked by Mr and Mrs S about its future worth or value.
- 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 Mr and Mrs S were assured they would make a *'profit'* nor 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:

- There is nothing in the sales note that suggest the product was sold as an investment. The note reads:
    - 'B/U members just putting more points into fractions. previously done fractions so happy with all explanations given. PA KID and SBF covered repayments easily affordable may even pay more monthly to bring down term of loan. No other qs at this time. Staying SBG.'
- 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’ on the 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, and this 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.

The Lender 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.

<u>The witness testimony</u>

Much of the Lender's response to the PD sets out reasons why it didn't think Mr and Mrs S's testimony was reliable. The Lender says that the statement contains large areas of repetition, errors and inconsistencies, and claims that are generic and lack detail. But I remain unpersuaded that this means the testimony as a whole is unreliable.

As regards when the statement was likely taken, as I set out in the PD, I think the evidence shows that it was taken on 8 May 2019. Having considered the Lenders suggestion that I need to consider this more closely, I don't agree. I remain of the opinion the evidence shows that on balance, the statement was prepared on the 8 May 2019 so was not influenced by *Shawbrook & BPF v FOS.*

I acknowledge, as I did in the PD, that there are repetitions in the statement where what is said relating to one fractional sale is repeated exactly in relation to another. And I again say that it is probable that the statement was drafted by the PR. I also note what the Lender says about the word count and the apparent changes in the font size in the statement. And I have considered all of that, as I did before I made my provisional decision, and I am mindful of the risk that Mr and Mrs S may have been guided through the process, and the associated risk that what has been written may not be their own specific recollections. But I think that risk is low – the statement does contain personal recollections that only Mr and Mrs S would know, so I remain satisfied that they had a significant input into its contents. And I remain satisfied that it is a record of Mr and Mrs S's recollections of the Time of Sale.

The Lender has said that there is nothing in the statement which relates to the Time of Sale. It bases this on the fact that the statement says the following:

> *"In June of 2015 we were on holiday, we were invited to an update meeting. When we attended it was clear that this was a sales presentation. They advised us there was a new system called fractional points and we were advised we would have the opportunity to get our money back after so many years with profit. We were advised we would partially own property and after the years were up we would have a guaranteed exit from the timeshare. We felt this meeting was very highly pressured. This was in relation to us having to make the decision on the day."*

But this is immediately followed by:

> *"As such on the 14 September 2015 we purchased 8,00 fractional points for the total cost of £10,160. This was paid by a Shawbrook Loan for the total cost of £xxxxx."*

So, it is apparent that there is a mistake in the first line, and it was not *June 2015* that was being referred to, but it was more likely *September 2015* that Mr and Mrs S were intending to write. After all, it is followed by the confirmation of the exact date, the value of the Fractional Club and that the loan was provided by the Lender, all of which relate to the Time of Sale. I note that the number of fractional points was recorded as 8,00 but this clearly is just missing

a zero, as the comma is present to indicate that *thousands* are being referred to. I also note that there is xxxxx when setting out the total cost of the lending. This is a detail that was probably not readily available at the time the statement was being drafted, and is, in my view, immaterial to whether the membership was sold as an investment or not.

As I said in the PD and I maintain now, whilst there are mistakes and repetitions, I don't think they fundamentally undermine the crux of the statement, which sets out how the Supplier sold and/or marketed the Fractional Club to Mr and Mrs S as an investment.

So I remain of the opinion that I am able to place weight on what Mr and Mrs S said happened at the Time of Sale. That does not mean that I have disregarded the evidence the Supplier has provided about how its sales personnel were trained to sell the Fractional Club membership – I have again taken all of that into account. But that was how they were trained, and it doesn't help me greatly when considering what actually happened at the Time of Sale. And as I've said, I feel able to give weight to what Mr and Mrs S say about that in their statement.

How the Supplier sold and/or marketed the Fractional Club

The Supplier has provided a copy of the sales note made following Mr and Mrs S's purchase of the Fractional Club membership, and I have set this out above. And I agree that there is no mention of the membership being bought by Mr and Mrs S as an investment. But that doesn't mean it wasn't sold and bought for that reason. 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 and Mrs S's statement more persuasive here.

The Lender has again pointed to the disclaimers that were contained in the sales documentation signed by Mr and Mrs S, and says that these disclaimers actually evidence *compliance* with the regulations, and the disclaimers and sales documentation 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 and Mrs S have said (plausibly in my view) that:

> *"…we were advised we would have the opportunity to get our money back after so many years with profit. We were advised we would partially own property and after the years were up we would have a guaranteed exit from the timeshare."*

And as I said in the PD, Mr and Mrs S exchanged 8,000 EC points for the same number of fractional points, and paid an additional £10,160 to do so. So given there was no increase in holiday rights with the purchase, it seems likely that the additional cost was reflective of the Allocated Property element of the membership. 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 the reduced membership term.

But in addition to what Mr and Mrs S have said in their statement, there was the handwritten note in the Q&A document. The Lender, in response to the PD, has said that there is nothing in the handwritten Q&A document which provides evidence that the Fractional Club was sold as an investment which would provide a financial gain or profit. And I agree. But that wasn't the point I was making. What I said was that I think the handwritten note clearly sets out how the difference between EC points and fractional points was described by the Supplier when they were marketed to Mr and Mrs S. And it sets out that the fractional points could be sold.

And when taking this note into account, along with the particular circumstances of this sale, and from what they have said in the statement, I remain 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.

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.

<u>Was the credit relationship between the Lender and Mr and Mrs S rendered unfair?</u>

The Lender, in response to the PD, hasn't submitted any new evidence which shows what it thinks Mr and Mrs S's motivation to make the purchase was. It has just set out that it disagrees with me because it doesn't think it is safe to rely on what they have said, and because it doesn't think the way the Supplier sold and/or marketed the Fractional Club membership to Mr and Mrs S breached Regulation 14(3) of the Timeshare Regulations.

But as I've said, I do feel able to give weight to what Mr and Mrs S said happened at the Time of Sale, and when taken together with the circumstances of the sale, I am satisfied that Regulation 14(3) was breached by the Supplier.

But as set out, that is not the end of the matter. 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.

And having reviewed everything again in light of the Lender's submissions, I remain satisfied that the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

Mr and Mrs S say 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 on several occasions prior to their purchase of Fractional Club, resulting in the improved benefits of the increased points holding. And as I've said, the conversion of their EC points to fractional points at the Time of Sale, for which they paid £10,160 was on a 1-for-1 basis, and did not provide them with any additional holiday rights. And the change from EC to fractional points also 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 have been available to them if they'd remained as EC members.

So, I remain of the view that there had to be some other benefit which motivated their purchase which was specific to the Fractional Club membership.

And I don't think that motivation was the much-reduced membership term when compared to the EC. After all, they retained a large number of EC points after the Time of Sale, with the

associated longer term, so they remain contracted to the Supplier after the Fractional Club membership ends and the Allocated Property is sold.

So I think it is likely that, as Mr and Mrs S have said, the prospect of a financial gain at the end of their membership term was the significant and important factor in their purchasing decision. Therefore, on the balance of probabilities, 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 EC membership.

I remain satisfied that they would not have pressed ahead with their purchase of the Fractional Club had they not been encouraged by the prospect of a financial gain from the sale of the Allocated Property.

With that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made, so the associated credit relationship with the Lender was rendered unfair under Section 140A of the CCA.

So, 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 Mr and Mrs S was unfair under Section 140A of the CCA, I think it would be fair and reasonable to put them back in the position they would have been in had they not purchased 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 Mr and Mrs S agree to assign to the Lender their 8,000 fractional points (those associated with this sale) or hold them on trust for the Lender if that can be achieved.

Mr and Mrs S were existing EC members, and 8,000 of their EC points were traded in against the purchase price of Fractional Club membership. Under their EC membership, they had to pay annual management charges as EC members. So, had Mr and Mrs S not converted 8,000 of their EC points into fractional points when they purchased the 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, if there is any, and the annual management charges they would have paid relating to their 8,000 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.

(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 (relating to 8,000 EC points) would have been had they not purchased Fractional Club membership.

(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 points they would have been entitled to use at the time of the holiday(s) as ongoing EC members. However, this deduction should be proportionate and relate only to the additional fractional points that were required to take the holiday(s) in question.

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 3 December 2025.

Chris Riggs

Ombudsman