

## **The complaint**

Mr and Mrs B'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.

## **Background to the Complaint**

Mr and Mrs B first purchased a timeshare with a timeshare provider (the 'Supplier') in 1998. Over the following years, they attended a number of sales presentations and increased their points ownership with the Supplier as members of its Grand Vacation Club and, later, its European Collection. By 2013, they held 30,000 points in the European Collection<sup>1</sup>.

On 20 March 2013, Mr and Mrs B traded 21,000 of their European Collection points towards the purchase of the same number of points a membership known as the Fractional Club. This purchase falls outside the scope of this complaint as it was funded by other means.

On 30 March 2015 (the 'Time of Sale'), Mr and Mrs B traded their remaining 9,000 points towards the purchase of the same number of points in another 'Fractional Club' membership at a cost of £11,250 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs B 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 B paid for their Fractional Club membership by taking finance of £11,250 from the Lender (the 'Credit Agreement').

Mr and Mrs B – using a professional representative (the 'PR') – wrote to the Lender on 15 March 2019 (the 'Letter of Complaint') to raise a number of different concerns. 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 B's concerns as a complaint and issued its final response letter on 10 April 2019, rejecting it on every ground.

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

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

## **The provisional decision**

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<sup>1</sup> Mr and Mrs B received a refund of an additional 6,000 points they purchased in November 2012.

Having considered everything, I thought Mr and Mrs B's complaint ought to be upheld, because the credit relationship between Mr and Mrs B and the Lender had been rendered unfair by a breach of Regulation 14(3) of the Timeshare Regulations by the Supplier. I set out my initial thoughts in the form of a provisional decision (the 'PD') and invited both parties to submit any new evidence or arguments that they wished me to consider before making my final decision.

In my PD, I said:

### ***The legal and regulatory context***

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

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

### ***My provisional findings***

*I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr and Mrs B 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 this complaint, it is not 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 B in the same or a better position than they would otherwise be in.*

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

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*Having considered the entirety of the credit relationship between Mr and Mrs B 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 – which includes training material that I think is likely to be relevant to the 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 B and the Lender.*

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

*The Lender does not dispute, and I am satisfied, that Mr and Mrs B'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 B say that the Supplier did exactly that at the Time of Sale – saying, the following in their testimony, which is signed and dated on 13 October 2017:*

*"We were staying at Club del Carmen in March 2015. We decided to convert the rest of our points to [Fractional Club] as we wanted 'all the points in the same pot'. Our [European Collection] points had no trade in value and by converting them we would be getting our money back in 15 years' time.*

*One of the sales people said that he was encouraging his family to convert all their points to [Fractional Club]. The impression was that "we were onto a winner here".*

*The [Fractional Club] was high in demand and very popular. They were "selling like hot cakes" so "we had to be quick". As the [Fractional Club] had gone up in value (we were paying circa £11,000 for 9,000 points while we had paid circa £11,000 for 21,000 [points] 2 years ago. The implication was that this was a "great investment" and that prices were rising quickly."*

*Mr and Mrs B allege, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because they were told by the Supplier that they would receive their money back and a potential profit at the end of the Fractional Club membership term.*

*The term "investment" is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and 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.*

*Mr and Mrs B'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 it is important to note at this stage that 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 B 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 B, 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 to Mr and Mrs B as an investment.*

*However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And for reasons I'll now come on to, given the facts and circumstances of this complaint, I think the Supplier is likely to have breached Regulation 14(3) of the Timeshare Regulations.*

### ***How the Supplier marketed and sold the Fractional Club membership***

*As part of our ongoing work involving complaints about timeshares, this Service has previously been given copies of training documents that were produced by the Supplier. The Supplier has also provided, in relation to other complaints, witness statements from former and (at the time) current employees that set out how the Supplier sold its products to prospective members.*

*I recognise the amount of witness evidence that's been provided by the Supplier in support of the disclaimers in the contemporaneous paperwork and acknowledge what these say about the Supplier not referring to the Fractional Club as an investment. However, I think the argument from the Lender on this issue runs the risk of taking too narrow of 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 purpose of Regulation 14(3) as a mechanism to protect consumers if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.*

*So, in my view, if a supplier were to imply 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 and 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*<sup>2</sup>, Mrs Justice Collins Rice said the following:

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

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

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

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

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

*Mr and Mrs B say in their testimony that they were sold the Fractional Club membership to them as an investment. So, I have thought about how the membership would likely have been presented by the Supplier. Alongside the information I have about the sale, and what this service has been told about how the Supplier trained its sales staff, I have considered the inherent probability of this allegations when assessing what I find is more likely than not to have happened.*

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<sup>2</sup> *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').

*And I am satisfied I am able to do that. After all, in Onassis v. Vergottis [1968] 10 WLUK 101, Lord Pearce referred to the need to look at “probabilities”, as well as contemporaneous documents and admitted or incontrovertible facts, when weighing the credibility of a witness’s evidence (at p.431). In Armagas Ltd v. Mundogas SA (the Ocean Frost) [1986] 2 W.L.R. 1063, Goff LJ also referred to looking at the “overall probabilities” when ascertaining the truth (at p.57). And in Gestmin SGPS S.A. v. Credit Suisse (UK) Limited [2013] EWHC 3560, Leggatt J suggested (at para.22) that factual findings should be based on “inferences drawn from the documentary evidence and known or **probable** facts” (my emphasis). Here, I think it is inherently more probable that a timeshare product with an investment element is sold in a way that promotes that element, and therefore risking a breach of Regulation 14(3), compared with the sale of a product without the possibility of a monetary return<sup>3</sup>.*

*The Lender may argue that it is not a breach of Regulation 14(3) to merely describe the nature of the Fractional Club and how it worked, and I agree. But in the circumstances of this complaint, it would not have made much sense if the Supplier included the investment element in its product without relying on it to promote the sale. Further, I find it fanciful that the Supplier would not have highlighted the possible returns available to Mr and Mrs B when it sold them the Fractional Club membership given they already held the same number of points in the European Collection. And the Supplier has previously confirmed that the Fractional Club worked much like the European Collection in terms of being able to use the points for holidays.*

*Given what I’ve already said about the Supplier’s training material and the way in which I think it was likely to have framed the sale of Fractional membership to prospective members (including Mr and Mrs B), I think it is more likely than not that the Supplier did, at the very least, imply that future financial returns (in the sense of possible profits) from the Fractional Club were a good reason to purchase it – which, broadly speaking, is consistent with Mr and Mrs B recollections of the sale.*

*As such, I am persuaded that Mr and Mrs B were told that by the Supplier that the Fractional Club represented an investment as they could potentially receive money in excess of what they paid, when the Allocated Property was sold in 15 years.*

### ***Was the credit relationship between the Lender and the Consumer 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 B and the Lender under the Credit Agreement and related Purchase Agreement as the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.*

*Indeed, it seems to that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs B 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.*

*On my reading of Mr and Mrs B’s testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. I will explain why I have reached that conclusion.*

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<sup>3</sup> 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 the investment element. For the avoidance of doubt, I do not make such a finding.

*Mr and Mrs B say in their testimony that their existing European Collection membership was due to run until 2054, and they did not want to leave this to their daughter. The Lender says that Mr and Mrs B benefitted from a shorter membership term by entering the Fractional Club and pointed out that they did not qualify for an exit under the Supplier's policy at the Time of Sale. But Mr and Mrs B were 74 and 72 years old and I am aware that the Supplier allowed customers who reached the age of 75 to exit their membership without financial penalty. So, I think it's very unlikely that they were sufficiently motivated by the Fractional Club's shorter membership term when they could have simply exited the European Collection membership the following year, upon Mrs B reaching 75 years of age, and in doing so, would not have needed to pay £11,250.*

*Mr and Mrs B also gained an additional benefit by entering the Fractional Club, which the Supplier called "Wish to Rent", whereby they could "rent" their unused points and receive £199 for each week they did not use. I have seen that they received £1,592 in rental income, which is equivalent to eight weeks of rental income. Mr and Mrs B say that the Supplier told them they could expect income in excess of their annual maintenance fees, but this turned out to be untrue. I find it very unlikely that they were sufficiently motivated by the prospect of receiving income for unused points unless this income would be in excess of the costs of maintaining their membership. After all, if they became unable or unwilling to use their points to take holidays, they could have simply exited the European Collection membership once Mrs B reached the age of 75 in one year's time, without needing to pay £11,250.*

*The Lender said that Mr and Mrs B reserved a total of 56 holidays during the course of the various memberships they held with the Supplier and say that this shows that they benefitted from their points. I am not arguing that Mr and Mrs B were not interested in taking holidays – their own testimony and their purchasing and reservation history clearly demonstrates that they were – but to me this only further highlights the fact that they already owned a membership that provided them with the same number and type of holidays that the Fractional Club membership provided them, so they must have been motivated by something else. In my view, the primary benefit that motivated them to enter the Fractional Club, which was specific to that membership and not available to them already, was the prospect of receiving a profit from their share of the proceeds from the sale of the Allocated Property when the membership term ends.*

*The Lender has raised a number of concerns it has with Mr and Mrs B's testimony and suggests that their testimony is not credible for those reasons. I have thought about these points and am not persuaded that Mr and Mrs B have said anything that would lead me to conclude that their testimony about the events at the Time of Sale is unreliable, or that I cannot place sufficient weight on their testimony. In particular, the Lender says that Mr and Mrs B incorrectly recalled the location of the sale as happening in Cromer. But this is not how I read their testimony. They quite clearly say that they were staying in Club del Carmen, as the Lender says they did, and that they purchased two fractions of a property in Cromer, which they did.*

*So, I think the prospect of a financial gain at the end of the Fractional Club membership term was likely to have been a significant and important factor in Mr and Mrs B's purchasing decision. And they have said as much in their testimony, which I find to be plausible and persuasive. Therefore, on the balance of probabilities, I think the Supplier's sales representative was likely to have led Mr and Mrs B to believe that the Fractional Club membership was an investment that may lead to a financial gain (i.e., a profit) in the future. And that share was one of the defining features of the membership that marked it apart from their existing European Collection membership. Mr and Mrs B 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.*

*With all that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision Mr and Mrs B ultimately made at the Time of Sale.*

## **Conclusion**

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*Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs B 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.*

In the PD, I then set out what I considered to be a fair and reasonable way for the Lender to put things right and calculate and pay fair compensation to Mr and Mrs B.

### **The responses to the provisional decision**

Mr and Mrs B accepted what I said in the PD with no further comments.

The Lender did not accept what I said in the PD and sent me further arguments for me to consider. It also sent a response from a third-party on behalf of the Supplier.

It starts by addressing the witness testimony from Mr and Mrs B that I have relied upon. It argued that the testimony is *"vague, brief, inconsistent, and includes factual inaccuracies which ultimately distort the actual events surrounding the Fractional Sale"*. In short, it says:

- It does not appear that there is any evidence in Mr and Mrs B's complaint that the Supplier said something at the time of the purchase to sell the Fractional Club membership as an investment which would provide them with a profit.
- Mr and Mrs B's evidence suggests the reason for their purchase was to have all their points in the same product.
- The statements Mr and Mrs B allege to have been made by the Supplier at the Time of Sale are not sufficient to breach Regulation 14(3) of the Timeshare Regulations.
- Mr and Mrs B inferred that the Fractional Club represented an investment, rather than an express or implied representation from the Supplier.

The Lender concluded that it is not credible that Mr and Mrs B were assured that they would make a profit or that the purpose of the Fractional Club sale was the pursuit of an investment objective as opposed to the motivation to purchase points to meet their future holiday needs.

The Lender disagreed with the approach I took to the disclaimers in the contractual documentation signed by Mr and Mrs B.

The Lender then considered how I approached the alleged breach of Regulation 14(3) of the Timeshare Regulations by the Supplier at the Time of Sale. It says:

- I have erred by conflating two meanings of the word "return" – in the sense of an investment (the measure of profit) and the returning of money at the end of the term (with no connotation of investment or profit). It says that the customer being told that some money would be "returned" 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 B 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 B. If they 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 I 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.
- I will be aware that the loan agreement between Mr and Mrs B and the Lender was active for less than two months before it was settled, therefore, based on the specific circumstances and the motivations for the purchase, it does not believe that the loan agreement would satisfy the test of unfairness.

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* [2018] EWHC 958 (Comm), was whether there was a “*material impact on the debtor when deciding whether or not to enter the agreement*”.
- I have 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 B’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 I reached 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 B with the intention of financial gain, so the complaint ought to be rejected.

### **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.

Having considered everything again, and having read and considered all of the reasons the Lender gave for why it disagreed with the PD, I remain satisfied that Mr and Mrs B’s complaint should be upheld for the same reasons I gave in the 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 the Fractional Club membership to Mr and Mrs B 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 purpose of Section 140A of the CCA.

I will also deal with 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 (and the Supplier's) response in full, I will confine my findings to what I believe are the salient points.

### Mr and Mrs B's testimony

Much of the Lender's response to my PD set out reasons why it didn't think I should rely on Mr and Mrs B's testimony. Specifically, it said the statement is "*vague, brief, inconsistent, and includes factual inaccuracies which ultimately distort the actual events surrounding the Fractional Sale*".

Specifically, it says:

*"It should also be noted that Mr and Mrs B's testimony makes repeated reference to 'VC' points but this is not a product offered by the Supplier – the earlier product was European Collection points. It is noted that the Ombudsman hasn't considered all of these points in his PD and factual inaccuracies."*

I disagree with the Lender's (and the Supplier's) assessment of Mr and Mrs B's testimony.

From what I can see, this appears to be the only example the Lender has identified of "*factual inaccuracies*" in the testimony. But I do not agree that the reference to "VC" points is materially an issue as it is very clear what Mr and Mrs B mean when they refer to their points in that way. And I am also aware that they were previously owners of points in what the Supplier called the "*Grand Vacation Club*", so it is understandable that they referred to their points as being tied to a "vacation club". I can also see that the PR correctly refers to those points as the "*European Collection*" in its Letter of Complaint. In any case, I don't think that such a small and, in my opinion, materially inconsequential error ought to mean that Mr and Mrs B's entire testimony should be considered unreliable and ought to be disregarded as a result, or that I ought to place less weight on it.

Mr and Mrs B's testimony was taken less than three years after the Time of Sale. I think it sufficiently detailed, lacks any material errors and so, I remain of the opinion that I can place sufficient weight on what Mr and Mrs B say happened at the Time of Sale.

### How the Supplier sold and/or marketed the Fractional Club membership

The Lender says that I have erred by relying on the case of *Gestmin* when assessing the reliability of Mr and Mrs B's witness testimony, and the correct approach would be to place little reliance on the witness testimony and to "*replace more reliance on the contemporaneous documents supplied by the Supplier*". It then says that the outcome would be different if I applied the "*correct interpretation*".

In fact, I did not rely on *Gestmin* when assessing the reliability of Mr and Mrs B's testimony. Instead, I said: "*factual findings should be based on inferences drawn from the documentary evidence and known or **probable** facts.*"

I then concluded that I think it is inherently more probable that a timeshare with an investment element is sold in a way that promotes that element, and therefore risking a breach of Regulation 14(3), compared with the sale of a product without the possibility of a monetary return. I explained why I reached that conclusion and I see no reason why I ought to have reached a different conclusion.

The Lender says that I have erred by conflating the meaning of the word “*return*” with the prospect of money “*being returned*” and that, if Mr and Mrs B were told they would receive a “*return*” they would have been informed of the return. The Lender says that I have dismissed the disclaimers in the sales documentation that say the Fractional Club membership should not be purchased as a financial investment. And, the Lender says that, although the PR states that it was represented that “*Fractional is a great investment*”, it is clear from Mr and Mrs B’s testimony that this was *their* inference from the cost of the points, rather than an express or implied representation from the Supplier.

But as I said in the PD, I think the argument by the Lender on these issues runs the risk of taking too narrow of a view of the prohibition against marketing and selling timeshares as investments. As I said, and 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 purpose of Regulation 14(3) as a mechanism to protect consumers if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.

So, as I said in the PD, in my view, if a supplier were to *imply* 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 and selling the product as an investment.

But I acknowledge, just as I did in the PD, 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 B, 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 to Mr and Mrs B as an investment.

The Lender said it disagrees with the approach I have taken to the disclaimers and it says that it was found not to have breached the regulations in *Brown & Brown v Shawbrook Bank Limited*. But that judgement in that case was made on its own specific circumstances. And I am also aware that the contractual paperwork was only produced, and the disclaimers were signed, after Mr and Mrs B had been through a lengthy sales presentation and had already decided to proceed with the purchase on the basis of what they had been shown and told by the Supplier. And I also note that they say in their testimony that they did not read these documents in detail. So, rather than dismissing the disclaimers, as the Lender says I did, I think it is important to balance these with what I think it is likely Mr and Mrs B were told at the Time of Sale about the Fractional Club membership.

And Mr and Mrs B have said, plausibly in my view, that the Supplier sold them the Fractional Club membership as an investment. They recall being “*misled into buying fractional ownership as an investment, which would be sold in 15 years and we would get our money back if not a profit*”. They remember being told by the Supplier that the Fractional Club was in high demand and implying that the increasing value of the membership implied that it was a “*great investment*”.

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

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

The Lender says that it is not credible that Mr and Mrs B were assured that they would make a profit, nor that the purpose of their purchase was the pursuit of an investment objective, as opposed to their motivation to purchase points to meet their future holiday needs and a shorter membership term length.

With regard to the specific allegation made by Mr and Mrs B, that the Supplier sold the Fractional Club membership to them as an investment, the Lender says:

*"One of the sales people said that he was encouraging his family to convert all their points to FOS [sic]. The impression was that "we were onto a winner here".*

*8. The above statement from Mr and Mrs B['s] witness testimony, again, is not the same as selling the product as an investment that would make a profit. We cannot fathom how the Ombudsman has come to the conclusion that the motivations for the purchase were driven by the alleged "investment" element, when the witness testimony doesn't confirm this."*

But I have considered what Mr and Mrs B say in their testimony as a whole. And, with regards to their motivation to purchase because of the investment element, Mr and Mrs B do confirm this in their testimony, where they say:

*"We wish to relinquish our timeshare because we were misled into buying fractional ownership as an investment, which would be sold in 15 years and we would get our money back if not make a profit."*

As I said in the PD, and I maintain now, I do not think it's plausible that Mr and Mrs B entered the Purchase Agreement to gain points to meet their future holiday needs, as they did not gain any additional points and had been successfully using the Supplier's points to take holidays for years. As I said, the Supplier has confirmed that the points could be used in the same way under the Fractional Club membership as they could be used under the European Collection. And I have already explained in some detail why I think it is simply not the case that Mr and Mrs B gained a shorter membership term, as they could have exited their existing membership around one year later when Mrs B turned 75. Furthermore, the Lender has not provided me with any new evidence to support its position that Mr and Mrs B were motivated by either of those factors; it has simply disagreed with my assessment of the evidence.

The Lender says that Mr and Mrs B's evidence suggests that the reason for their purchase is that they wanted to have all their points in the same product. But I think it is unreasonable to suggest that Mr and Mrs B parted with the amount of money that they did, simply to have all their points in one product. After all, there is no obvious benefit to them holding all their points within one product, unless that product provided them with something that their existing product did not. It is important to consider why Mr and Mrs B wanted all their points in one product. And in this case, I am persuaded that the motivating factor in their decision to move all their points to the Fractional Club membership was that they gained their share of the Allocated Property and, when it was due to be sold, the possibility of receiving a profit in excess of what they paid. And I do not think they would have pressed ahead with the purchase if it was not for this defining feature and the possibility of making a profit.

Lastly, the Lender has drawn my attention to the fact that Mr and Mrs B settled their loan account within two months of its activation. But it has not said why it feels this is relevant to my determination that the relationship between them was unfair. And I see no reason to reach a different conclusion because of the duration of the debtor-creditor relationship.

With that being the case, I am satisfied that the Supplier's breach of Regulation 14(3) of the Timeshare Regulations was material to the decision Mr and Mrs B ultimately made, so I think that it is fair and reasonable for me to uphold their complaint.

### **Fair Compensation**

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Having found that Mr and Mrs B 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 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, provided Mr and Mrs B 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 B were existing European Collection members, and their membership was traded in against the purchase price of Fractional Club membership. Under their European Collection membership, they had 9,000 European Collection Points. And, like Fractional Club membership, they had to pay annual management charges as European Collection members. So, had Mr and Mrs B 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 B 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 European Collection members.

In the calculations I shared in my PD, I did not account for the payment of £1,592 Mr and Mrs B say they received from the Supplier under its "Wish to Rent" scheme in 2015. I think it is fair to allow the Lender to deduct an amount equal to the proportion of that payment which Mr and Mrs B received from renting their 9,000 points converted from the European Collection. Mr and Mrs B have confirmed they accept this amendment to the redress calculations.

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

- (1) The Lender should refund Mr and Mrs B'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 B's Fractional Club annual management charges paid after the Time of Sale and what their European Collection annual management charges 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 B used or took advantage of; and
- ii. Any proportion of the £1,592.00 payment that Mr and Mrs B received through the Supplier's "Wish to Rent" scheme that relates to the 9,000 Fractional Points they gained at the Time of Sale; and
- iii. The market value of the holidays\* Mr and Mrs B took using their Fractional Points *if* the Points value of the holiday(s) taken amounted to more than the total number of European Collection Points they would have been entitled to use at the time of the holiday(s) as ongoing European Collection 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 B took a holiday worth 2,550 Fractional Points and they would have been entitled to use a total of 2,500 European Collection Points at the relevant time, any deduction for the market value of that holiday should relate only to the 50 additional Fractional Points that were required to take it. But if they would have been entitled to use 2,600 European Collection Points, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

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

- (4) Simple interest\*\* at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.
- (5) The Lender should remove any adverse information recorded on Mr and Mrs B's credit files in connection with the Credit Agreement reported within six years of this decision.
- (6) If Mr and Mrs B'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 B 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 the consumer a certificate showing how much tax it's taken off if they ask for one.

### **My final decision**

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs B to accept or reject my decision before 11 December 2025.

Andrew Anderson  
**Ombudsman**