DRN-4578200

The complaint

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

What happened

Mr and Mrs M were existing members of a timeshare called the Vacation Club (the 'VC') from a timeshare provider (the 'Supplier') having bought a number of VC points over time. As VC 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 September 2012 Mr and Mrs M traded in some of their VC points towards the outright purchase of one of the Supplier's Real Estate properties. Neither this ownership of a property, nor their VC points purchases are the subjects of this complaint and are included here for background purposes only.

But the product that is at the heart of this complaint is Mr and Mrs M's purchase of membership of a different type of timeshare (the 'Fractional Club') from the Supplier on 19 February 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,860 fractional points for £27,288. But after trading in their remaining VC points, they ended up paying £8,027 (the 'Purchase Agreement') for their Fractional Club membership.

Unlike the VC, Fractional Club membership was asset backed – which meant it gave Mr and Mrs M 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 M paid for their Fractional Club membership by taking finance of £8,027 from the Lender in their joint names (the 'Credit Agreement'). The balance of this loan was cleared on 13 March 2016.

Mr and Mrs M – using a professional representative (the 'PR') – wrote to the Lender on 24 June 2019 (the 'Letter of Complaint') to raise a number of different concerns regarding their Fractional Club membership and the fairness of their credit relationship with the Lender. 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 did not respond to their complaint (it later said it had not received it) so on 21 April 2020 the PR referred Mr and Mrs M's complaint to the Financial Ombudsman Service.

As no response had been received, the Lender was notified of Mr and Mrs M's complaint by this Service. The Lender said it had not given an answer to the complaint, and it would now

consider it. But other than providing a 'holding' update, it did not give its final response to Mr and Mrs M's complaint.

So, the complaint was assessed by an Investigator at this Service who, having considered the information on file, upheld the complaint on its merits.

The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr and Mrs M at the Time of Sale in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'). And given the impact of that breach on their purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr and Mrs M was rendered unfair to them for the purposes of Section 140A of the CCA.

The Lender responded to the Investigator's opinion by saying it didn't think this Service had jurisdiction to consider the merits of Mr and Mrs M's complaint. It said they had made it too late under the regulator's rules.

The Investigator considered this point and didn't agree. He thought Mr and Mrs M had referred the complaint to this Service within six years of when the outstanding balance of the Credit Agreement had been cleared, so he said the complaint had been made within the time limits required.

The Lender did not agree with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

The provisional decision

Having considered everything that had been submitted, I agreed with the Investigator in that I thought Mr and Mrs M's complaint was in the jurisdiction of this Service, and that it ought to be upheld. I set out my initial thoughts on both of these issues in a provisional decision (the 'PD').

As regards this Service's jurisdiction I said:

"Our Service can't consider every complaint that is brought to it. The rules that set out what it can consider are known as the Dispute Resolution Rules (DISP) and are contained in the Financial Conduct Authority (the 'FCA') Handbook. For me to be able to consider the merits of Mr and Mrs M's complaint, our Service needs to have jurisdiction to do so. To put it simply, I can only consider a complaint if our rules allow.

The part of the DISP rules that cover time limits are found within DISP 2.8.2. This says, as far as is relevant here:

The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

1) *…*
2) *More than:*
    a. *Six years after the event complained of; or (if later)*
    b. *Three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint; unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has written acknowledgement or some other record of the complaint having been received.*

…

Mr and Mrs M have complained that the Lender was party to an unfair credit relationship with them as a result of how the Supplier sold and/or marketed the Fractional Club membership to them. This credit relationship started when the Lender agreed to provide them with the finance to make the purchase on 19 February 2014, and the alleged unfairness that is the subject of this complaint commenced then and was perpetuated until the credit relationship ended, which I can see was when the credit balance was cleared by Mr and Mrs M on 13 March 2016.

So, for me to be able to consider a complaint about an unfair credit relationship between Mr and Mrs M and the Lender, under DISP 2.8.2 the complaint needed to have been made within six years of that relationship existing. So, in other words, under the rules Mr and Mrs M had to have made their complaint by 13 March 2022.

The PR has provided a copy of the Letter of Complaint it says it sent to the Lender. This is dated 24 June 2019 and is correctly addressed, but the Lender says it did not receive it and there is no record of it being received, so it was not acknowledged.

But as the rules set out, it is not only the respondent that can be notified of a complaint. The rules allow for the complaint to be sent to the Ombudsman, and as I've said, this Service has a record of the complaint being received on 21 April 2020, which was within six years of the credit relationship between Mr and Mrs M and the Lender being in existence.

So, I am currently satisfied that this Service has jurisdiction to consider the merits of Mr and Mrs M's complaint, so I will go on and do that now. If the Lender disagrees with my provisional findings on this jurisdiction issue, it can let me know in response to this provisional decision."

I then addressed the merits of Mr and Mrs M's complaint. I said:

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

And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr and Mrs M 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 M in the same or a better position than they would otherwise be in.

The witness testimony

As part of the PR's initial submission to this Service, it sent us a statement from Mr M, dated 20 March 2018. This set out his and Mrs M's recollections of their relationship with the Supplier. As regards what he remembered about the Time of Sale he said:

> *"In February 2014, we were on holiday in Tenerife and all the usual things happened in terms of a supposed breakfast meeting, and a high-pressured sales presentation etc. By this point, we were so used to it I feel silly even repeating it.*
>
> *They said to us that they wanted to apologise to us for all the issues that we had suffered over the years and that they had this brand new, wonderful product that would solve all of our issues. They said that if we purchased this new product, that being fractional points, it would safeguard us and we would definitely get out [sic] money back.*
>
> *They told us that every single point that we had purchased before was in perpetuity and they explained that this would be passed on to our family on our deaths. They told us that if we purchased fractional points, then it would have a guaranteed exit and that we wouldn't pass anything on to our family at all.*
>
> *They said that we could sell it and that a certain amount of the money would then be held in an account and when it was sold, we would get at least £40,000 back. It sounded like it was an automatic thing that would happen on the date that they put on the form. Actually, thinking about it, that clearly can't be the case because I have no idea how they are going to automatically sell a product and give us 40,000. I suspect that they are promising everyone the same thing so really, it doesn't make any sense.*
>
> *Therefore, on 19 February 2014, we purchased 1,860 fractional rights which translates to three fractional weeks in Unit 35D at Sunningdale Village. This cost £8,027. This was financed by a loan with Shawbrook Bank."*

I have thought about how much weight I can place on the contents of the statement when considering the merits of Mr and Mrs M's complaint.

From what I know about the way this particular PR worked, I think it is likely that this statement was taken during the course of a telephone conversation with Mr M and was taken as part of the PR's timeshare relinquishment work. But given that it was prepared and written by the PR in this way, I am mindful of the risk that Mr M may have been guided through the process, and the associated risk that what has been written might not be his own specific recollections.

But I think that risk is low, as I can see it contains personal information about their purchasing history that only Mr and Mrs M would have known, including the concerns they had with their previous membership and what they were told. So, I have no doubt that Mr and Mrs M had a significant input into its contents. It is also not unusual for statements to be prepared on a complainants' behalf by professional representatives. Taking everything into account I am satisfied that it is a record of Mr M's recollections of their relationship with the Supplier and what he remembers being told at the Time of Sale.

When considering how much weight I can place on Mr M's statement, I am assisted by the judgement in the case of Smith v Secretary of State for Transport [2020] EWHC 1954 (QB).

At paragraph 40 of the judgment, Mrs Justice Thornton helpfully summarised the case law on how a court should approach the assessment of oral evidence. Although in this case I have not heard direct oral evidence, I think this does set out a useful way to look at the written evidence Mr M has 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 Ms 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)."*

So, as I've said, I have thought about how much weight I can place on this statement when considering the merits of Mr and Mrs M's complaint. And having done so, I feel able to place weight on its contents. I do so whilst being cognisant of the fact that memories can fade over time, and that inconsistencies in evidence are a normal part of someone trying to remember

what happened in the past. So, I'm not surprised that there may be some inconsistencies between what he says has happened over the course of their purchases, and what other evidence shows. The question to consider, therefore, is whether there is a core of acceptable evidence from Mr M, such that the inconsistencies have little to no bearing on whether his testimony can be relied on, or whether such inconsistencies are fundamental enough to undermine, if not contradict, what the Supplier was likely to have said and/or done during the sale of the Fractional Club.

The Lender has pointed to some inaccuracies in the statement as a reason to doubt its credibility. For example, when recalling their purchase in 2001 Mr M has said it was to "purchase more points" whereas the purchase was made to replace a 'destinations' membership, which was not points-based. It also points out that Mr and Mrs M bought 400 VC points in April 2001, not in 2000 as stated in the testimony.

As I've said, inconsistencies in evidence are a normal part of someone trying to remember what happened in the past. And I don't find the inconsistencies highlighted by the Lender in any way material to whether the Fractional Club was marketed to them 13 years later as an investment. Making what I consider to be minor and insignificant errors in the statement about unrelated purchases that were made 17 years before does not call into question the credibility of everything he has said and are not material to whether the testimony can be relied on. I do not think these mistakes or inconsistencies fundamentally undermine the crux of the statement, which, in my view, sets out that the Fractional Club was sold to them as an investment.

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

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

1. *The Supplier's sales and marketing practices at the Time of Sale – 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 M 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 M's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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

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

But Mr and Mrs M 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 be sold on a set date and would provide them with at least a £40,000 return.

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 M'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 M as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to 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 M, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs M as an investment, and these disclaimers have been signed by both of them.

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

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives – including:

1. *A document called the 2013/2014 Sales Induction Training (the '2013/2014 Induction Training');*
2. *screenshots of an Electronic Sales Aid (the 'ESA'); and*
3. *a document called the "FPOC2 Fly Buy Induction Training Manual" (the 'Fractional Club Training Manual')*

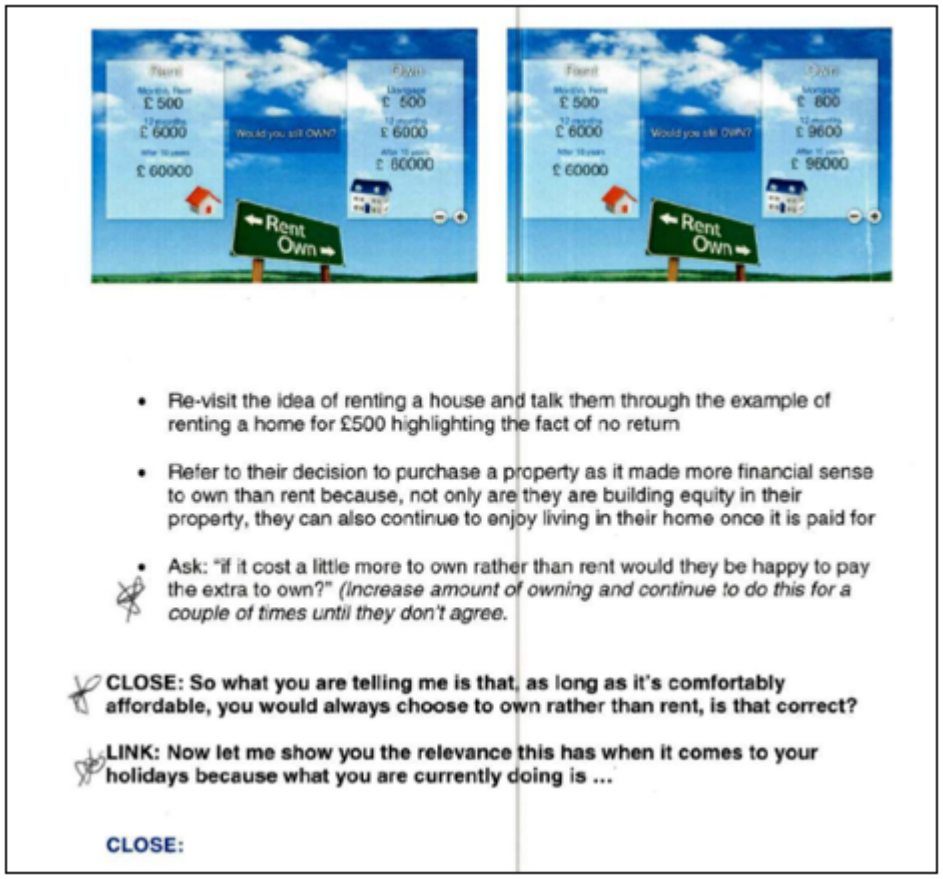
Neither the 2013/2014 Induction Training nor the ESA I've seen included notes of any kind. However, the Fractional Club Training Manual includes very similar slides to those used in the ESA. And according to the Supplier, the Fractional Club Training Manual (or something similar) was used by it to train its sales representatives at the Time of Sale. So, it seems to me that the Training Manual is reasonably indicative of:

(1) *the training the Supplier's sales representatives would have got before selling Fractional Club membership; and*

(2) *how the sales representatives would have framed the Supplier's multimedia presentation (i.e., the ESA) during the sale of Fractional Club membership to prospective members – including Mr and Mrs M.*

The "Game Plan" on page 23 of the Fractional Club Training Manual indicates that, of the first 12 to 25 minutes, most of that time would have been spent taking prospective members through a comparison between "renting" and "owning" along with how membership of the Fractional Club worked and what it was intended to achieve.

Page 32 of the Fractional Club Training Manual covered how the Supplier's sales representatives should address that comparison in more detail – indicating that they would have tried to demonstrate that there were financial advantages to owning property, over 10 years for example, rather than renting:



- Re-visit the idea of renting a house and talk them through the example of renting a home for £500 highlighting the fact of no return
- Refer to their decision to purchase a property as it made more financial sense to own than rent because, not only are they are building equity in their property, they can also continue to enjoy living in their home once it is paid for
- Ask: "if it cost a little more to own rather than rent would they be happy to pay the extra to own?" *(increase amount of owning and continue to do this for a couple of times until they don't agree.*

CLOSE: So what you are telling me is that, as long as it's comfortably affordable, you would always choose to own rather than rent, is that correct?

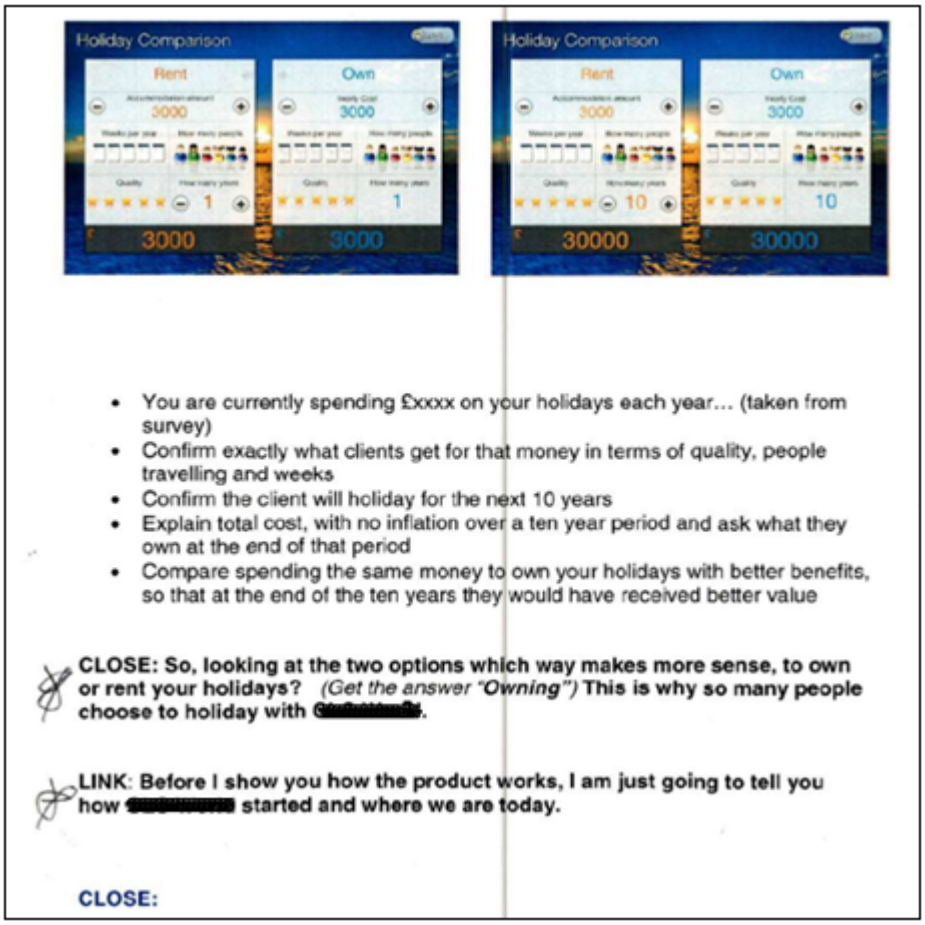
LINK: Now let me show you the relevance this has when it comes to your holidays because what you are currently doing is …

CLOSE:

Indeed, one of the advantages of ownership referred to in the slide above is that it makes more financial sense than renting because owners "are building equity in their property". And as an owner's equity in their property is built over time as the value of the asset increases relative to the size of the mortgage secured against it, one of the advantages of ownership over renting was portrayed in terms that played on the opportunity ownership gave prospective members of the Fractional Club to accumulate wealth over time.

I acknowledge that the slides don't include express reference to the "investment" benefit of ownership. But the description alludes to much the same concept. It was simply rephrased in the language of "building equity". And with that being the case, it seems to me that the approach to marketing Fractional Club membership was to strongly imply that 'owning' fractional points was a way of building wealth over time, similar to home ownership.

Page 33 of the Fractional Club Training Manual then moved the Supplier's sales representatives onto a cost comparison between "renting" holidays and "owning" them. Sales representatives were told to ask prospective members to tell them what they'd own if they just paid for holidays every year in contrast to spending the same amount of money to "own" their holidays – thus laying the groundwork necessary to demonstrating the advantages of Fractional Club membership:



With the groundwork laid, sales representatives were then taken to the part of the ESA that explained how Fractional Club membership worked. And, on pages 41 and 42 of the Fractional Club Training Manual, this is what sales representatives were told to say to prospective members when explaining what a 'fraction' was:

> *"FPOC = small piece of […] World apartment which equals* ***ownership of bricks and mortar*** *[…]*
>
> *Major benefit is the property is sold in nineteen years* ***(optimum period to cover peaks and troughs in the market)*** *when sold you will get your share of the proceeds of the sale*
>
> *SUMMARISE LAST SLIDE:*
>
> *FPOC equals a passport to fantastic holidays for 19 years* ***with a return at the end of that period.*** *When was the last time you went on holiday and* ***got some money back? How would you feel if there was an opportunity of doing that?***
>
> *[…]*
>
> *LINK: Many people join us every day and one of the main questions they have is* ***"how can we be sure our interests are taken care of for the full 19 years?*** *As it is very*

important you understand how we ensure that, I am going to ask Paul to come over and explain this in more details for you.

[…]

*"Handover: (Manager's name) John and Mary love FPOC and have told me the best for them is……...**Would you mind explaining to them how their interest will be protected over the next 19 year[s]**?" (My emphasis added)*

The Fractional Club Training Manual doesn't give any immediate context to what the manager would have said to prospective members in answer to the question posed by the sales representative at the handover. Page 43 of the manual has the word "script" on it but otherwise it's blank. However, after the Manual covered areas like the types of holiday and accommodation on offer to members, it went onto "resort management", at which point page 61 said this:

"T/O will explain slides emphasising that they only pay a fraction of maintaining the entire property. It also ensures property is kept in peak condition to maximise the return in 19 years['] time.

[…]

*CLOSE: **I am sure you will agree with us that this management fee is an extremely important part of the equation as it ensures the property is maintained in pristine condition so at the end of the 19 year period, when the property is sold, you can get the maximum return.** So I take it, like our owners, there is nothing about the management fee that would stop you taking you holidays with us in the future?..." (My emphasis added)*

By page 68 of the Fractional Training Manual, sales representatives were moved on to the holiday budget of prospective members. Included in the ESA were a number of holiday comparisons. It isn't entirely clear to me what the relevant parts of the ESA were designed to show prospective members. But it seems that prospective members would have been shown that there was the prospect of a "return".

For example, on page 69 of the Fractional Club Induction Training Manual, it included the following screenshots of the ESA along with the context the Supplier's sales representatives were told to give to them:

[…]

> *"We also agreed that you would get nothing back from the travel agent at the end of this holiday period. Remember with your fraction at the end of the 19 year period, you will get some money back from the sale, so even if you only got a small part of your initial outlay, say £5,000 it would still be more than you would get renting your holidays from a travel agent, wouldn't it?"*

I acknowledge that the slides above set out a "return" that is less than the total cost of the holidays and the "initial outlay". But that was just an example and, given the way in which it was positioned in the Training Manual, the language did leave open the possibility that the return could be equal to if not more than the initial outlay. And indeed Mr M has been specific in his testimony that he remembers the Supplier referring to them getting back £40,000. But in any case, the slides above represent Fractional Club membership as:

(1) *The right to receive holiday rights for 19 years whose market value significantly exceeds the costs to a Fractional Club member; plus*

(2) *A significant financial return at the end of the membership term.*

And to consumers (like Mr and Mrs M) who were looking to buy holidays anyway, the comparison the slides make between the costs of Fractional Club membership and the higher cost of buying holidays on the open market was likely to have suggested to them that the financial return was in fact an overall profit.

As I've said, Mr M has been specific about the amount of return he says the Supplier told them they could expect on the sale of the Allocated Property. I acknowledge that there is little context given to this specific figure, and it is unclear how it relates to their overall expenditure for the membership.

But even acknowledging that there may not have been a comparison between the expected level of financial return and the purchase price of the Fractional Club membership, if I were to only concern myself with express efforts to quantify to Mr and Mrs M the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

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

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

And I think it is likely that that is what has happened here. 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 M), 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 a Fractional Membership were a good reason to purchase it – which, broadly speaking, is consistent with Mr and Mrs M recollections of the sale.

So, overall, on the balance of probabilities, I think the Supplier's sales representative was likely to have led Mr and Mrs M to believe that Fractional membership was an investment

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[1] The Department for Business Innovation & Skills *"Consultation on Implementation of EU Directive 2008/122/EC on Timeshare, Long-Term Holiday Products, Resale and Exchange Contracts (July 2010)".* https://assets.publishing.service.gov.uk/media/5a78d54ded915d0422065b2a/10-500-consultation-directive-timeshare-holiday.pdf

that may lead to a financial gain (i.e., a profit) in the future. And with that being the case, I do not find them either implausible or hard to believe when they say that they were told that they were buying shares in property that, being an investment, may well lead to a financial gain. On the contrary, given everything I have seen so far, I think that is likely to be what Mr and Mrs M were led to believe by the Supplier at the relevant time. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

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 M 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 me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs M 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 M'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 acknowledge that they seem to have been dissatisfied with their existing VC membership, and they have said that they were concerned about it being held 'in perpetuity', which the shorter membership term of the Fractional Club would avoid. But I don't think this was the only reason they made the purchase.

It is, I think, important to put their purchase of the Fractional Club in the context of their other previous purchases. As I've said, they had been members of the Supplier's VC for several years, and this membership only provided them with holiday rights. But in September 2012 Mr and Mrs M seem to have made a change to the way they used their membership. They traded in some of their VC points towards the outright purchase of one of the Supplier's holiday properties. But they kept some which would indicate that they wanted to retain the flexibility of the timeshare, alongside having a fixed holiday home to use. Then, at the Time of Sale, they traded in their remaining VC points towards the Fractional Club membership, and the major difference between this and their VC (other than the shorter membership term) was the investment potential of the Allocated Property. So, when taken in the context of their previous outright property purchase, although not mentioned in the testimony, it seems that this Fractional Club membership purchase was likely to have been made along the same lines of property ownership.

That doesn't mean they were not interested in holidays - their own testimony and purchase history clearly demonstrates that they were, which is not surprising given the nature of the product at the centre of this complaint. But as Mr and Mrs M say (plausibly in my view) 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, 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 membership. As I've said, I also acknowledge that the shorter membership term was attractive to them, but I don't think from what they've had to

say that they would have pressed ahead with the purchase solely for this reason. I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

Mr and Mrs M 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'm not persuaded that they would have pressed ahead with their purchase regardless.

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 M under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint."

I then went on to set out how I thought the Lender should calculate and pay fair compensation to Mr and Mrs M.

The responses to the provisional decision

The PR, on Mr and Mrs M's behalf, accepted what I had said in the PD with no further comment.

The Lender, however, did not accept what I had said, and sent a comprehensive response setting out why it disagreed with it and provided further evidence to support its position that the complaint ought not to be upheld. It said, in summary that:

<u>The prospect of a financial gain from the Fractional Club membership was not an important and motivating factor in their decision to purchase:</u>

The Lender said the PD has not adequately considered all the available evidence, including direct evidence from Mr and Mrs M themselves. It said this is significant as it is in their own words –

- Their letter dated 12 March 2020 to the PR provides a detailed account of their reasons for purchasing (e.g. the promise of holidays) and their reasons for dissatisfaction with the memberships – all of which relate exclusively to availability, accommodation standards, flights and service levels.
    - No reference is made to a representation of a financial gain, or receiving at least £40,000 as set out in the statement prepared by the PR. As this narrative is not present in the letter written in their own words, it cannot reasonably be concluded that the prospect of a financial gain was an important and motivating factor in their purchase.
    - In their own words *"The only way to get out of our original Points contract which had a "Perpetuity Clause" was to exchange it to a Fractional Ownership contract which had a life of approximately 20 years."*
- In their email to the Supplier dated 16 June 2020 about their membership termination, they make no reference to an investment narrative. It is difficult to reconcile why they failed to mention the alleged representation of receiving a return of at least £40,000 as alleged in the statement.

The Lender said that any reliance on Mr M's statement is unsafe. It said I ought to have assessed whether the evidence is clear, consistent and contemporaneous, and is an accurate reflection of Mr M's recollections. It said greater weight should be placed on the letter dated 12 March 2020 and the email of 16 June 2020, which are in Mr and Mrs M's own words.

Regulation 14(3) of the Timeshare Regulations

The Lender said that as has been made clear in *Shawbrook & BPF v FOS*[2] there is nothing inherent in the Fractional Club which contravenes the prohibition in Regulation 14(3).

It said that the PD set out that the mere existence of the *'prospect of a financial return'* constituted an *'investment',* and in doing so falls into error by conflating two meanings of the word 'return': (i) a 'return on investment', which is normally understood to mean the measure of profit (the return) on the original investment; and (ii) a customer being told that some money will be 'returned' upon sale, which carries no connotation of financial gain/profit. The Lender said the former is what must not be marketed under the Timeshare Regulations; and the latter is an inherent feature of fractional products and does not breach Regulation 14(3).

It went on to point out that being told that (a) there is a specific Allocated Property and (b) there will be an amount returned at the end of the term is not selling the product as an investment; it is merely accurately describing a feature that has been found by a Court as not inherently objectionable.

Finally, the Lender said that the PD had dismissed the disclaimers contained in the contractual paperwork with no proper basis. It said that the disclaimers had been found to evidence compliance with Regulation 14(3).

The incorrect test has been applied in determining whether the relationship was unfair

The Lender quoted the following part of the PD: *"I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit… I think the Supplier's breach of Regulation 14(3) was material to the decisions they ultimately made"*. It said this appears to reverse the burden of proof, in that the PD appears to start from the position that the prospect of a financial gain existed, but this was not insignificant enough for it not to render the relationship unfair. It said the correct starting point is to assess whether there is sufficient evidence of a material impact on the decision to enter the agreement. In the absence of this evidence, the relationship ought not to be found unfair.

Conclusion

The Lender concluded that it thought the outcome set out in the PD ought not to be maintained. It said there is no clear and compelling evidence that the prospect of a financial gain was an important and motivating factor when Mr and Mrs M decided to make their Fractional Club purchase at the Time of Sale.

As the deadline for further responses has now passed, the complaint has come back to me for further consideration.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable

[2] *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin)

in the circumstances of this complaint.

I note that in the Lender's response to my PD that it has not argued that Mr and Mrs M's complaint is not in this Service's jurisdiction. So, I see no further need to address this point.

As regards the merits of their complaint, having considered everything again, I still uphold Mr and Mrs M's complaint for the reasons set out above in the extract of my PD. I will also deal with the matters the Lender raised in response. In doing so, I note again that my role as an Ombudsman is not to address every single point that has been made in response. Instead, it is to decide what is fair and reasonable 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 find are the salient points.

Mr M's witness testimony and other correspondence

As regards the testimony from Mr M, the Lender has said that I ought to have assessed whether the evidence is clear, consistent and contemporaneous, and is an accurate reflection of Mr M's recollections.

But the PD considered, in some detail, both the provenance and contents of the statement. I was satisfied that, even though it had been prepared and written by the PR, what had been recorded was Mr M's recollections of their purchase. And I was also satisfied, being cognisant of the fact that memories can fade over time, that Mr M's testimony could be relied on. Having reconsidered everything again, I remain satisfied that it is safe to place weight on Mr M's testimony when considering what most likely happened at the Time of Sale.

The Lender has pointed to the email and letter sent to the Supplier and PR respectively, and highlighted that these do not at any stage set out that the Fractional Club was either sold as an investment, nor that it was bought for that reason.

I will begin by addressing the letter sent by Mr and Mrs M to the PR dated 12 March 2020. I had considered what they had said in this letter as part of my provisional deliberations, as it was sent to us by the PR in its original submissions. It was written following a holiday Mr and Mrs M had taken as part of their membership, and set out their reasons for why they wanted to terminate their membership, and provided some photographs taken on this latest holiday to support their assertion that the standard of the accommodation they had been given was poor.

The Letter set out, in summary:

- It was near impossible to get their first or second choice of accommodation and usually ended up with something which was not the 5 star as promised.
- They were unable to get the cheap flights they were promised.
- The representatives only ever tried to get them to upgrade.
- The best accommodation went to people the Supplier was trying to sell memberships to.
- They did not receive 5-star accommodation, had to endure the noise of workmen on the latest holiday, and found others had been allocated better accommodation despite booking later than they had.
- They had previously complained about the lack of standards. They were told the only way to get out of their previous 'points' membership which had a "Perpetuity Clause" was to exchange it to the Fractional Club which had a term of approximately 20 years.

This letter, written two years after the statement, sets out clearly that Mr and Mrs M were unhappy with the holidays the Fractional Club was providing them, and how it had not provided what they were told it would. And it is clear, in my view, that as this letter was written soon after a holiday that Mr and Mrs M were particularly unhappy with, the focus of the letter is clearly about these problems. It is not, in my opinion, significant that there is no mention in the letter of the membership being originally sold as an investment, nor of the potential £40,000 return, because that was not what the letter was about. It was about the problems that they were experiencing with the membership up to that point.

I acknowledge that at the end of the letter they have said that they were told that buying the Fractional Club was the only way to avoid the 'perpetuity' of their VC membership. But as I said in the PD, and I maintain now, I don't think this was the only reason they made the purchase.

It is, as I said in the PD, important to put their purchase of the Fractional Club in the context of their other previous purchases. They had been members of the Supplier's VC for several years, and this membership only provided them with holiday rights. Then, in September 2012 Mr and Mrs M seem to have made a change to the way they used their membership. Trading in some of their VC points towards the outright purchase of one of the Supplier's holiday properties but keeping some would indicate, in my opinion, that they wanted to retain the flexibility of the timeshare, alongside having a fixed holiday home to use. Then, at the Time of Sale, they traded in their remaining VC points towards the Fractional Club membership, and the major difference between this and their VC (other than the shorter membership term) was the investment potential of the Allocated Property. So, when taken in the context of their previous outright property purchase, it seems to me that this Fractional Club membership purchase was likely to have been made along the same lines of property ownership.

So, while I agree that the shorter membership term was attractive to Mr and Mrs M, for the reasons set out above and in the PD, I don't think it was the reason they ultimately decided to buy it.

The Lender has provided a copy of an email sent by Mr and Mrs M to the Supplier, dated 16 June 2020 in which they sought the Supplier's help in terminating their membership. This set out the reasons they were unhappy with the membership, but again, as the Lender points out, no mention is made of the membership being sold as an investment, nor of the potential profit of £40,000 as set out in the statement.

But again, I do not think this provides evidence that the membership was *not* sold as an investment, nor that the above representation was not made. It is just not mentioned in this email. The email focusses on the problems that they had personally experienced with the membership up until that point. After all, the investment element and the potential return would not be significant until the end of the membership term, so it not being mentioned in this email does not, in my view, suggest that it was *not* sold in this way. And it should be noted that in this email Mr and Mrs M are not looking to simply terminate their membership – they are looking to come to an amicable settlement with the Supplier – which suggests that they considered their membership to have a value that required consideration.

So, having given careful consideration to the contents of the letter and email, and everything the Lender has said about them, I do not think that they cast sufficient doubt over what Mr M has said in his statement. I remain satisfied that I am able to place weight on Mr M's testimony when considering what most likely happened at the Time of Sale.

Was there a breach of Regulation 14(3) of the Timeshare Regulations?

The Lender has said that the PD was premised on a material error of law in its approach to the prohibition under Regulation 14(3) of the Timeshare Regulations. It said the PD had said

that the mere existence of the *'prospect of a financial return'* constituted an *'investment',* and in doing so falls into error by conflating two meanings of the word 'return': (i) a 'return on investment', which is normally understood to mean the measure of profit (the return) on the original investment; and (ii) a customer being told that some money will be 'returned' upon sale, which carries no connotation of financial gain/profit. The Lender said that the former is what must not be marketed under the Timeshare Regulations; and the latter is an inherent feature of fractional products and does not breach Regulation 14(3).

But I don't think the Lender has understood the point that was being made here. In the PD I set out what Regulation 14(3) said:

> *"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."*

And then I set out the definition of the word 'investment' I was using:

> *"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."*

But the Fractional Club was asset-backed by an Allocated Property, and the share in this property clearly constituted an investment as it offered the member the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But there was no conflation of the word 'return' because I made it clear that the fact that the fractional 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 <u>as an investment</u>. 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*. So, for the avoidance of doubt, I am saying that the Timeshare Regulations did not ban products such as the Fractional Club - they just regulated how such products were marketed and sold.

And as regards the point the Lender has made about the disclaimers included in the contractual documentation actually evidencing <u>compliance</u> with the regulations, I agree with the Lender to the extent that the disclaimers did set out that the membership should *not* be looked at as a financial investment, and it is likely that Mr and Mrs M signed to say they had read and understood that. But these disclaimers were contained in documents which would have been given to Mr and Mrs M to sign *after* they had been through the sales presentation, and *after* they had agreed to make the purchase on the basis of the presentation and what they had been told by the Supplier. And as I set out, that presentation suggested that the membership could lead to a financial gain (i.e. a profit) from the sale of the associated Allocated Property. So, I think it unlikely that, having made a decision to purchase on the basis of what they had seen and heard, the disclaimers would have done much to dissuade Mr and Mrs M from thinking that the membership was an investment. It is also 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.

<u>Has the incorrect test been applied in determining whether the relationship was unfair?</u>

Having thought about what the Lender has said here, it appears to have misunderstood what I set out in the PD. The burden of proof has not been reversed here. It is clear it was

because the Supplier's breach of Regulation 14(3) at the Time of Sale was material to their purchasing decisions, that I decided that the associated credit relationships had been rendered unfair.

So, whilst I acknowledge that there were other aspects of the Fractional Club membership that Mr and Mrs M were attracted to, I think, having considered everything that has been submitted, Mr and Mrs M were motivated to make their Fractional Club purchase because of the associated share in the Allocated Property and the possibility of a profit. And because of that, the breach of Regulation 14(3) by the Supplier was material to the purchasing decision they ultimately made, and this rendered their associated credit relationship with the Lender unfair to them.

Conclusion

Having reconsidered everything following the responses to the PD, I remain satisfied that this complaint ought to be upheld. I think the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs M under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A.

Putting things right

In the PD I 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 M. Neither side has made any comment on my proposed redress, so I see no reason to depart from my provisional thoughts on this issue.

For the avoidance of doubt, I shall set out my directions below.

Fair Compensation

Having found that Mr and Mrs M would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under Section 140A of the CCA, I think it would be fair and reasonable to put 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 that Mr and Mrs M both 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 M were existing VC members, and their membership was traded in against the purchase price of Fractional Club membership. Under their VC membership, they had a number of VC points. And, like Fractional Club membership, they had to pay annual management charges as VC members. So, had Mr and Mrs M not purchased Fractional Club membership, they would have always been responsible for paying an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr and Mrs M 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 VC members.

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

(1) The Lender should refund Mr and Mrs M'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 M's Fractional Club annual management charges paid after the Time of Sale and what their VC 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 M used or took advantage of; and

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

(6) If Mr and Mrs M'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 M 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 M a certificate showing how much tax it's taken off if they ask for one.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M and Mrs M to accept or reject my decision before 27 March 2026.

Chris Riggs
Ombudsman