DRN-5018248

The complaint

Ms C and Mr P's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) being party to unfair credit relationships 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

Ms C and Mr P were existing members of a timeshare they had purchased from a timeshare provider (the 'Supplier').

While on a holiday, Ms C and Mr P purchased a new membership of a timeshare (the 'Fractional Club 1') from the Supplier on 30 September 2012 (the 'Time of Sale 1'). They entered into an agreement with the Supplier to buy 2,832 fractional points at a cost of £46,376 (the 'Purchase Agreement 1'). But after trading in their existing timeshare, they ended up paying £9,868 for membership of the Fractional Club.

Unlike their previous timeshare membership, the Fractional Club membership was asset backed – which means it gave Ms C and Mr P 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 1') after their membership term ends.

Ms C and Mr P paid for their Fractional Club 1 membership by taking finance of £9,868 from the Lender in their joint names (the 'Credit Agreement 1').

On 8 May 2013 Ms C and Mr P traded in their Fractional Club 1 membership[1] and purchased a new membership (the 'Fractional Club 2') from the Supplier (the 'Time of Sale 2'). They entered into an agreement with the Supplier to buy 3,360 fractional points at a cost of £54,903 (the 'Purchase Agreement 2'). But after the trade in value of Fractional Club 1 was applied they ended up paying £8,527. And like their previous Fractional Club 1 membership, this included a share in the net sales proceeds of the property named on the Purchase Agreement 2 (the 'Allocated Property 2') after their membership term ends.

Ms C and Mr P paid for their Fractional Club 2 membership by taking finance of £8,527 from the Lender in their joint names (the 'Credit Agreement 2').

Ms C and Mr P – using a professional representative (the 'PR') – wrote to the Lender on 14 August 2017 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at both Time of Sale 1 and Time of Sale 2 giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. The Lender being party to an unfair credit relationship under the Credit Agreements and

[1] By trading in their membership of Fractional Club 1, Ms C and Mr P no longer have any rights to any of the net sale proceeds of the Allocated Property 1.

related Purchase Agreements for the purposes of Section 140A of the CCA.

(1) Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale

Ms C and Mr P say that the Supplier made a number of pre-contractual misrepresentations at Time of Sale 1 and Time of Sale 2 – namely that the Supplier told them:

1. The Fractional Club membership had a guaranteed end date when that was not true.
2. They were buying an interest in a specific piece of "real property" when that was not true.
3. The Fractional Club membership was an "investment" when that was not true.

Ms C and Mr P say that they have a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Ms C and Mr P.

(2) Section 140A of the CCA: the Lender's participation in an unfair credit relationship

The Letter of Complaint set out several reasons why Ms C and Mr P say that the credit relationships between them and the Lender were unfair to them under Section 140A of the CCA. The reasons set out were the same in respect of both of the relationships under Credit Agreement 1 and Credit Agreement 2. In summary, they include the following:

1. The misrepresentations made by the Supplier as part of the precontractual negotiations during Time of Sale 1 and Time of Sale 2.
2. The contractual terms setting out (i) the duration of their Fractional Club memberships and/or (ii) the obligation to pay annual management charges for the duration of their memberships, were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
3. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions and/or aggressive commercial practices under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.

The Lender dealt with Ms C and Mr P's concerns as a complaint and issued its final response letter on 2 October 2017, rejecting it on every ground.

Ms C and Mr P, via the PR, then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, partially upheld the complaint on its merits.

He thought Ms C and Mr P's complaint of unfairness in the credit relationship with the Lender in respect of Credit Agreement 1 ought to be upheld. He thought it was likely that the Supplier had marketed and sold Fractional Club 1 membership as an investment to Ms C and Mr P at the Time of Sale 1 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 resulting credit relationship between the Lender and Ms C and Mr P was rendered unfair to them for the purposes of section 140A of the CCA.

However, the Investigator didn't think the Lender was party to an unfair credit relationship with Ms C and Mr P resulting from Credit Agreement 2. He also didn't think there was enough evidence to persuade him that any misrepresentations were made by the Supplier at

either Time of Sale 1 or Time of Sale 2. The Investigator set out how he thought the redress due to Ms C and Mr P ought to be calculated by the Lender.

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

Having considered everything I thought Ms C and Mr Ps' complaint ought to be upheld, which was a different outcome to that reached by the Investigator, so I set out my initial thoughts in a provisional decision (the 'PD'). 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 3.6.4 R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (when appropriate), what I consider to have been good industry practice at the relevant time.

I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:

- *The CCA (including Section 75 and Sections 140A-140C).*
- *The law on misrepresentation.*
- *The Timeshare Regulations.*
- *The UTCCR.*
- *The CPUT Regulations.*
- *Case law on Section 140A of the CCA – including, in particular:*
    - *The Supreme Court's judgment in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 ('Plevin') (which remains the leading case in this area).*
    - *Patel v Patel [2009] EWHC 3264 (QB).*
    - *The Supreme Court's judgment in Smith v Royal Bank of Scotland Plc [2023] UKSC 34 ('Smith').*
    - *Carney v NM Rothschild & Sons Ltd [2018] EWHC 958 ('Carney').*
    - *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm) ('Kerrigan').*
    - *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').*

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But they represented a minimum standard. And as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time – which, in this complaint, includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code').

Ms C and Mr P's complaint is in relation to two separate and distinct sales and the two associated credit agreements. As such I need to consider each sale, and the linked credit

agreement separately.

However, before I explain my findings, 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 Ms C and Mr P's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the Lender ought to have accepted and paid a claim under Section 75 of the CCA, and all of the alleged reasons there was an unfair debtor-creditor relationship, save for the allegation that the memberships were sold as investments. This is because 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 both the Fractional Club 1 and Fractional Club 2 memberships to Ms C and Mr P as an investment, thereby rendering the credit relationship between them and the Lender unfair to them for the purposes of Section 140A of the CCA. And even if those other aspects of the complaint ought to succeed, the redress I'm currently proposing puts Ms C and Mr P in the same or a better position than they would be if the redress was limited to their other allegations.

What's more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

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

As Section 140A of the CCA is relevant law in the context of this complaint, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationships between Ms C and Mr P and the Lender were unfair. And as I have said, I need to consider the sales of Fractional Club 1 and 2, and the credit relationships formed from each, separately.

Under Section 140A of the CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement 1 and 2) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as "a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]". And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to "finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Ms C and Mr P's membership of the Fractional Club 1 and 2 were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under Section 140(1)(c) CCA.

Antecedent negotiations under Section 56 cover both the acts and omissions of the Supplier, as Lord Sumption made clear in Plevin, at paragraph 31:

"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.' […] Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."

And this was recognised by Mrs Justice Collins Rice in Shawbrook & BPF v FOS at paragraph 135:

"By virtue of the deemed agency provision of s.56, therefore, acts or omissions 'by or on behalf of' the bank within s.140A(1)(c) may include acts or omissions of the timeshare company in 'antecedent negotiations' with the consumer".

In the case of Scotland & Reast v British Credit Trust Limited [2014], the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that "negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law" before going on to say the following in paragraph 74:

"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[2]

So, the Supplier is deemed to be the Lender's statutory agent for the purpose of the pre-contractual negotiations.

[2] The Court of Appeal's decision in *Scotland* was recently followed in *Smith*.

What's more, the scope of that responsibility extends to both acts and omissions by the Supplier as the Supreme Court in Plevin made clear when it referred to 'acts or omissions' when discussing Section 56. And as Section 56(3)(b) says that an applicable agreement can't try to relieve a person from liability for 'acts or omissions' of any person acting as, or on behalf of, a negotiator, it must follow that the reference to 'omissions' would only be necessary because they can be attributed to the creditor under Section 56.

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in Patel (which was recently approved by the Supreme Court in the case of Smith), that determining whether or not the relationship complained of was unfair had to be made "having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination" – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in Plevin (at paragraph 17):

"Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with […] whether the creditor's relationship with the debtor was unfair."

Instead, it was said by the Supreme Court in Plevin that the protection afforded to debtors by Section 140A is the consequence of all of the relevant facts.

I have considered the entirety of both of the credit relationships between Ms C and Mr P and the Lender along with all of the circumstances of the complaint.

When coming to my conclusion, and in carrying out my analysis, I have looked at all the evidence provided to me from both parties, including the Supplier's sales processes – which includes:

1. *The Supplier's sales and marketing practices at the Time of Sale 1 and 2 – which includes training material that I think is likely to be relevant to the sale; and*
2. *The provision of information by the Supplier at the Time of Sale 1 and 2.*

I have then considered the impact of (1) and/or (2) on the fairness of the credit relationships between Ms C and Mr P and the Lender.

<u>Ms C and Mr P's complaint that Fractional Club 1 and Fractional Club 2 were sold as investments in breach of Regulation 14(3) of the Timeshare Regulations</u>

The Lender does not dispute, and I am satisfied that both of Ms C and Mr P's Fractional Club 1 and 2 memberships met the definition of a "timeshare contract" and 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 both Time of Sale 1 and Time of Sale 2:

"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, although not explicitly set out as an alleged breach of Regulation 14(3) in their Letter of Complaint, Ms C and Mr P say that the Supplier did exactly that at the Times of Sale.

In addition to this, Ms C and Mr P have set out in a statement dated 15 August 2016 their recollections of what happened in the run up to and during both sales.

In relation to the sale of Fractional Club 1, they said, as far as is relevant to this complaint:

> *"We were also advised that [the Supplier] had re-structured things, by introducing a new product called Fractional Ownership, whereby clients could get out of the Vacation Points system and purchase part of an actual property, which would be an appreciating asset for us to sell, at the end of the Fractional Ownership's 19 year term…"*
>
> *"The Fractional Ownership was sold to us as a way out of the Vacation Club, and also a way of getting a return for our money in the future."*

And in relation to the purchase of Fractional Club 2, they said, as far as is relevant here:

> *"In May 2013, whilst staying at [the Supplier]'s Paradise Resort in Tenerife, we were invited to another presentation. Thinking we already had some valuable equity in property, we agreed to upgrade, by purchasing further Fractional Rights. We were told that purchasing the further Fractional Rights would enable us to change our allocated property to a more luxurious allocated property in the Paradise resort, Tenerife, which we were happy with, as it appeared to be excellent for kids, with big apartments…"*

Ms C and Mr P allege,

(1) *There were three aspects to their investment as Fractional Club members: relinquishment of their existing arrangement, holiday rights and a profit on the sale of the Allocated Property; and*

(2) *They were told by the Supplier that they would get their money back or more during the sale of the Fractional Club memberships.*

And therefore the Supplier breached Regulation 14(3) at the Time of Sale 1 and 2.

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

Ms C and Mr P's share in the Allocated Property 1 and 2 clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

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

To conclude, therefore, that the Fractional Club memberships were marketed or sold to Ms C and Mr P as investments 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 investments, 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 in both sales to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Ms C and Mr P, 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 memberships were not sold to Ms C and Mr P as an investment. For example, in the Member's Declaration document, there are 15 statements, signed as having been read. These include:

> *"5. We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that [the Supplier] makes no representation as to the future price or value of the Fraction."*

And the Standard Information form, for example, stipulated the following on page 8 under the heading "Primary Purpose":

> *"The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for direct purposes of a trade in nor as an investment in real estate. [The Supplier] makes no representation as to the future price or value of the Allocated Property or any Fractional rights."*

When read on their own and together, these disclaimers go some way to making the point that the purchase of Fractional Rights shouldn't be viewed as an investment. But they weren't to be read on their own. They had to be read in conjunction with what else the Standard Information Form had to say, which, for both sales, included the following disclaimer:

> ***11. Investment advice***
>
> *The Vendor, any sales or marketing agent and the Manager and their related businesses (a) are not licenced investment advisors authorized by the Financial Services Authority to provide investment or financial advice; (b) all the information has been obtained solely from their own experience as investors and is provided as general information only and as such it is not intended for use as a source of investment advice and (c) all purchasers are advised to obtain competent advice from legal, accounting and investment advisors to determine their own specific investment needs; (d) no warranty is given as to any future values or returns in respect of an Allocated Property.*

This disclaimer seems to have been aimed at distancing the Supplier from any investment advice that was given by its sales agents, telling customers to take their own investment advice, and repeating the point that the returns from membership from the Fractional Club weren't guaranteed.

Yet I think it would be fair to say that, while a prospective member who read the disclaimer in

question might well have thought that they would be wise to seek professional investment advice in relation to membership of the Fractional Club, rather than rely on anything they might have been told by the Supplier, it wouldn't have done much to dissuade them from regarding membership as an investment. In fact, I think it would have achieved rather the opposite.

It's also difficult to explain why it was necessary to include such a disclaimer in the Standard Information Form if there wasn't a very real risk of the Supplier marketing and selling membership of the Fractional Club 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.

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And there are a number of strands to Ms C and Mr P's allegations that the Supplier breached Regulation 14(3) at the Times of Sale, including (1) that membership of the Fractional Club was expressly described as an "investment" in several different contexts and (2) that membership of the Fractional Club could make them a financial gain and/or would retain or increase in value.

So, I have considered:

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

(2) *whether the Supplier's actions constituted breaches of Regulation 14(3).*

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

How the Supplier marketed and sold the Fractional Club membership

During the course of 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 a document called "2011 Spain PTM FPOC 1 Practice Slides Manual" (the '2011 Fractional Training Manual')

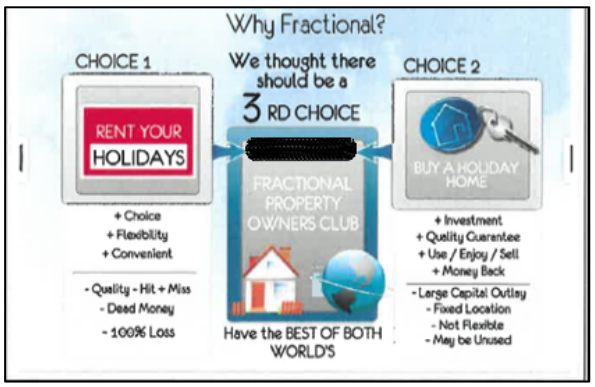
As I understand it, the 2011 Fractional Training Manual was used throughout the sale of the Supplier's first version of a product called the Fractional Property Owners Club – which I've referred to and will continue to refer to as the Fractional Club. And given the dates of the sales to which this complaint relates, and having seen the sales documentation relating to each, I'm satisfied that both sales were this first version of the Fractional Club, so the training material I go on to describe would have been applicable to both sales.

It isn't entirely clear whether Ms C and Mr P would have been shown the slides included in the Manual. But it seems to me to be reasonably indicative of:

(1) *the training the Supplier's sales representatives would have got before selling both of Ms C and Mr P's Fractional Club memberships; and*

(2) *how the sales representatives would have framed the sale of Fractional Club membership to Ms C and Mr P.*

Having looked through the manual, my attention is drawn to page 6 (of 41) – which includes the following slide on it:

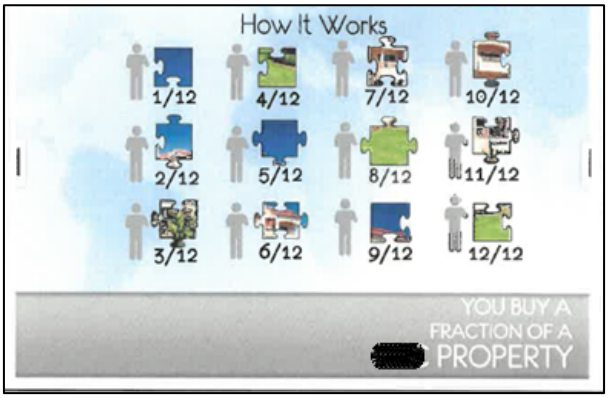


This slide titled "Why Fractional?" indicates that sales representatives would have taken Ms C and Mr P through three holidaying options along with their positives and negatives:

1. *"Rent Your Holidays"*
2. *"Buy a Holiday Home"*
3. *The "Best of Both Worlds"*

It was the first slide in the 2011 Fractional Training Manual to set out any information about Fractional Club membership, and I think it suggests that sales representatives were likely to have made the point to Ms C and Mr P that membership combined the best of (1) and (2) – which included choice, flexibility, convenience and, significantly, an investment they could use, enjoy and sell before getting money back.

The manual then moved on to two slides (on pages 7 and 8) concerned with how Fractional Club membership worked:



I'm aware that the Supplier says that 90-95% of its time during its sales presentations was focused on holidays rather than the sale of an allocated property. Having looked through the 2011 Fractional Training Manual, it seems to me that there were 10 slides on how Fractional Club membership worked before the slides moved on to sections titled "Peace of Mind", "Resort Management" and "Which Fractional". And as 5 of the 10 slides look like they focused on holidays, there seems to me to have been a fairly even split during the Supplier's sales presentations between marketing membership of the Fractional Club as a way of buying an interest in property and as a way of taking holidays.

However, even if more time was spent on marketing membership of Fractional Club membership as a way of taking holidays rather than buying an interest in property, as the slides above suggest, in my view, that the Supplier's sales representatives would have probably led prospective members to believe that a share in an allocated property was an investment (after all, that's what the slide titled "Why Fractional" expressly described it as), I can't see why the Supplier wouldn't have been in breach of Regulation 14(3) in those circumstances.

I acknowledge that there was no comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Ms C and Mr P 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)).'"[3] *And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.*

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

Indeed, if I'm wrong about that, I find it difficult to explain why, in paragraphs 77 and 78 followed by 99 and 100 of Shawbrook & BPF v FOS when, Mrs Justice Collins Rice said the following:

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[3] 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

"[…] 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."

And as the slides clearly indicate that the Supplier's sales representative was likely to have led them to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e., a profit) in the future, I don't find Ms C and Mr P either implausible or hard to believe when they say they were told they would "purchase part of an actual property [i.e., the Allocated Property 1], which would be an appreciating asset for us to sell…", and in relation to Fractional Club 2 "…thinking we already had some valuable equity in property, we agreed to upgrade, by purchasing further Fractional Rights. We were told that purchasing the further Fractional Rights would enable us to change our allocated property to a more luxurious allocated property…". On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Ms C and Mr P were led by the Supplier to believe at the relevant time. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations at both the Time of Sale 1 and Time of Sale 2.

Were the Credit Relationships with the Lender Rendered Unfair?

Having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale 1 and Time of Sale 2, I now need to consider what impact those breaches had on the fairness of the credit relationships between Ms C and Mr P and the Lender under the Credit Agreement 1 and Credit Agreement 2. Before considering each relationship separately, I will set out the legal background that I have taken into account.

As the Supreme Court's judgment in Plevin makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in Carney and Kerrigan (respectively) on causation.

In Carney, HHJ Waksman QC said the following in paragraph 51:

"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"

And in Kerrigan, HHJ Worster said this in paragraphs 213 and 214:

"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court ***may*** *make an order* ***if*** *it determines that the relationship is unfair to the debtor. […]*

[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

So, it seems to me that, if I am to conclude that the breaches of Regulation 14(3) led to credit relationships between Ms C and Mr P and the Lender that were unfair to them and warranted relief as a result, whether the Supplier's breaches of Regulation 14(3)[4] led them to enter into the purchase agreements and related credit agreements is an important consideration.

On my reading of Ms C and Mr P's testimony, the prospect of a financial gain from the purchase of Fractional Club 1 membership was an important and motivating factor when they decided to go ahead with their purchase. That doesn't mean they were not interested in holidays. Their own testimony and timeshare purchase history demonstrates that they quite clearly were. And that is not surprising given the nature of the product at the centre of this complaint. But I have not seen enough evidence to persuade me that the prospect of a financial gain from Fractional Club membership was so insignificant, in their view, compared to the holiday rights that came with the membership that their "desire" for holidays rendered the Supplier's breach of Regulation 14(3) unimportant to the decision they ultimately made.

Ms C and Mr P have not said or suggested, for example, that they would have pressed ahead with the purchases in question had the Supplier not led them to believe that Fractional Club membership was an appealing investment opportunity. They were after all, prior to their purchase of Fractional Club 1, existing members of a timeshare arrangement, but one which did not offer the prospect of a financial return. If buying more holiday rights was the only or even the main reason they made the purchase, I'm unsure why they would not have simply increased their non-fractional points in their existing membership.

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[4] which, having taken place during its antecedent negotiations with Ms C and Mr P, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender.

The Lender may say, in response to this provisional decision, that Ms C and Mr P may have likely wanted to purchase the fractional membership due to its term being shorter. I accept that having a shorter membership term was likely one reason why Ms C and Mr P were interested in Fractional Club 1 membership, but I'm not sufficiently persuaded that this was the only reason, or that the prospect of a profit wasn't at all important to them.

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 not have retained their existing timeshare membership, and would have pressed ahead with their purchase of Fractional Club 1 regardless.

And I think the same in relation to their purchase of Fractional Club 2. As the membership being sold to them was the same product as Fractional Club 1, I consider it likely that it was sold in the same manner, and that the potential investment return was likely to have been a determining factor in Ms C and Mr P's purchasing decision. Indeed, Ms C and Mr P have said in their testimony that they considered they already had "some valuable equity" when they entered into Fractional Club 2, and saw its purchase as an opportunity to "…change our allocated property to a more luxurious allocated property…". Afterall, the Fractional Club 2 membership promised Ms C and Mr P five fractions of the proceeds of the sale of the allocated property at the end of the membership term, as opposed to the three fractions they would have got with Fractional Club 1.

And as I've said, given that it was likely that the sale of Fractional Club 2 was pitched as an investment in breach of Regulation 14(3), and as I think it likely that the potential for an increased financial return was an important driver for Ms C and Mr P in their purchase of Fractional Club 2 membership, it follows that the associated credit relationship under Credit Agreement 2 with the Lender was rendered unfair to them as a result.

My Provisional Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Ms C and Mr P under both the Credit Agreement 1 and Credit Agreement 2 for the purposes of Section 140A of the CCA. So, I think it is fair and reasonable that I uphold Ms C and Mr P's complaint.

Fair Compensation

Having found that Ms C and Mr P would not have agreed to purchase both the Fractional Club 1 and Fractional Club 2 memberships were it not for the breaches of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of those breaches meaning that, in my view, the associated credit relationships between the Lender and Ms C and Mr P were 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 memberships (i.e., not entered into the Purchase Agreement 1 and Purchase Agreement 2), and therefore not entered into the associated credit agreements, provided Ms C and Mr P agree to assign to the Lender their 3,360 Fractional Points or hold them on trust for the Lender if that can be achieved.

As there are two separate credit relationships which were rendered unfair, these must be taken into account separately when it comes to awarding compensation.

Here's what I think needs to be done to compensate Ms C and Mr P with that being the case – whether or not a court would award such compensation.

Credit Agreement 1:

(1) The Lender should refund Ms C and Mr P the repayments they made to it under the Credit Agreement 1.

(2) In addition to (1), the Lender should also refund the annual management charges Ms C and Mr P paid as a result of Fractional Club 1 membership (if any).

(3) The Lender can deduct

i. *The value of any promotional giveaways that Ms C and Mr P used or took advantage of before they traded in their Fractional Club 1 membership; and*

ii. *The market value of the holidays* Ms C and Mr P took using their Fractional Points from Fractional Club 1.*

(the 'Net Repayments')

**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 Ms C and Mr P 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 1 seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.*

(4) Simple interest[5] 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 Ms C and Mr P's credit file(s) in connection with Credit Agreement 1.

Credit Agreement 2:

(1) The Lender should refund Ms C and Mr P the repayments they made to it under the Credit Agreement 2, and cancel any outstanding balance if there is one.

(2) In addition to (1), the Lender should also refund the annual management charges Ms C and Mr P paid as a result of Fractional Club 2 membership (if any).

(3) The Lender can deduct

i. *The value of any promotional giveaways that Ms C and Mr P used or took advantage of before they traded in their Fractional Club 2 membership; and*

ii. *The market value of the holidays* Ms C and Mr P took using their Fractional Points from Fractional Club 2.*

(the 'Net Repayments')

**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 Ms C and Mr P took using their Fractional Points, deducting the relevant annual*

[5] 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.

management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement 2 seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

(4) Simple interest[6] 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 Ms C and Mr P's credit file(s) in connection with Credit Agreement 2.

It seems from the submissions, that Ms C and Mr P's membership of Fractional Club 2 has been suspended for non-payment of the required management charges. If that is the case, I can see it would be possible that Ms C and Mr P are still entitled to reinstate their Fractional Club 2 membership, which means the remedy I have proposed above does risk providing them with an unjustified windfall. So, to mitigate this risk, as I've already said, Ms C and Mr P will have to agree to hold the benefit of 3,360 Fractional Points for the Lender, or assign them to the Lender if that can be achieved.

However, it is possible that the Supplier might pursue Ms C and Mr P for other costs in addition to the annual management charges arising from their Fractional Club 2 membership, so there is also the possibility of continuing detriment that I think needs addressing. So, in keeping with what I've said above, the Lender should indemnify Ms C and Mr P against any other liabilities accruing from 8 May 2013 onwards that result from their ownership of Fractional Rights. This, together with what I've said in the paragraphs above will achieve, as closely as I can in this complaint, the same financial position for Ms C and Mr P as if they had never joined the Fractional Club in the first place.

The PR responded to my PD and accepted it. The Lender also responded and said while they didn't agree with some of the findings made in my PD, they would not challenge it overall.

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.

Following the responses from both parties, I've considered all the evidence and arguments afresh. As neither party has challenged the outcome that I reached in my PD provisional, I see no reason to reach a different conclusion in this final decision.

My final decision

For the reasons set out above, I uphold this complaint and direct Shawbrook Bank Limited to compensate Ms C and Mr P in line with the steps set out above under the heading *Fair Compensation*.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms C and Mr P to accept or reject my decision before 10 October 2024.

Chris Riggs
Ombudsman

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[6] 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.