DRN-5100750

The complaint

Mr R's complaint is, in essence, that Clydesdale Financial Services Limited trading as Barclays Partner Finance (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him 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.

Mr and Mrs R purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 8 October 2012 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 4,720 fractional points at a cost of £9,226.00 (the 'Purchase Agreement'), trading in their existing timeshare holiday club membership as part of the transaction. The membership term was 19 years.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs R 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 R paid for their Fractional Club membership by taking finance of £9,226.00 from the Lender in Mr R's name only (the 'Credit Agreement'). Mr R paid off the loan in full in November 2013.

Mr and Mrs R's Fractional Club membership was terminated by mutual agreement between Mr and Mrs R and the Supplier with effect from December 2016, following a formal request they made earlier that year due to ill health.

Mr and Mrs R wrote to the Lender, which it received on 16 August 2018 (the 'Letter of Complaint'), to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.

2. A breach of contract by the Supplier giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.

3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

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

Mr and Mrs R say that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. Persuaded them to purchase more points to overcome the problems they were experiencing with availability and having to pay more when booking the holidays they wanted, but the same problems persisted.

Mr and Mrs R 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 Mr and Mrs R.

(2) Section 75 of the CCA: the Supplier's breach of contract

Mr and Mrs R say that they found it difficult to book the holidays they wanted when they wanted and had to pay extra on top of using their points.

As a result of the above, Mr and Mrs R say that they have a breach of contract claim against the Supplier, 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 Mr and Mrs R.

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

Although Mr and Mrs R's Letter of Complaint did not refer specifically to Section 140A I think it is clear that they had concerns about the fairness of Mr R's relationship with the Lender and that is one of the reasons they made the complaint. As consumers I would not expect them to know the specific parts of the CCA that would deal with their concerns. So, in line with my inquisitorial remit when deciding complaints, I have considered Section 140A of the CCA when making my decision, since I think this is particularly relevant to this complaint.

The Letter of Complaint set out why Mr and Mrs R think that the credit relationship between Mr R and the Lender was unfair to him under Section 140A of the CCA. Mainly this was that:

1. Fractional Club membership was marketed and sold to them as an investment, which would be a breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'), albeit they didn't mention the Timeshare Regulations.

2. The contractual terms setting out the obligation to pay annual management charges for the duration of their membership were unfair contract terms – the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR') are relevant to this.

3. They were pressured into purchasing Fractional Club membership by the Supplier.

The Lender dealt with Mr and Mrs R's concerns as a complaint and issued its final response letter on 14 September 2018, rejecting it on every ground. The Lender said that Mr and Mrs R had been timeshare members with the Supplier since 2000 – giving them annual points to spend on holidays with the supplier. Mr and Mrs R upgraded their membership and/or purchased additional points on multiple occasions over the years.

Mr and Mrs R then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator 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 R at the Time of Sale in breach of Regulation 14(3) of 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 R was rendered unfair on him for the purposes of section 140A of the CCA.

The Lender did not agree with the Investigator's assessment and asked for more time to respond fully. Despite this being over 11 months ago, the Lender has not provided any

further response. As such, the complaint has been passed to me so I can make a decision, which is the final stage in our complaint handling process.

During the course of the complaint Mr R has passed away. As its sole executor, Mrs R is representing the estate of Mr R in this complaint.

I issued a provisional decision on 7 October 2024 explaining why I was planning to uphold this complaint and what I was planning to tell the Lender to do to put things right. A copy of this is below.

START OF COPY OF MY PROVISIONAL FINDINGS

The legal and regulatory context

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

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 Consumer Protection from Unfair Trading Regulations 2008 (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).
    - *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast').*
    - *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*').
    - 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 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').

What I've provisionally decided – and why

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

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr and Mrs R as an investment, which, in the circumstances of this complaint, rendered the credit relationship between Mr R and the Lender unfair to him 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 isn't necessary to make formal findings on all of them. This includes the allegations that:

- The Supplier misrepresented the Fractional Club membership to Mr and Mrs R.
- The Supplier breached the Purchase Agreement.
- The Lender ought to have accepted and paid the claim under Section 75 of the CCA.

Because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr R's estate in the same or a better position than it would be in if the redress was limited to misrepresentation or breach of contract.

What is 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, 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 relationship between the Mr R and the Lender was unfair.

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) 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 Mr and Mrs R's membership of the Fractional Club 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 s.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*, 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."[1]

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

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 the credit relationship between Mr R and the Lender along with all of the circumstances of the complaint and 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; and

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

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;

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 R and the Lender.

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs R'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 R say that the Supplier did exactly that at the Time of Sale – saying the following during the course of this complaint:

- *We were assured that we were investing in a popular resort.*

- *We were heavily misled and mis-sold by [the Supplier] as we were persuaded to invest in their holiday club membership.*

- *Regular attendances at […] presentations were stated to be a condition of being a member, in order to inform us of any changes, withdrawal of products and new developments to the accommodation in which we were invested.*

- *Each time we made a purchase it was because the presenters assured us that the new product they were promoting was better than the last one and would give us more security for our investment.*

- *Towards the end of our membership when we were trying to cease our membership due to being unable to book our 1st, 2nd, 3rd or 4th choice of holiday over a number of years and the increasing maintenance costs; we attended a presentation which lasted from breakfast at 10am until 5pm during which we were pressured into exchanging our Vacation Points for Fractional Property Owners Club. We were told that this would safeguard our investment for our family and could be sold back to [the Supplier] in the event of our death.*

- *We understand that this […] membership was for holidays, but this was not how it was portrayed at presentations we attended it was promoted as an investment in the provision of high quality accommodation for our family to use. In addition the change to Fractional Property ownership was presented as exchanging our investment in [high quality accommodation] for an investment in Property in order to safeguard our investment for our family.*

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

(1) They were consistently given the impression that the timeshare memberships they were purchasing were an investment.

(2) Specifically in relation to Fractional Club membership, they were told it was an investment in property, which would safeguard their investment for their family.

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

Mr and Mrs R's share in the Allocated Property 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 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 R 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 R, 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 R as an investment.

The member's declaration initialled and signed by Mr and Mrs R included the following points (number 5 of 15):

- *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 CLC makes no representation as to the future price or value of the Fraction.*

The 12-page information statement included the following on page 2:

- *Fractional rights have been designed to be used and enjoyed and not bought with the expectation or necessity of future financial gain.*

And the following on page 8:

- *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. CLC makes no representation as to the future pace or value of the Allocated Property or any Fractional rights.*

- *Investment advice: The Vendor, any sales or marketing agent and the Manager end their related businesses (a) are not licensed investment advisors authorized by the Financial Services Authority to provide investment or financial advice; (b) all information has been obtained solely from their own experiences 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) alt 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.*

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And there are a number of strands to Mr and Mrs R's allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that membership of the Fractional Club was expressly described as an *"investment*" in several different contexts and (2) that membership of the Fractional Club would safeguard their investment for their family.

So, I have considered:

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

(2) whether the Supplier's actions constitute a breach of Regulation 14(3).

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

How the Supplier marketed and sold the Fractional Club membership

It is clear that Mr and Mrs R were given a lot of information at the time of sale and signed many documents including:

1. Purchase Agreement
2. acknowledgement of withdrawal rights
3. member's declaration
4. credit application
5. Credit Agreement
6. "how we use your information" sheet
7. client compliance confirmation
8. an information statement

These documents all appear to have been signed on the same day in the same meeting, so it is plausible that Mr and Mrs R would not have read every part of every document. And it is not clear that the above disclaimers were specifically drawn to Mr and Mrs R's attention nor that their importance was highlighted to them. Their recollection suggests it is unlikely that they were, given that Mr and Mrs R were left with the impression that Fractional Club membership was an investment that would benefit their family.

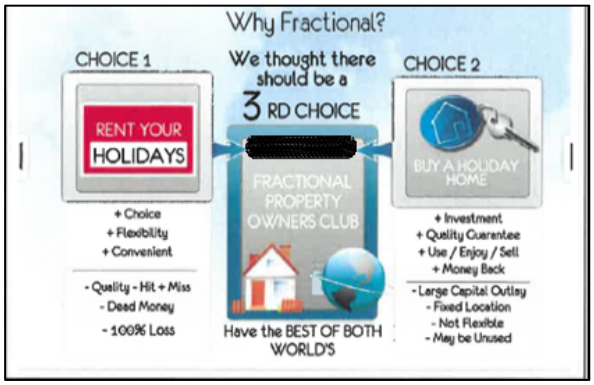
During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives – including a document called "2011 Spain PTM FPOC 1 Practice Slides Manual" (the '2011 Fractional Training Manual').

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. It isn't entirely clear whether Mr and Mrs R 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 Mr and Mrs R Fractional Club membership; and

2) how the sales representatives would have framed the sale of Fractional Club membership to Mr and Mrs R.

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 Mr and Mrs R through three holidaying options along with their positives and negatives:

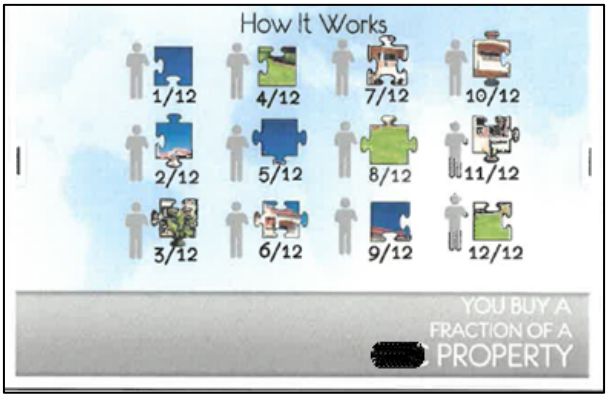
(1) "Rent Your Holidays"

(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 Mr and Mrs R 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 onto 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 Fractional Club membership as a way of taking holidays rather than buying an interest in property, because 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 Mr and Mrs R 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)).''* [2] 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.

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[2] 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

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 it's conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment.

Mr and Mrs R say, in their own words, that the Supplier positioned membership of the Fractional Club as an investment to them. And as I've said before, the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members – including Mr and Mrs R.

And as the slides clearly indicate that the Supplier's sales representative was likely to have led Mr and Mrs R 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 them either implausible or hard to believe when Mr and Mrs R say they viewed Fractional Club membership as an investment in property that would benefit their family.

On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mr and Mrs R 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.

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 R and the Lender under the Credit Agreement and related Purchase Agreement.

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 a breach of Regulation 14(3) led to a credit relationship between Mr R and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) (which, having taken place during its antecedent negotiations with Mr and Mrs R, 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) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On my reading of Mr and Mrs R'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. At the time of the presentation at which they agreed to purchase Fractional Club membership, Mr and Mrs R say they were seeking to give up their membership due to their ongoing dissatisfaction with the availability of the holidays they wanted to take (which had led to them allowing friends and family to use their points for holidays instead of them) and the increasing maintenance fees that were payable. But instead of this they were persuaded to purchase Fractional Club membership on the basis that it would give more security for their investment.

That doesn't mean they were not interested in holidays. Their own testimony 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 membership that their "desire" for holidays rendered the Supplier's breach of Regulation 14(3) unimportant to the decision they ultimately made.

Mr and Mrs R have not said or suggested, for example, that they would have pressed ahead with the purchase in question had the Supplier not led them to believe that Fractional Club membership was an appealing investment opportunity. And as they faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I have not seen enough to persuade me that they would have pressed ahead with their purchase regardless.

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 R 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.

Fair Compensation

Having found that Mr and Mrs R would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and Mr R was unfair under section 140A of the CCA, I think it would be fair and reasonable to put Mr R's estate back in the position it would have been in had Mr and Mrs R not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement.

With that being the case, here's what I think needs to be done to compensate the estate of Mr R – whether or not a court would award such compensation:

(1) The Lender should refund the estate of Mr R all repayments to it under the Credit Agreement.

(2) In addition to (1), the Lender should also refund the annual management charges Mr and Mrs R paid as a result of Fractional Club membership.

(3) The Lender can deduct

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

ii. The market value of the holidays* Mr and Mrs R took (or allowed friends and family to take) using their Fractional Points.

(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 Mr and Mrs R took (or allowed friends and family to take) 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.

(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.

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

My provisional decision

For the reasons I've explained, I provisionally uphold this complaint. I intend to tell Clydesdale Financial Services Limited trading as Barclays Partner Finance to pay the estate of Mr R fair compensation as set out above.

END OF COPY OF MY PROVISIONAL FINDINGS

The lender responded to my provisional decision by providing its response to the Investigator's assessment and asking if this would change my provisional decision.

I responded to the lender as follows:

> *"Thank you for re-sending your response to my provisional decision, which had not previously been received. This was largely a copy of your response to the Investigator's assessment (which we had not previously received) and did not address the provisional decision.*
>
> *In the main you appeared to be unhappy that the Investigator's assessment lacked detail and you weren't convinced the Investigator had properly considered the evidence including Mr R's recollections and allegations about what happened at the time of sale.*
>
> *In my provisional decision I took into account Mr and Mrs R's recollections of what happened and how the Fractional Club membership was presented to them, alongside the sales documents and what I know about how the Supplier sold Fractional Club membership at that time. I went into some detail in my provisional decision.*
>
> *The recollections set out in the Letter of Complaint related not just to the purchase of Fractional Club membership in 2012, but to Mr and Mrs R's experience with the Supplier since taking trial membership around 2001. While the letter lists a number of membership benefits that they were promised and does not mention the Fractional Club membership being sold to them as an "investment in property", it does describe the timeshares generally as being a way of "investing in a popular resort". The letter makes clear that Mr and Mrs R felt they had been misled and mis-sold to by the Supplier.*
>
> *Mr and Mrs R's submission to the Financial Ombudsman Service included a letter dated 22 October 2018, a copy of which I've attached, explaining why they were unhappy with your response to the complaint. This included the following references to Fractional Club membership being sold to them as an investment:*
>
> - *We were told that this would safeguard our investment for our family and could be sold back to CLC in the event of our death.*
>
> - *We understand that this CLC membership was for holidays, but this was not how it was portrayed at presentations we attended it was promoted as an investment in the provision of high quality accommodation for our family to use. In addition the change to Fractional Property ownership was presented as exchanging our investment in the Vacation Club for an investment in Property in order to safeguard our investment for our family.*
>
> *The letter also explained that many of the bookings made with Mr and Mrs R's Fractional Club membership points were made on behalf of friends and family, since Mr and Mrs R's could not book the holidays they wanted, which was a major reason they sought to exit from the membership. So, while their booking history would suggest they could book the holidays they want, their explanation is that they simply allowed others to use their points, so they did not go to waste.*

Mr and Mrs R submitted this complaint without the assistance of a professional representative. And I'm satisfied that what has been said in their letters reflects their recollections of what happened. It is clear they have concerns about how they were treated by the Supplier over 16 years, which included eight separate sales presentations where they were persuaded to make a purchase. Overall, I think their recollections about the sale of the Fractional Club membership are plausible and persuasive when considered alongside the other evidence in this case. And I'm not persuaded, on the basis of your response, to depart from the findings and conclusions set out in my provisional decision.

I'm mindful that you have not provided a full response to my provisional decision, which I trust goes into the sort of detail you felt was lacking in the Investigator's assessment. So, I wanted to give you a final chance to provide any further comments before I issue my final decision."

The Lender responded to say that it had not seen Mr and Mrs R's letter dated 22 October 2018 and having further considered the matter it would accept my findings. The Lender said that it would settle the matter as below, bearing in mind the loan was paid off on 18 November 2013, so there is no outstanding balance:

a. *Return to Mr R's Estate the Repayments Mr R made to the loan, along with any paid for but unused annual management charges he paid the Supplier as a result of the membership funded by BPF.*

b. *BPF will deduct from the above redress:*

    i. *the cost of any promotional giveaways given to The Late Mr R at the time of the Fractional Sale.*

    ii. *where applicable, any holiday benefit derived from holidays taken using the fractional membership using the holiday benefit deduction principles and methodology already shared with your service in the absence of any other evidence on value.*

    iii. *any rental income he may have received for the Fractional membership.*

    (The net repayment)

c. *Pay 8% simple interest per annum on each of the net repayments from the date each payment was made to the date this complaint is settled.*

In light of this, my final decision sets out what the Lender should do to put things right.

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.

For the reasons explained in my provisional decision and my subsequent response to the Lender, I uphold this complaint.

Having considered the Lender's proposed settlement, I'm satisfied that it is fair and reasonable to deduct from the settlement any rental income Mr R received from his Fractional Club membership as well as the other deductions mentioned in my provisional

decision.

Putting things right

To put things right, the Lender should:

(1) Refund to the estate of Mr R all repayments made under the Credit Agreement; and

(2) Refund the annual management charges Mr and Mrs R paid as a result of Fractional Club membership.

(3) The Lender can deduct

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

ii. The market value of the holidays* Mr and Mrs R took (or allowed friends and family to take) using their Fractional Points; and

iii. Any rental income received through their Fractional Club membership.

(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 Mr and Mrs R took (or allowed friends and family to take) 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.

(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.

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

My final decision

I uphold this complaint. I direct Clydesdale Financial Services Limited trading as Barclays Partner Finance to put things right as set out above in the "Putting things right" section.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mr R to accept or reject my decision before 4 December 2024.

Phillip Lai-Fang
Ombudsman