DRN-5149635

The complaint

Miss I'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 her 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.

The complaint is only in Miss I's name as only she is named on the credit agreement. But the timeshare in question was in both her name and Mr S's name, so I'll refer to them both throughout, where relevant.

What happened

Miss I and Mr S purchased a trial membership of a timeshare from a timeshare provider (the 'Supplier') in January 2016.

They then purchased full membership of the timeshare (the 'Fractional Club') from the Supplier on 6 November 2016 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 850 fractional points at a cost of £13,813 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Miss I and Mr S 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.

Miss I and Mr S paid for their Fractional Club membership by taking finance of £16,987 from the Lender in Miss I's name only (the 'Credit Agreement'). This consolidated their earlier lending for the purchase of their trial membership.

Miss I – using a professional representative (the 'PR') – wrote to the Lender on 15 November 2021 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving her 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 her 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.
4. The Credit Agreement being unenforceable because it was not arranged by a credit broker regulated by the Financial Conduct Authority (the 'FCA')] to carry out such an activity.

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

Miss I says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. Told them that they had purchased an investment and would have a share of a property and its value would considerably increase, therefore they were promised a considerable return on investment.
2. Told them they could sell the timeshare back to the resort or easily sell it at a profit.
3. Told them they would have access to the holiday apartment at any time all around the year.

Miss I says that she has 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, she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Miss I.

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

Miss I suggests that the Supplier breached the Purchase Agreement because it went into liquidation in December 2020. And this means she wouldn't be able to recover any amounts that are expected to be awarded by the Spanish courts.

As a result of the above, Miss I suggests that she has a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Miss I.

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

The Letter of Complaint set out several reasons why Miss I says that the credit relationship between them and the Lender was unfair to them under Section 140A of the CCA. In summary, they include the following:

1. Membership was marketed and sold to them as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. The term which stated that, if Mr and Mrs R failed to make a payment under the Purchase Agreement the agreement would be forfeited along with any money they had paid to the Supplier so far, is an unfair term.

The Lender acknowledged the complaint but did not provide a final response to it.

Miss I, therefore, referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

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

I considered the matter and issued a provisional decision on 6 November 2024. In that decision, 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 Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations')*
- *The Consumer Rights Act 2015.*
- *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 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').

My provisional findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Miss I as an investment, which, in the circumstances of this complaint, rendered the credit relationship between her and the Lender unfair to her 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 Miss I's complaint, it isn't necessary to make formal findings on all of them.

This includes the allegation that the Supplier misrepresented the membership and breached the Purchase Agreement and that the Lender ought to have accepted and paid those claims under Section 75 of the CCA because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Miss I in the same or a better position than she would be 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 Miss I 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 Miss I and Mr S'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.

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."

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

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 Miss I 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. I will explain why.

When coming to that conclusion, and in carrying out my analysis, I have looked at all the evidence provided from both parties, including:

1. *The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale;*
2. *The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*
3. *Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; and*
4. *The inherent probabilities of the sale given its circumstances.*

I have then considered the impact of (1) to (4) on the fairness of the credit relationship between Miss I 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 Miss I and Mr S's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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

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

But Miss I (and Mr S) say that the Supplier did exactly that at the Time of Sale – saying the following in their recollections of the sale (my emphasis added):

> *"In the beginning of the presentation we mentioned to the representative that we do not want to buy anything further as we are not able to use the benefits of the existing trial membership and this is not for us. Despite this the representative continued with his presentation. He used these charts and computer software from their website to convince us…we kept refusing and declining and he kept convincing us with different presentation slides…the representative also said that we should look at this as an investment as we will be buying a share of 2.19% of the 2 bedroom [property]. He also said after completing 17 years on 31 December 2033, this property will be sold and we will get our share of 2.19% of this property. At this point our focus was diverted towards an investment as we showed no interest in full membership.*
>
> *[…]*
>
> *He also mentioned that we can sell our holidays to our friends and make money if we will not use it. He then also explained about the resort maintenance charge and how we can recover that by introducing a friend to attend the presentation and we will receive £200 for this.*

[…]

At this point we were convinced that it will be an investment with guaranteed returns at the end of 17 years, we can cancel the membership if we are not happy, we can change the finance company for cheaper rate of interest, we can sell our holidays to friends to cover our fees paid towards this membership as well as we will be having holidays. So, considering this in mind we agreed to go ahead.

[…]

After arriving in the UK, as advised by the representative we attempted to follow his instructions and give out invitation letter…this didn't really work…this made us realise that the way they sugar coated everything doesn't work in reality.

On 26 May 2017, we emailed [the Supplier] to explain that we want to sell our fractional property shares as our financial circumstances have changed. We explained in the email that we bought someone's share from [the Supplier] who sold it after two years of membership and we had been informed while buying these shares that we can certainly sell it in the future if we don't want to continue with this membership. We also informed her that we have not used any points or the bonus week so far."

I should note that although their witness statement is not signed or dated, we have seen confirmation directly from Miss I and Mr S that they wrote this statement in December 2020.

I acknowledge that there is no explicit suggestion by Miss I and Mr S in their statement that the sales representative specifically led them to believe that they could expect a financial gain or profit from the sale of the Allocated Property. And, the Lender may argue, in response to this provisional decision, that the wording used in the statement is simply a factual description of how the membership worked. But, Miss I and Mr S have said that the sales representative told them they could "make money" from the membership by selling holidays to friends and family. And, they have gone on to say that as a result of what they were told at the Time of Sale, they were "convinced that it will be an investment with guaranteed returns". And, I can't see what that could reasonably and realistically have meant apart from an expectation of financial gain (i.e. a profit) in the context of the sale of an asset backed timeshare given everything else I know about the sale (which I'll expand on further below) and Miss I and Mr S's reasons for making the purchase.

So, given the overall content of their statement and what is said in the Letter of Complaint, in my view, Miss I alleges, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because they were told by the Supplier that they would get their money back or more during the sale of Fractional Club membership.

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

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

prohibit the marketing and selling of such a timeshare contract per se.

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Miss I and Mr S as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier 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.

I'm aware that in the sales paperwork usually provided to prospective members of the Fractional Club, the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Miss I and Mr S, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were usually, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Miss I and Mr S as an investment.

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 Miss I's allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that membership of the Fractional Club was expressly described as an "investment" and (2) that membership of the Fractional Club could make them a financial gain and/or would retain or increase in value.

So, I have considered:

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

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

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

How the Supplier marketed and sold the Fractional Club membership

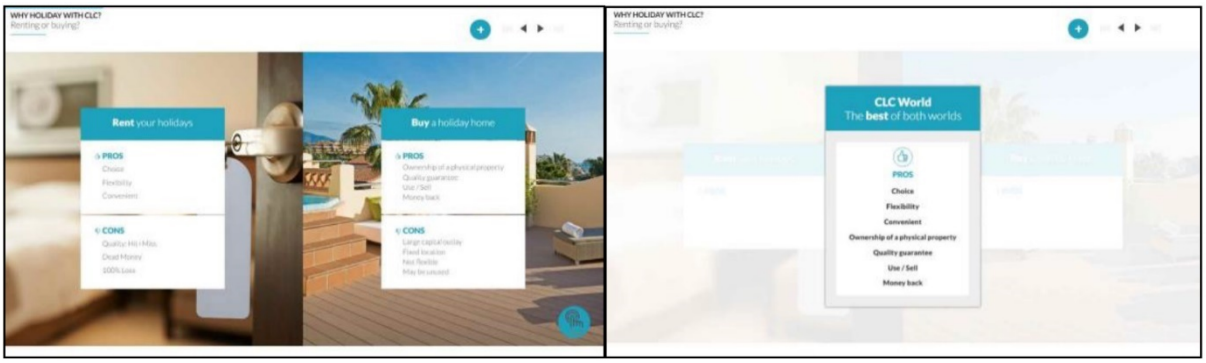
During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier provided information on how it sold membership of timeshares like Miss I and Mr S's – which includes a document called the "Fractional Property Owners Club Fly Buy Manual 2017" (the '2017 Fractional Training Manual')

As I understand it, the 2017 Fractional Training Manual was used from November 2017 onwards during the sale of the Supplier's second version of the Fractional Property Owners Club (which I will continue to refer to as simply the Fractional Club) – which was the version Miss I and Mr S appear to have purchased. It is not entirely clear whether Miss I and Mr S 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 Miss and Mr S Fractional Club membership; and*

(2) *how the sales representatives would have framed the sale of Fractional Club membership to Miss I and Mr S.*

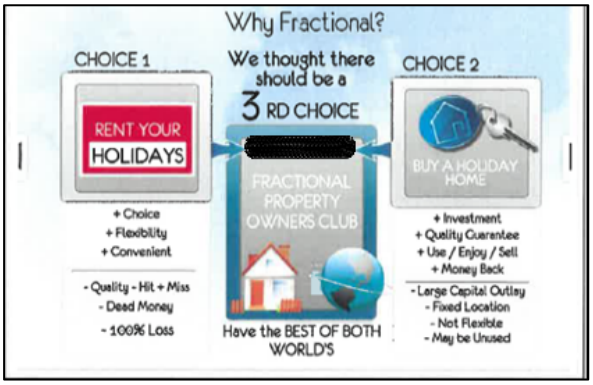
Having looked through the Manual, my attention is drawn first to page 19 (of 74) – which includes two slides called "Why holiday with [the Supplier]? Renting or buying?".



They were the first slides in the Manual that seems to me to set out any information about Fractional Club membership, albeit without expressly referring to the Fractional Club, because they suggest that sales representatives were likely to have made the point to Miss I and Mr S that holidaying with the Supplier combined the best of (1) and (2), including, amongst other things, ownership of a physical property and money back – which were benefits that were only front and centre of Fractional Club membership.

From the off, therefore, it seems likely that sales representatives would have demonstrated that there were financial advantages to Fractional Club membership rather than being a member of a 'standard' timeshare.

Indeed, the slides above presented a very similar prospect to that presented in a slide used in one of the Supplier's earlier training manuals that was used to help it sell the first version of Fractional Property Owners Club:



All three indicate that sales representatives would have taken prospective members 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"*

I acknowledge that the slides incorporated into the 2017 Fractional Training Manual don't include express reference to the 'investment' benefit of Fractional Club membership. But they allude to much the same concept.

One of those advantages referred to in the slides on page 19 of the 2017 Fractional Training Manual is the "ownership of a physical property". And as an owner's equity in their property is built over time as the value of the asset increases relative to the size of any mortgage secured against it, this particular advantage of Fractional Club membership was portrayed in terms that played on the opportunity ownership gave prospective members of the Fractional Club to accumulate wealth in a similar way.

When the Manual moved on to describe how membership of the Fractional Club worked between pages 26 and 36, one of the major benefits of Fractional Club membership was described on page 35 as:

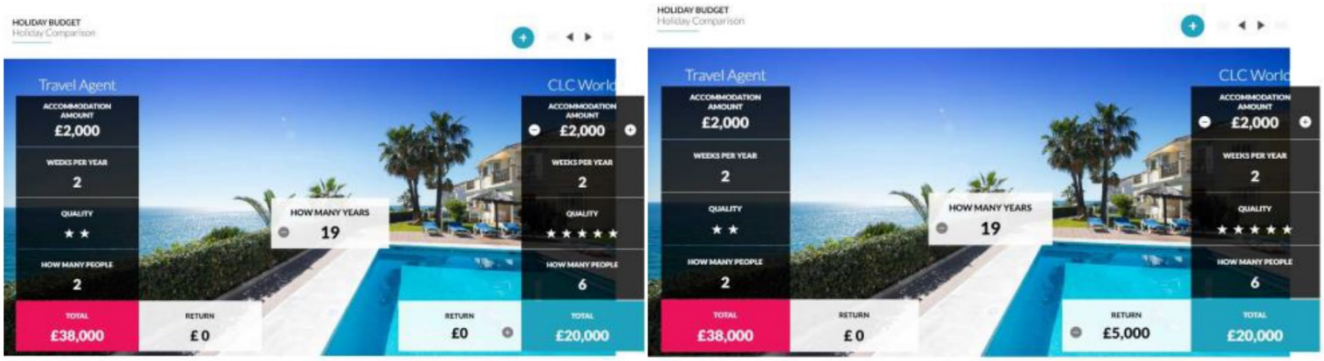
"A major benefit is that after 19 years of fantastic holidays, the property in which you own a fraction is sold and you will receive your share of the sale proceeds according to the number of fractions owned."

And on page 36 there were notes that encouraged sales representatives to summarise this benefit in the following way:

"So really FPOC equals a passport to fantastic holidays for 19 years with a return at the end of that period. When was the last time you went on holiday and got some money back?".

After discussing some of the other aspects of membership, such as the different resorts available to members, page 53 of the Manual indicates that sales representatives would have moved onto a cost comparison between "renting" holidays and "owning" them. Sales representatives were encouraged to tell prospective members how much they would spend over 19 years (i.e., the length of Fractional Club membership) on holidays with "no return" in contrast to spending the same amount of money as Fractional Club members – thus demonstrating the financial advantages of membership.

Page 53 included the following slides and accompanying notes:



"We aren't only talking about 10 years, we are talking about 10 years, we are talking about 19 years. So in actual fact, with the travel agent over 19 years you would have spend over £… with no return.

However, with [the Supplier] you would still have spent the same £… because once your fraction is paid for, the remaining years of holiday accommodation is taken care of.

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

I acknowledge that the slides above set out a "return" that is less than the total cost of the holidays and the "initial outlay". But that was just an example and, given the way in which it was positioned in the 2017 Fractional Training Manual, the language did leave open the possibility that the return could be equal to if not more than the initial outlay. Furthermore, the slides above represent Fractional Club membership as:

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

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

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

What's more, I think the Supplier's sales representatives were encouraged to make prospective Fractional Club members (like Miss I and Mr C) consider the advantages of owning something and view membership as a way of generating a return, rather than simply paying for holidays in the usual way. That was likely to have been reinforced throughout the Supplier's sales presentations by describing membership as a form of property ownership referring to the prospect of a "return". And with that being the case, I think the language used during the Supplier's sales presentations was likely to have been consistent with the idea that Fractional Club membership was an investment.

I acknowledge that there may not have been a 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 Miss I and Mr S 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 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:

"[…] 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."*

Given what I've already said about the Supplier's training material and the way in which I think it was likely to have framed the sale of Fractional membership to prospective members (including Miss I and Mr S), I think it is more likely than not that the Supplier did, at the very least, imply that future financial returns (in the sense of possible profits) from a Fractional Membership were a good reason to purchase it

So, overall, I think the Supplier's sales representative was likely to have led Miss I and Mr S to believe that Fractional membership was an investment that may lead to a financial gain (i.e., a profit) in the future. And with that being the case, I don't find them either implausible or hard to believe when they say they were told they were buying shares in property and they would 'get their shares back' and 'make money' with 'guaranteed returns'. And, as I've said above, I can't see what that could reasonably and realistically have meant apart from an expectation of financial gain (i.e. a profit) in the context of the sale of an asset backed timeshare given everything else I know about the sale and Miss I and Mr S's reasons for making the purchase. On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Miss I and Mr S 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 Miss I and Mr S 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 Miss I and the Lender that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) (which, having taken place during its antecedent negotiations with Miss I, 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) lead her to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On my reading of Miss I and Mr S'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.

As mentioned, Miss I and Mr S were trial members but weren't interested in upgrading to a full membership as they felt the product 'wasn't for them'. The only benefits of trial membership are the holidays it offered. So, in my view, there had to be some other reason why they went on to purchase full membership. And this fits with what they have had to say as they've described that they refused to purchase until the sales agent told them they should look at it as an investment and that they'd be buying a shares of a property and that they would then 'get that back' when the property was sold, offering them "guaranteed returns".

I acknowledge they've briefly said "as well as we will be having holidays". But, this was only alongside the fact that they had been "convinced that it will be an investment with guaranteed returns".

I think this is supported by the fact that around six months after their purchase (during which time they had not used the membership for holidays at all) they describe contacting the Supplier and saying they wanted to sell their "fractional property shares". After being told the Supplier does not operate a resale programme, they then tried to sell their membership on the open market.

It was only a year later, in 2018, that they then went on a holiday using their bonus week after their attempts at selling the membership were unsuccessful. And it doesn't seem that they took any further holidays after that.

So, for the above reasons, as Miss I and Mr S say (plausibly in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit as that share was one of the defining features of membership that marked it apart from their existing trial membership. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

Miss I and Mr S have not said or suggested, for example, that they would have pressed ahead with the purchase in question had the Supplier not led them to believe that Fractional Club membership was an appealing investment opportunity. And as Miss I faced the prospect of borrowing and repaying a substantial sum of money while subjecting herself and Mr S to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from Fractional membership, 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 Miss I 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 Miss I would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable to put her back in the position she would have been in had she not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Miss I (and Mr S) agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Here's what I think needs to be done to compensate Miss I with that being the case – whether or not a court would award such compensation:

(1) The Lender should refund Miss I repayments to it under the Credit Agreement and cancel any outstanding balance if there is one.
(2) In addition to (1), the Lender should also refund the annual management charges Miss I (and Mr S) paid as a result of Fractional Club membership.
(3) The Lender can deduct

i. *The value of any promotional giveaways that Miss I used or took advantage of; and*
ii. *The market value of the holidays* Miss I (And Mr S) took 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 Miss I and Mr S took using their Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.*

*(4) Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.*
(5) The Lender should remove any adverse information recorded on Miss I's credit file in connection with the Credit Agreement.
(6) If Miss I and Mr S's Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.

***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."*

The PR responded to my provisional decision and accepted it. The Lender also responded and said that, overall, they would be willing to accept the outcome, given the facts and circumstances of this particular case.

However, they raised some further points in relation to my proposed method of compensation (as outlined above under the heading 'Fair Compensation') which I'll address further below.

Having received the relevant responses, I'm now finalising my decision.

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.

As neither party has provided any new evidence or arguments in relation to the merits of the complaint, I don't believe there is any reason for me to reach a different conclusion on those elements from that which I reached in my provisional decision (outlined above). I do wish to stress that I have considered all the evidence and arguments afresh before reaching that conclusion.

As explained above, the only outstanding points are in relation to how Miss I (and Mr S) should be appropriately compensated.

In response to my provisional decision, the Lender's first point was that they said they would only be able to make queries and requests to the Supplier in relation to any ongoing liabilities and reinstatement of previous membership. They said they would not directly indemnify Miss I and Mr S in relation to any potential future liabilities to the Supplier. And, that any queries about reinstatement of prior membership should be directed to the Supplier by Miss I and Mr S themselves.

Secondly, they said that the loan used to purchase the membership complained about here also consolidated a previous loan Miss I and Mr S took out (also provided by the Lender) for the purchase of their trial membership. The Lender said Miss I and Mr S should remain liable for any element of the loan which was used to consolidate the prior finance for the earlier purchase of the trial membership. And, they therefore would only look to compensate them in relation to the loan which financed the purchase which is the subject of this complaint. They confirmed the interest rate which applied to both loans was the same.

I considered these points and in relation to the first point, asked the Lender whether the Supplier are willing to confirm in writing to both this Service and Miss I and Mr S that they will not pursue them at any point in the future for any ongoing liabilities in relation to their membership. If the Supplier was not willing to do this, I asked the Lender to explain why they would not indemnify Miss I and Mr S in the way I'd outlined in my provisional decision.

In relation to the second point, I explained to the Lender that I'd considered their comments regarding Miss I and Mr S's trial membership. However, I highlighted to the Lender that Miss I and Mr S no longer have the trial membership and as far as I was aware this could not be reinstated. And, even if it could, I explained that from what I had seen, they would not want it to be reinstated. So, I explained to the Lender that their proposal would mean Miss I and Mr S would be paying for a membership that they don't have and either can't be reinstated, or they wouldn't want it to be.

So, with this in mind, I asked the Lender to explain why they felt it would be fair to compensate Miss I and Mr S in relation to the second loan only.

The Lender responded and in relation to the first point said they had an established process with the Supplier whereby they would confirm to the Lender post-settlement that the membership had been terminated. They said they would ask them if they'd be prepared to confirm this to our Service once this had been done.

I acknowledge what the Lender has said here, but this doesn't give me any assurance the Supplier will not pursue Miss I and Mr S at any point in the future for any ongoing liabilities in relation to their membership. The Supplier has only said they would confirm the membership has been terminated, which isn't the same. The Lender hasn't given me any reason why they wouldn't be able to indemnify Miss I and Mr S in the way I outlined in my provisional decision, and they haven't given me sufficient reason as to why I shouldn't include that direction in my final decision. If the Supplier's termination of the membership means the Lender's indemnification ultimately becomes irrelevant, then I see no harm or prejudice caused to the Lender by them doing so. However, if the Supplier does ultimately pursue Miss I and Mr S at some point in the future for any liabilities in relation to their membership, the Lender's indemnification will ensure they're adequately protected and/or compensated against any such future action by the Supplier. So, I remain satisfied this element of what I've recommended to put this complaint right is fair and reasonable and remains a direction I should make in this decision.

In relation to the second point, the Lender explained the trial membership can be reinstated and said this has been confirmed by the Supplier. But, they also said this didn't need to happen if Miss I and Mr S did not want it. They said the trial membership is a very different product and was not complained about by Miss I and Mr S. They also said trial memberships in general were not the subject of *Shawbrook & BPF v FOS* and there is no evidence Miss I and Mr S's trial membership was mis-sold and therefore does not warrant compensation in relation to it.

I acknowledge the Lender's comments here but I don't agree, and I'll explain why.

As I understand it, trial membership involved the purchase of a fixed number of week-long holidays at the Supplier's main resorts over a set period in return for a fixed price. The purpose of trial membership was to give prospective members of the Supplier's longer-term products a glimpse of what it might be like to be a member of the Fractional Club for instance. And according to an extract from the Supplier's business plan, roughly 50% of trial members went on to become timeshare members as a result.

If, after purchasing trial membership, a consumer went on to purchase membership of one of the Supplier's longer-term products, their trial membership was usually cancelled and traded in against the purchase price of their timeshare – which is what happened at the Time of Sale. Miss I and Mr S's trial membership was, therefore, a precursor to their Fractional Club membership. And as they paid for their trial membership using finance that they refinanced under the Credit Agreement, in the absence of any realistic prospect of the trial membership being reinstated to the satisfaction of both parties to it, it acted, in essence, as a deposit that I think ought to be reflected in my redress when remedying this complaint given its facts and circumstances.

So, I remain satisfied that the method of redress I proposed in my provisional decision is the fair and reasonable way to resolve this complaint. So, for the avoidance of doubt, upon receipt of notification from this Service of Miss I's acceptance of my final decision, the Lender should:

(1) Refund Miss I repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.
(2) In addition to (1), the Lender should also refund the annual management charges Miss I (and Mr S) paid as a result of Fractional Club membership.
(3) The Lender can deduct:

i. The value of any promotional giveaways that Miss I used or took advantage of; and
ii. The market value of the holidays* Miss I (And Mr S) took using their Fractional Points.

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

(4) Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.
(5) The Lender should remove any adverse information recorded on Miss I's credit file in connection with the Credit Agreement.
(6) If Miss I and Mr S's Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.

*I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Miss I and Mr S took using their Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

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

My final decision

For these reasons, I uphold Miss I's complaint and direct Clydesdale Financial Services Limited trading as Barclays Partner Finance to compensate Miss I in line with what I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss I to accept or reject my decision before 1 January 2025.

Fiona Mallinson
Ombudsman