DRN-5171888

The complaint

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

What happened

Mr and Mrs H had previously purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier'). They upgraded their membership on 18 June 2014 (the 'Time of Sale'), entering into an agreement with the Supplier to buy 1,240 fractional points at a cost of £6,848 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs H 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 H paid for their Fractional Club membership by taking finance from the Lender in both their names (the 'Credit Agreement'). This was for £18,918, borrowed over 15 years[1].

Mr and Mrs H – using a professional representative (the 'PR') – wrote to the Lender on 16 October 2017 (the 'Letter of Complaint') to complain about 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.

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

The Letter of Complaint set out several reasons why Mr and Mrs H 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. Fractional Club membership was marketed and sold to them as an investment. Although it wasn't expressed this way in the Letter of Complaint, that would amount to a breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. They were pressured into purchasing Fractional Club membership by the Supplier.
3. They were not advised of any commissions paid to the Supplier by the Lender.

The Lender dealt with Mr and Mrs H's concerns as a complaint and issued its final response letter on 11 January 2018, rejecting it on every ground.

Mr and Mrs H 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.

---

[1] The amount borrowed was more than the cost of the upgrade. In my provisional decision, I said that I had assumed this extra borrowing was used to refinance an earlier loan and invited both parties to let me know if they disagreed with what I'd said. Neither party did and Mr and Mrs H agreed with my proposed redress, which was set out on the basis that the Credit Agreement refinanced an earlier loan. So I'm satisfied the extra borrowing was used to refinance the earlier loan.

The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr and Mrs H 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 and Mrs H was rendered unfair to them for the purposes of section 140A of the CCA.

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

Having considered everything, I came to the same conclusion as our Investigator and thought Mr and Mrs H's complaint should be upheld. I issued a provisional decision, setting out my thoughts and invited both parties to respond with anything further they wished me to consider before I issued a final decision. The provisional decision included the following:

'*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 Unfair Terms in Consumer Contracts Regulations 1999 (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 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 Mr and Mrs H as an investment, which, in the circumstances of this complaint, rendered the credit relationship between them and the Lender unfair to them for the purposes of Section 140A of the CCA.

However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I recognise that there are a number of aspects to Mr and Mrs H's complaint, it isn't necessary to make formal findings on all of them. This includes the allegation, for example, that commission was paid but not disclosed to them.

That's because, even if other aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs H in the same or a better position than they would be if the redress was limited to commission or any of the other points of complaint raised.

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 Mr and Mrs H 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 H'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."[2]

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

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."

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 and Mrs H 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*
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 and Mrs H 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 H 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 H say that the Supplier did exactly that at the Time of Sale – saying the following in the Letter of Complaint:

'Our clients were advised that if they purchased more fractions [then] they would make a

better return on their investment.'

At the same time that the PR referred the complaint to our service, it provided a statement from Mr C. This statement was unsigned, but the PR said it was his evidence of what happened and I see no reason to question that was the case, despite it being unsigned. In the statement, with respect to an earlier sale in September 2013, Mr C said:

'They told us that this would be an investment for us and that we could make a return on it.'

And in respect of the June 2014 sale (that forms the subject to this complaint):

'They told us that if we purchased more fractional points that we would be able to get more holidays and there would be better availability and better accommodation for us. I should say that actually, we have had slightly better availability and slightly better accommodation. The one problem we have with this was that they told us that the more points we buy, the more money we would get back at the end because of the investment element. Obviously, when you are buying fractions, you are buying a portion of the property and once it is sold, you get back more of the profit if you have more fractions.'

Mr and Mrs H allege, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because there were two aspects to their Fractional Club membership: holiday rights and a profit on the sale of the Allocated Property.

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 H'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 H 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 H, 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 H as an investment. As an example, the 'Member's Declaration' document Mr and Mrs H signed included the following:

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

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 H'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 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 Mr and Mrs H 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 has provided training material used to prepare its sales representatives – including:

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

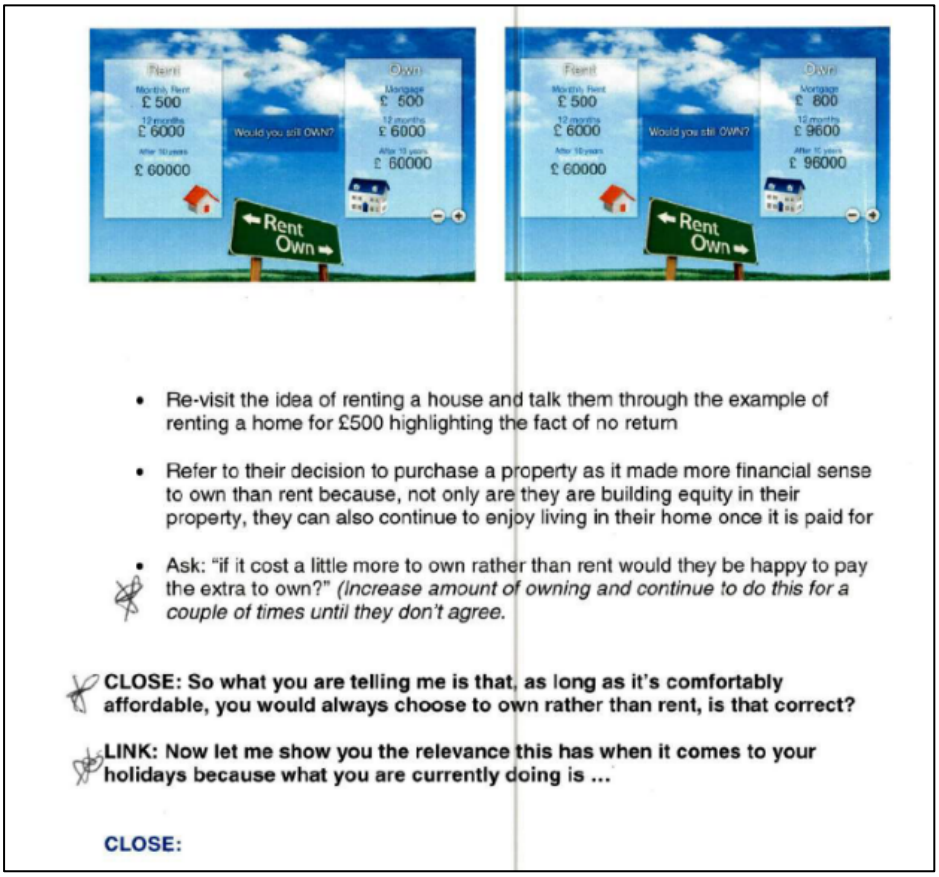
Neither the 2013/2014 Induction Training nor the ESA I've seen included notes of any kind. However, the Fractional Club Training Manual includes very similar slides to those used in the ESA. And according to the Supplier, the Fractional Club Training Manual (or something similar) was used by it to train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

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

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

Page 32 of the Fractional Club Training Manual covered how the Supplier's sales representatives should address that comparison in more detail – indicating that they would

have tried to demonstrate that there were financial advantages to owning property, over 10 years for example, rather than renting:



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

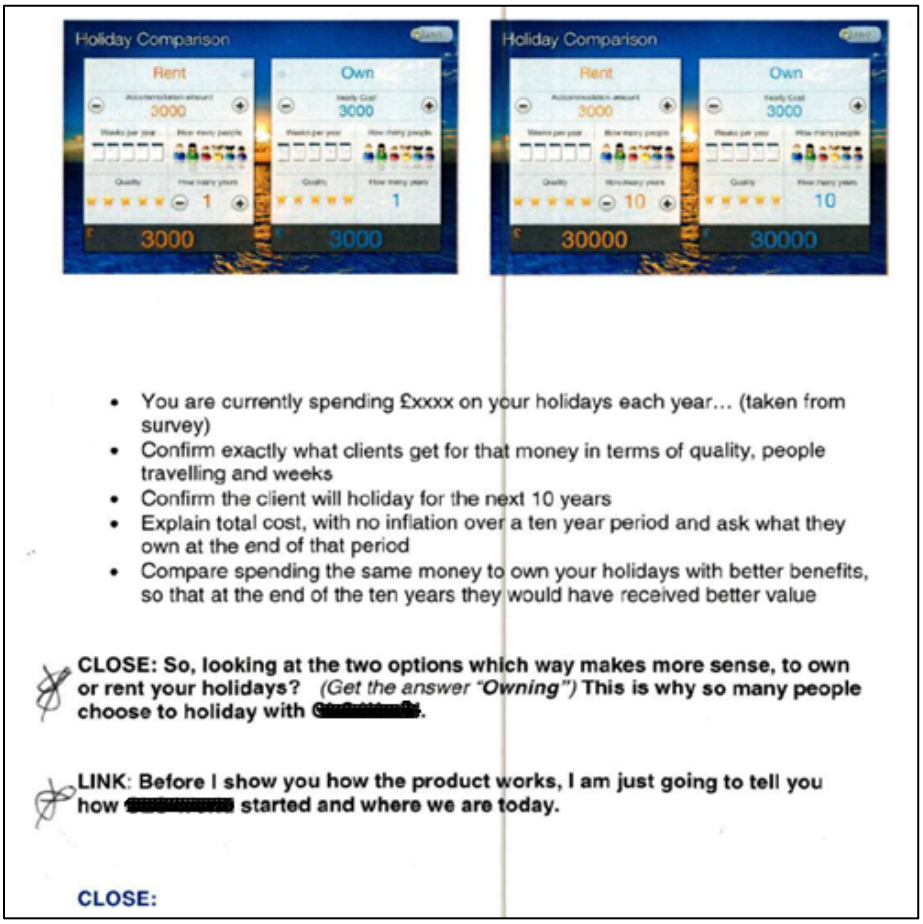
CLOSE: So what you are telling me is that, as long as it's comfortably affordable, you would always choose to own rather than rent, is that correct?

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

CLOSE:

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

I acknowledge that the slides don't include express reference to the "investment" benefit of ownership. But the description alludes to much the same concept. It was simply rephrased in the language of "building equity". And with that being the case, it seems to me that the approach to marketing Fractional Club membership was to strongly imply that 'owning' fractional points was a way of building wealth over time, similar to home ownership.
Page 33 of the Fractional Club Training Manual then moved the Supplier's sales representatives onto a cost comparison between "renting" holidays and "owning" them. Sales representatives were told to ask prospective members to tell them what they'd own if they just paid for holidays every year in contrast to spending the same amount of money to "own" their holidays – thus laying the groundwork necessary to demonstrating the advantages of Fractional Club membership:



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

> *"FPOC = small piece of […] World apartment which equals* ***ownership of bricks and mortar***
> *[…]*
>
> *Major benefit is the property is sold in nineteen years* ***(optimum period to cover peaks and troughs in the market)*** *when sold you will get your share of the proceeds of the sale*
> *SUMMARISE LAST SLIDE:*
> *FPOC equals a passport to fantastic holidays for 19 years* ***with a return at the end of that period.*** *When was the last time you went on holiday and* ***got some money back? How would you feel if there was an opportunity of doing that?***
> *[…]*
> *LINK: Many people join us every day and one of the main questions they have is* ***"how can we be sure our interests are taken care of for the full 19 years?*** *As it is very important you understand how we ensure that, I am going to ask Paul to come over and explain this in more details for you.*
> *[…]*
> *"Handover: (Manager's name) John and Mary love FPOC and have told me the best for them is……..****Would you mind explaining to them how their interest will be protected over the next 19 year[s]****?"*
> *(My emphasis added)*

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

> *"T/O will explain slides emphasising that they only pay a fraction of maintaining the entire property. It also ensures property is kept in peak condition to maximise the return in 19 years['] time.*
> *[…]*
>
> *CLOSE:* ***I am sure you will agree with us that this management fee is an extremely important part of the equation as it ensures the property is maintained in pristine condition so at the end of the 19 year period, when the property is sold, you can get the maximum return.*** *So I take it, like our owners, there is nothing about the management fee that would stop you taking you holidays with us in the future?..."*
> *(My emphasis added)*

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

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

[…]

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

I acknowledge that the slides above set out a "return" that is less than the total cost of the holidays and the "initial outlay". But that was just an example and, given the way in which it was positioned in the Training Manual, the language did leave open the possibility that the

return could be equal to if not more than the initial outlay. 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 Mr and Mrs H) 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.

I also 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 H the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that '[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).'"[3] *And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.*

So, if a supplier implied to consumers that future financial returns (in the sense of possible profits) from a timeshare were a good reason to purchase it, I think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment. Indeed, if I'm wrong about that, I find it difficult to explain why, in paragraphs 77 and 78 followed by 99 and 100 of Shawbrook & BPF v FOS when, Mrs Justice Collins Rice said the following:

"[…] 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

---

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

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."*

I think the Supplier's sales representatives were encouraged to make prospective Fractional Club members consider the advantages of owning something and view membership as an opportunity to build equity in an allocated property rather than simply paying for holidays in the usual way. That was likely to have been reinforced throughout the Supplier's sales presentations by the use of phrases such as "bricks and mortar" and notions that prospective members were building equity in something tangible that could make them some money at the end. And as the Fractional Club Training Manual suggests that much would have been made of the possibility of prospective members maximising their returns (e.g., by pointing out that one of the major benefits of a 19-year membership term was that it was an optimum period of time to see out peaks and troughs in the market), 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.

Overall, therefore, as 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, they indicate that the Supplier's sales representative was likely to have led Mr and Mrs H 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. 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 being sold an investment here. On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mr and Mrs H 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 and Mrs H 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 and Mrs H and the Lender that was unfair to them 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 H, 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 them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

The Lender has said that Mr and Mrs H were experienced timeshare members who bought timeshares both before and after this purchase. However, I can't see how that was relevant to whether the breach of Regulation 14(3) led to an unfair credit relationship as, for example, it is not said that Mr and Mrs H ought to have not relied on or believed in what they were told by the Supplier at the Time of Sale due to their previous purchasing history.
On my reading of Mr and Mrs H'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. 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 as Mr and Mrs H say (plausibly in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit as that share was one of the defining features of membership that marked it apart from their existing membership. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

Mr and Mrs H 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 H 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 H would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable to put them back in the position they would have been in had they not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr and Mrs H agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

*However, Mr and Mrs H had taken out a Fractional Club membership before the Time of Sale, under which they were already liable to pay maintenance fees. So had they not taken out the membership that is the subject of this complaint, they would always have needed to pay some maintenance fees. I think the fairest way to work out compensation is to attribute a proportion of the fees paid whilst the relevant Fractional Club membership was in place down to that membership. Here, Mr and Mrs H already had a certain number of points before the Time of Sale and purchased an additional number of points. So I think [number of additional points acquired at time of sale/total number of points held after then*100]% of the fees can be directly attributed to the purchase at the Time of Sale and the Lender needs to refund that proportion of any fees paid during the time the Fractional Club membership was in place.*

*Further, Mr and Mrs H went on to upgrade their membership again in December 2014, paying an additional £6,921 to acquire 1,510 points.[4] As a result of the upgrade, it's necessary to consider whether the relationship continued to be unfair. But here, I think that any new membership effectively continued their existing membership, albeit with more points. So I think their new membership was essentially just a top up of their fractional points, effectively rolling over what they, plus adding more, had into a new purchase agreement. In other words, I still think that Mr and Mrs H's original purchase under the Purchase Agreement and the loan from the Lender had ongoing financial consequences for them, which continued the unfair relationship with the Lender. And for that reason, the Lender is still answerable for them, in my view. That means their remaining points were effectively 'rolled over' into the new agreement and had ongoing financial consequences for them and I think the compensation needs to reflect that. So, in my view, the Lender also needs to refund the proportion of the maintenance fees payable after the upgrade that related to the number of fractional points rolled over, in other words [points before upgrade/points after upgrade*100]% of the fees.*

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

(1) The Lender should refund Mr and Mrs H's 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 Mr

[4] I say this in the belief that the loan was not refinanced at the time of upgrade and carried on. If either party disagrees with this, they can let me know in response to this provisional decision.

and Mrs H paid as a result of Fractional Club membership as set out above.

(3) The Lender can deduct

i. *The value of any promotional giveaways that Mr and Mrs H used or took advantage of;*
ii. *Any repayments they would have made towards any loan consolidated by the Credit Agreement at the Time of Sale; and*
iii. *The market value of the holidays* Mr and Mrs H 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 Mr and Mrs H 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 Mr and Mrs H's credit files in connection with the Credit Agreement.

(6) If Mr and Mrs H'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 initially accepted my provisional decision, but it later requested that £3,000 in compensation be paid to Mr and Mrs H in addition to the redress I had previously recommended. This was for the distress and inconvenience the PR said the Lender had caused in not reaching a fair and reasonable outcome to Mr and Mrs H's complaint (and to others the PR represented).

The Lender did not agree with my provisional decision. It provided substantial submissions that, in summary, covered what it said was the correct legal approach to the question of whether the Supplier breached Regulation 14(3) and how I ought to have interpreted and assessed both the Supplier's training and marketing materials and Mr and Mrs H's evidence. The Lenders submissions ran to ten pages, so although I have read them in full, in this decision I will not deal with everything raised, but I will cover what I consider to be the salient points.

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.

Here, I will respond to the salient points the Lender has made in broadly the same order it has made them before considering the PR's request for further compensation.

The PR has argued that there is nothing inherent in Fractional Club membership that, when sold, automatically breaches the prohibition in Regulation 14(3). And it has said that I conflated the prospect to Mr and Mrs H of a financial return with the concept of that being an investment, i.e. the concepts of a 'return on investment' with the idea that some money would be 'returned' on the sale of the Allocated Property.

I agree and, as I made clear in my provisional decision, that the mere existence of an investment element in a Fractional Club membership does not automatically mean Regulation 14(3) has been breached. But the circumstances in this case still lead me to think there has been a breach on this occasion, despite the Lender's most recent comments.

The Lender says I've mistaken Mr and Mrs H's testimony to mean that they expected to see a profit on their investment, when in fact they say they were told *some* money would be returned to them on the sale of the Allocated Property – in line with the features of the product and how it was sold. The Lender says that would conflate the two concepts set out above.

Having carefully reviewed Mr and Mrs H's comments again, I'm satisfied that Mr and Mrs H said they expected to get some money back at the end of the membership term and that they thought they would (or could) make a profit. It is, for example, worth repeating what they say specifically about the Time of Sale:

> '*They told us if we purchased more fractional points that we would be able to get more holidays and there would be better availability and better accommodation for us. I should say that actually, we have had slightly better availability and slightly better accommodation. The one problem we have with this was that* ***they told us that the more points we buy, the more money we would get back at the end because of the investment element. Obviously, when you are buying fractions, you are buying a portion of the property and once it is sold, you get back more of the profit if you have more fractions.***' (emphasis my own)

In the light of comments such as these, I remain satisfied that Mr and Mrs H say that they were given the impression not only that their purchase would lead to a return of some money, but also that the return would, more likely than not, come to more than they had put in.

I do not disagree with the Lender when it says the prospect of better holidays and better availability were also attractive to Mr and Mrs H. It seems they holidayed using their membership on several occasions between 2014 and 2017. However, I still believe from what they say that the investment element was a major factor for them when deciding to purchase Fractional Club membership.

The Lender says Mr and Mrs H surrendered their membership in 2018 after they had appointed the PR. The Lender says surrendering membership meant Mr and Mrs H were no longer entitled to their fractional ownership and rights to a payment when the Allocated Property was sold. The Lender says it seems unlikely that if, investing was such an important aspect of the purchase, that Mr and Mrs H would not engage with the Supplier on the implications of the surrender.

I think, looking at the timing of Mr and Mrs H's surrender, that this happened *after* the PR had made a complaint on their behalf and after they had asked for the Lender to return what they had paid for membership. I cannot say for certain why they surrendered their membership at that time, but it appears to have been done in the knowledge that they were giving up any investment element of membership and after speaking with their professional advisers. Whether or not that was a sensible thing to do is beyond the scope of this decision,

however I do not think surrendering membership after complaining it was sold as an investment is inconsistent with it being sold as an investment or with that being a motivating factor behind the purchase. In any event, I do not believe that anything significant turns on this point.

On the subject of Mr and Mrs H's testimony more broadly, the Lender says this should not be relied on. It points to a lack of detail and what it calls notable errors that bring into question the accuracy of their recollections, particularly as the statement is undated. The Lender considers it likely that the PR shaped the content of the statement.

In considering the weight to place on Mr and Mrs H's recollections and evidence I have considered the judgment in *Smith v Secretary of State for Transport* [2020] EWHC 1954 (QB), where it was held (at para 40):

> "*At the start of the hearing, I raised with Counsel the issue of how the Court should assess his oral evidence in light of his communication difficulties. Overnight, Counsel agreed a helpful note setting out relevant case law, in particular the commercial case of Gestmin SPGS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) (Leggatt J as he then was at paragraphs 16-22) placed in context by the Court of Appeal in Kogan v Martin [2019] EWCA Civ 1645 (per Floyd LJ at paragraphs 88-89). In the context of language difficulties, Counsel pointed me to the observations of Stuart-Smith J in Arroyo v Equion Energia Ltd (formerly BP Exploration Co (Colombia) Ltd) [2016] EWHC 1699 (TCC) (paragraphs 250-251). Counsel were agreed that I should approach Mr Smith's evidence with the following in mind:*
>
> a. *In assessing oral evidence based on recollection of events which occurred many years ago, the Court must be alive to the unreliability of human memory. Research has shown that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probably facts (Gestin and Kogan).*
>
> b. *A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence (Kogan).*
>
> c. *The task of the Court is always to go on looking for a kernel of truth even if a witness is in some respects unreliable (Arroyo).*
>
> d. *Exaggeration or even fabrication of parts of a witness' testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony (Arroyo).*
>
> e. *The mere fact that there are inconsistencies or unreliability in parts of a witness' evidence is normal in the Court's experience, which must be taken into account when assessing the evidence as a whole and whether some parts can be accepted as reliable (Arroyo).*

f. *Wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, may be neither reliable nor even truthful, the difficulty of discerning where the truth actually lies, what findings he can properly make, is often one of almost excruciating difficulty yet it is a task which judges are paid to perform to the best of their ability (Arroyo, citing Re A (a child) [2011] EWCA Civ 12 at para 20).*"

Although that judgment relates to assessing oral evidence, I think it is also important guidance to consider when undertaking an assessment of written evidence, as I must in Mr and Mrs H's case.

With that in mind, I agree with the Lender that there appear to be some factual errors in Mr and Mrs H's statement and parts where some detail is lacking. Given when we received the statement, and the reference in it to their desire to surrender their membership which they did in 2018, I think it likely it was made at around the time of the Letter of Complaint of October 2017. Since that was more than three years after the Time of Sale, I think it understandable that they might not recall absolutely everything from back then in great detail or with complete accuracy.

Aside from that, the Lender says Mr and Mrs H failed to clarify what they understood 'a return or profit' would be. I do not see that omission as significant as, given they use the terms 'investment' and 'profit', it is reasonable to infer this meant more money than they put in. I do not think the fact that they have not elaborated on exactly how much more they stood to gain detracts from what they have said.

Nevertheless, I consider that the testimony – together with the Letter of Complaint – is balanced and consistent regarding the Fractional Club membership being presented to them as an investment. I think I can safely take account of it in my consideration of the circumstances.

In my provisional decision, I set out in detail my thoughts on the sales and training materials provided by the Supplier that were relevant at the Time of Sale. I note both that the Lender disagrees with much of what I said and my reasons for doing so. I won't repeat my analysis here but suffice it to say that I am not persuaded by the objections raised. The Lender argues Mr and Mrs H did not see the slides I mentioned in my provisional decision, but it is not in dispute that the Supplier's sale staff were trained using the materials I discussed, which is the point I made in that decision. Further, the Lender has not pointed me to what Mr and Mrs H would have been shown, so I remain of the view that the materials I pointed to are relevant in determining how Fractional Club membership came to be sold.

On that basis, I remain of the view that the way in which the Fractional Club membership was sold to Mr and Mrs H more likely than not emphasised the positives of ownership of 'bricks and mortar' and the opportunity open to them to make a profit on their outlay. For example, where the Fractional Club Training Manual referenced terms like 'building equity' and securing the 'maximum return', the impression of wealth accumulation was conveyed that, in my opinion, was akin to investing. I also note that, as I said in my provisional decision, the documents to which I referred were used to train sales staff. For the avoidance of doubt, I make no finding that these documents, in and of themselves, automatically meant that any salesperson having been trained on them must have breached Regulation 14(3) when they sent on to sell Fractional Club membership. Rather, it is my view that these documents set out where sales staff were to put emphasis and how to position membership to prospective customers. That, coupled with Mr and Mrs H's own memories of the sale and the other evidence, is what I have relied upon when making a finding that I think Regulation 14(3) was breached in this case.

The Lender says any fair analysis of the training and contractual materials is that Mr and Mrs H were told that their only investment was in holidays and that 'some money' would be returned, which may be a 'small part of your initial outlay'. The materials are not, in my view, as clear as the Lender suggests, which is why I have drawn the conclusions that I have.

I accept, as I did in my provisional decision, that the Supplier made efforts to avoid specifically describing Fractional Club membership as an investment. And that there were disclaimers in the contemporaneous paperwork to the effect that Fractional Club membership had not been sold as an investment. But I am mindful that the sale did not take place based on the paperwork alone. I believe the face-to-face nature of the sale meant anything said by the Supplier at that time would have been just as, if not more, powerful than anything the papers may have conveyed.

I thank the Lender for highlighting to me a County Court judgment that involved consideration of the sales practices in force at the Time of Sale. And for copies of provisional decisions issued by some of my ombudsman colleagues. It suggests that I reconsider Mr and Mrs H's complaint in light of them. But just as it was for those decision-makers to take account of the merits of the cases before them, it is for me to weigh up the specific merits of this complaint. That is what I have done here. So, although I have thought about those other decisions and County Court judgment, I have come to my own findings on the facts of this case.

Taking everything account, including the Lender's most recent submissions, I see no reason to depart from my provisional findings as set out above.

That includes me making no award of compensation for distress and inconvenience – either for £3,000 as the PR recently argued for – or for any other amount. I can understand that Mr and Mrs H may have found the complaints process difficult at times. But I have not seen anything persuasive to suggest their interactions with the Lender during the course of this complaint had an impact beyond the usual frustrations of a complaints process.

Further, no compensation for distress and inconvenience was claimed when the complaint was first made nor when the PR initially contacted us to confirm Mr and Mrs H wanted to accept my provisional decision, so by this stage I cannot see that they felt they had been caused any such distress by the Lender. It was not until learning that the Lender had requested, and obtained, a two-week extension to respond to that decision that the PR made any submissions on this point.

More importantly, I find the submissions the PR did make to be largely generic, with references to its clients and lenders in general, with little or no persuasive evidence to suggest Mr and Mrs H in fact suffered distress and inconvenience to such an extent that significant (or any) compensation for non-financial was warranted in addition to the redress I had already recommended the Lender pay for their financial losses. I note that I am directing the payment of interest to compensate Mr and Mrs H for the time they have been out of pocket and, in my view, that adequately compensates them for the time they have waited for the complaint to be resolved.

Putting things right

Having found that Mr and Mrs H would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable

to put them back in the position they would have been in had they not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr and Mrs H agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

However, Mr and Mrs H had taken out a Fractional Club membership before the Time of Sale, under which they were already liable to pay maintenance fees. So had they not taken out the membership that is the subject of this complaint, they would always have needed to pay some maintenance fees. I think the fairest way to work out compensation is to attribute a proportion of the fees paid whilst the relevant Fractional Club membership was in place down to that membership. Here, Mr and Mrs H already had a certain number of points before the Time of Sale and purchased an additional number of points. So I think [number of additional points acquired at time of sale/total number of points held after then*100]% of the fees can be directly attributed to the purchase at the Time of Sale and the Lender needs to refund that proportion of any fees paid during the time the Fractional Club membership was in place.

Further, Mr and Mrs H went on to upgrade their membership again in December 2014, paying an additional £6,921 to acquire 1,510 points. As a result of the upgrade, it's necessary to consider whether the relationship continued to be unfair. But here, I think that any new membership effectively continued their existing membership, albeit with more points. So I think their new membership was essentially just a top up of their fractional points, effectively rolling over what they, plus adding more, had into a new purchase agreement. In other words, I still think that Mr and Mrs H's original purchase under the Purchase Agreement and the loan from the Lender had ongoing financial consequences for them, which continued the unfair relationship with the Lender. And for that reason, the Lender is still answerable for them, in my view. That means their remaining points were effectively 'rolled over' into the new agreement and had ongoing financial consequences for them and I think the compensation needs to reflect that. So, in my view, the Lender also needs to refund the proportion of the maintenance fees payable after the upgrade that related to the number of fractional points rolled over, in other words [points before upgrade/points after upgrade*100]% of the fees.

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

(1) The Lender should refund Mr and Mrs H's 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 Mr and Mrs H paid as a result of Fractional Club membership as set out above.
(3) The Lender can deduct

   i. The value of any promotional giveaways that Mr and Mrs H used or took advantage of;
   ii. Any repayments they would have made towards any loan consolidated by the Credit Agreement at the Time of Sale; and
   iii. The market value of the holidays* Mr and Mrs H 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 Mr and Mrs H 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 Mr and Mrs H's credit files in connection with the Credit Agreement.
(6) If Mr and Mrs H'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 consumers a certificate showing how much tax it's taken off if they ask for one.

My final decision

I uphold Mr and Mrs H's complaint about Shawbrook Bank Limited and direct it to pay compensation as set out above.

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

Nimish Patel
Ombudsman