DRN-5188069

The complaint

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

What happened

Mr J purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 25 June 2013 (the 'Time of Sale').

Mr J was an established customer of the Supplier since 2000, when he first purchased a 'floating week' timeshare membership. Mr J upgraded his membership later the same year, switching from the floating week to a point-based membership after he joined the Supplier's Vacation Club. Mr J's membership came with an annual entitlement of 2,501 points that he could use to book holidays though the Supplier. His Vacation Club membership ended when he entered into a new agreement with the Supplier to buy 2,580 fractional points, increasing his annual entitlement by 79 points.

Fractional Club membership was asset backed – which meant it gave Mr J more than just holiday rights. It also included a share in the net sale proceeds of a property named on his Purchase Agreement (the 'Allocated Property') after his membership term ends. Mr J agreed to pay an extra £7,843 on top of the trade-in value he would get for his Vacation Club membership.

Mr J paid for his upgrade to Fractional Club membership by taking finance of £8,622 from the Lender (the 'Credit Agreement'), which also paid for the first year's management charge.

Mr J – using a professional representative (the 'PR') – wrote to the Lender on 17 April 2018 (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 J says that the credit relationship between him and the Lender was unfair on him under Section 140A of the CCA. In summary, they include the following:

1. The Lender paid commission to the Supplier but didn't tell Mr J about this.

2. Misleading statements by the Supplier, including that:

    a. His existing Vacation Club membership was being phased out, so he had to upgrade to Fractional Club membership.

    b. His existing Vacation Club membership had no end date and the only way to exit from that membership was to upgrade to Fractional Club membership.

    c. Fractional Club membership was an exclusive club where only members could book holidays in the Supplier's resorts.

3. Fractional Club membership was marketed and sold to him as an investment giving him partial ownership of a resort in Spain. After 19 years he would receive his money back plus a return on his investment

4. He was pressured into purchasing Fractional Club membership by the Supplier, which told him he was getting a special purchase price if he signed and purchased that day.

5. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mr J's concerns as a complaint and issued its final response letter on 14 November 2018, rejecting it on every ground.

Mr J 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.

Our investigator's assessment and responses

The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr J at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of that breach on his purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr J was rendered unfair to him 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. The Lender said that the witness statement provided by Mr J was not credible due to its strong similarities to the Letter of Complaint, with most of the sentences being nearly identical. But also said that the witness statement made clear that Mr J purchased Fractional Club membership because he was primarily interested in holidays.

The Lender also provided a letter from the Supplier, which said amongst other things that Mr J had signed the Purchase Agreement four days after the sales presentation, having turned down the initial proposal, and ultimately agreeing to a less expensive purchase. And that since 2000 MR J had taken a total of 25 holidays with his various timeshare memberships.

My provisional decision and responses

On 20 November 2024, I issued a provisional decision which said that I was planning to uphold this complaint, and gave my detailed reasons for this.

The PR responded to say that Mr J accepted my provisional decision.

The Lender responded to say that it would not challenge my provisional decision and would settle the complaint in line with what I had said. The Lender made some additional comments, but while I have noted those, since the Lender has agreed to settle this complaint there is no need for me to respond to those additional comments in this decision.

A copy of my provisional findings are below and form part of my final decision.

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').

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.

The Lender is not challenging my provisional decision. So, I am not minded to alter my provisional findings. A copy of my provisional findings are below and explain the decision I have reached.

START OF COPY OF PROVISIONAL FINDINGS

What I've provisionally decided – and why

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

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 J as an investment, which, in the circumstances of this complaint, rendered the credit relationship between him and the Lender unfair to him for the purposes of Section 140A of the CCA.

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

- The Lender paid commission to the Supplier but didn't tell Mr J about this.
- Misleading statements by the Supplier, including that:
    - His existing Vacations Club membership was being phased out, so he had to upgrade to Fractional Club membership.
    - His existing Vacation Club membership had no end date and the only way to exit from that membership was to upgrade to Fractional Club membership.
    - Fractional Club membership was an exclusive club where only members could book holidays in the Supplier's resorts.
- He was pressured into purchasing Fractional Club membership by the Supplier, which told him he was getting a special purchase price if he signed and purchased that day.
- The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

Because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr J in the same or a better position than he would be in if the redress was limited to those aspects.

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

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

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between the Mr J 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 J'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 the 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.

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

I have considered the entirety of the credit relationship between Mr J 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 J 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 J's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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

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

But Mr J effectively says that the Supplier did exactly that at the Time of Sale – saying the following during the course of this complaint:

- In the witness statement dated 13 March 2018:

    - *"They had told me that the fractional system was an investment as I would have partial ownership of a complex in Spain. It was even noted that after 19 years the complex will be sold for me and I would receive my money back and a return on my investment."*

- In the Letter of Complaint dated 17 April 2018:

    - *"Your brokers representatives advised that the… fractional system was an investment and our client would have partial ownership of a complex in Spain. It was confirmed to our client that after 19 years the complex will be sold by [the Supplier] and our client would receive his money back plus a return on his investment."*

I note the Letter of Complaint matches closely the witness statement. But I do not find this unusual or suspicious given the witness statement was written over a month prior to the Letter of Complaint. It does not seem to me that it is unusual or unexpected that the PR would use Mr J's own words when writing the Letter of Complaint.

Some points in the witness statement and Letter of Claim do not match up to the reality of Mr J's existing Vacation Club membership. For example, he says that he was told Vacation Club membership was being phased out, so he had to upgrade to Fractional Club membership, and that Vacation Club membership was in perpetuity and upgrading to Fractional Club membership was the only way to exit the Vacation Club. Also, there is a discrepancy between Mr J's recollection of feeling that he had to decide on the day and the Supplier's records showing he signed the Purchase Agreement four days after the presentation.

The Lender suggests that this calls into question the rest of Mr J's testimony because the Supplier's representatives were unlikely to have told Mr J things that were factually incorrect, and he has not accurately recalled when he signed the purchase agreement. However, I am satisfied that a salesperson may sometimes allow a consumer to think something that may not be true – whether because the consumer has made an assumption themselves or the salesperson has given them that impression.

I've also noted that Mr J's membership agreement was also subject to the Holiday Club's 'Articles of Association' and under a section titled 'Dissolution', it reads:

*"43.1 The Association shall continue in existence until either (a) the year **2047** when an Ordinary Resolution shall be required to continue the Association's existence for a further term of 50 years (and following that successive terms of 50 years) and unless such an Ordinary Resolution is passed (the Founder Member and any of its associated companies agreeing not to exercise its vote) the Association shall be wound up; or (b) a Special Resolution is passed to wind up the Association. In both cases the Association shall direct the Trustee in the terms of Clauses 18.4.3 or 18.4.4 of the Trust Deed in which event after the provisions of 18.4.3, 18.4.4 and 18.5 of the Trust Deed have been complied with, the Association shall be wound up"* [my emphasis]

Although the Articles of Association suggest Mr J's Holiday Club Membership may come to an end in 2047, it also allows for a 50-year term extension (and successive 50-year term extensions thereafter). So, I can see how Mr J could have formed the impression that their Holiday Club Membership was open-ended.

In terms of the points membership being phased out, it is clear that the Supplier had created the Fractional Club membership and was keen to sell this to its existing customers. I do not think it is beyond the realms of possibility that the salesperson might have given Mr J the impression that the points membership was outdated, and he'd be better off upgrading to Fractional Club membership, particularly in light of the shorter membership term and the asset backed nature of the Fractional Club membership. In short, Mr J's allegations do not appear to me to be so implausible that I should give no weight to anything in his statement.

He does appear to misremember the timing of when he signed the Purchase Agreement. And that does give me pause for thought about whether he has misremembered anything else about the sale. But in reaching my decision I have taken into account all the evidence available, including what I know about how the Supplier sold Fractional Club membership at the time. Mr J did proceed with a token 79-point upgrade despite initially declining a more substantial purchase. So, I don't find Mr J's allegations about being told his membership was being phased out entirely implausible. But I don't need to make a formal finding on its veracity as I think his complaint succeeds for other reasons.

Specifically, Mr J in effect alleges that the Supplier breached Regulation 14(3) at the Time of Sale because:

(1) There were two aspects to his Fractional Club membership: holiday rights and a profit on the sale of the Allocated Property.

(2) He was told by the Supplier that he would get his money back or more during the sale of Fractional Club membership.

So, I have considered all of the other available evidence in this complaint to see whether it points to Mr J being sold Fractional Club membership by the Supplier as an investment.

Part of that evidential matrix is what it was that Mr J actually bought. At the Time of Sale, he had 2,501 points, which he exchanged for 2,580 fractional points. The purchasing power in respect of exchanging points for holidays was the same between the two types of points – in other words, Mr J only acquired a very small increase in his holiday purchasing points (3% increase) for £7,483. This small increase suggests the purpose of the upgrade was something other than increased holiday rights. In other words, that it was possible Mr J bought it for the investment potential.

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 J's share in the Allocated Property clearly, in my view, constituted an investment as it offered him the prospect of a financial return – whether or not, like all investments, that was more than what he 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 J 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 him as an investment, i.e. told him or led him to believe that Fractional Club membership offered him 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 J, the financial value of his 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 J as an investment.

The member's declaration 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 a trade in and that CLC makes no representation as to the future price or value of the Fraction.*

The 12-page information statement included the following on page 2 (at the bottom of the fourth paragraph under *"Exact nature and content of the rights"*):

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

And the following on page 8:

- *5. Primary Purpose: The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for direct purposes of a trade in nor as an investment in real estate. CLC makes no representation as to the future pace or value of the Allocated Property or any Fractional rights.*

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

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And there are a number of strands to Mr J'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 him 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 J or led him to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered him 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 a document called "2011 Spain PTM FPOC 1 Practice Slides Manual" (the '2011 Fractional Training Manual').

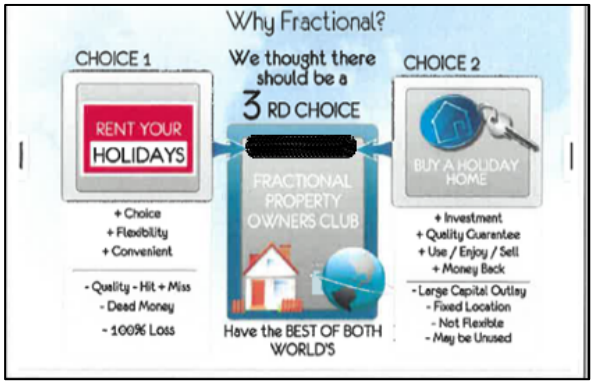
As I understand it, the 2011 Fractional Training Manual was used throughout the sale of the Supplier's first version of a product called the Fractional Property Owners Club – which I've referred to and will continue to refer to as the Fractional Club. It isn't entirely clear whether

Mr J would have been shown the slides included in the Manual. But it seems to me to be reasonably indicative of:

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

(2) how the sales representatives would have framed the sale of Fractional Club membership to Mr J.

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

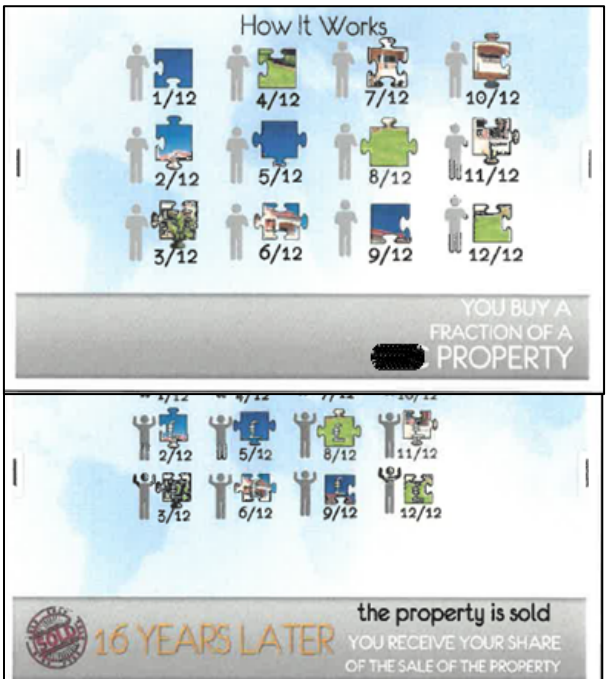


This slide titled "*Why Fractional?*" indicates that sales representatives would have taken Mr J through three holidaying options along with their positives and negatives:

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

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

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



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

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

I acknowledge that there was no comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mr J the financial value of the proprietary interest he was 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.

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.

Mr J says, in his own words, that the Supplier positioned membership of the Fractional Club as an investment to him. And as I've said before, the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of

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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

the Fractional Club to prospective members – including Mr J. And as the slides clearly indicate that the Supplier's sales representative was likely to have led him to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e., a profit) in the future, I don't find him either implausible or hard to believe when he says he was told that the fractional system was an investment and that after 19 years he would receive his money back and a return on his investment.

On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mr J was 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 J 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. […]"*
>
> [my emphasis]

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 J and the Lender that was unfair to him and warranted relief as a

result, whether the Supplier's breach of Regulation 14(3) (which, having taken place during its antecedent negotiations with Mr J, 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 him to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

For this reason, I've also thought about the terms of the bargain. Mr J acquired a very small increase in holiday rights when he took out Fractional Club membership, a shorter membership term and the investment element as set out above. So, I've considered all of these aspects further. For the £7,843 Mr J ended up paying for membership of the Fractional Club, he gained an extra 79 points rights (in addition to his 2,501 existing (non-fractional) points rights which were exchanged on a one for one basis to Fractional Club points rights) and a one thirteenth share in the sale proceeds of the Allocated Property.

It strikes me that had Mr J been seeking to only increase his points rights by an extra 79 points, he could have done so more economically by extending his existing Vacation Club membership. The nominal additional purchasing power these 79 points rights represented, noting his existing 2,501 points were already sufficient for Mr J to qualify for the platinum level of membership, begs the question as to why he would seek to increase his holding and what benefit he would hope to gain.

Further, I've not seen any evidence that points to Mr J wishing to have a shorter membership term, rather the evidence points to the investment element being a major factor in his purchasing decision. Indeed, if – as he says – Mr J believed his existing membership was in the throes of being '*phased out*', I would have expected him to allow this to happen, had he been seeking to exit his membership.

So, I think the prospect of a financial gain from Fractional Club membership was the more important and motivating factor when he decided to go ahead with his purchase – and my reading of Mr J's testimony doesn't suggest otherwise. That doesn't mean he was not interested in holidays. His use of his existing Vacation Club membership demonstrates that he quite clearly was. And that is not surprising given the nature of the product at the centre of this complaint. But I have not seen enough evidence to persuade me that the prospect of a financial gain from Fractional Club membership was so insignificant, in his view, compared to the additional holiday rights that came with membership, that his "desire" for 19 extra points rights rendered the Supplier's breach of Regulation 14(3) unimportant to the decision he ultimately made.

Mr J has not said or suggested, for example, that he would have pressed ahead with the purchase in question had the Supplier not led him to believe that Fractional Club membership was an appealing investment opportunity. And as he faced the prospect of borrowing and repaying a substantial sum of money while subjecting himself to long-term financial commitments, had he 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 he would have pressed ahead with his 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 J 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.

For the reasons explained in my provisional decision, I uphold this complaint.

Putting things right

Having found that Mr J 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 him back in the position he would have been in had he not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr J agrees to assign to the Lender 2,580 of his Fractional Points or hold them on trust for the Lender if that can't be achieved.

I think Mr J would have kept his membership of the non-fractional holiday club and he would have kept the same amount of non-fractional points rights as he exchanged for fractional points rights. Mr J added 79 points to his existing 2,501 points holding when he purchased his Fractional Club membership – with the new points representing 3% (rounded) of the 2,580.

Mr J would have needed to pay both an annual membership fee and an annual management charge as a member of the non-fractional holiday club. The annual management charge Mr J paid as a member of the Fractional Club was calculated differently. Except for the annual management charge relating to the 79 additional points rights, I don't think the amount he paid in management charges as a member of the Fractional Club would have been materially different compared to the amount he would've continued to pay, had he stayed a member of the non-fractional holiday club. But he did acquire 79 additional points rights. So, I consider it fair for the lender to refund 3% the amount he paid in management charges as a member of the Fractional Club.

I've seen that the Supplier says its records show Mr J's membership was suspended in June 2015 owing to the non-payment of the annual management charge. But the Supplier also says that Mr J contemplated purchasing more fractional points rights in 2017 before withdrawing from the agreement during the recission period. So, his membership may have since been reinstated.

Mr J has mentioned taking holidays as a member of the Fractional Club but neither party to the complaint have provided the details of the use Mr J made of his membership. It is possible Mr J could've enjoyed the same level of benefit without using the 79 additional points rights he acquired when joining the Fractional Club. But on the basis Mr J did exchange his annual entitlement of 2,580 fractional points rights, it would be fair, therefore, for the Lender to reduce the redress proportionately to reflect the market value of the accommodation bookings, but by no more than 3% of the value of each stay.

I recognise that it can be difficult to determine the market value of the accommodation bookings reasonably and reliably when they were taken a long time ago and might not have been available on the open market. And if it isn't practical or possible to determine the market value of the extra holiday benefits Mr J enjoyed by using the 79 additional points rights, I think a pragmatic alternative to reasonably reflect fair usage would be to deduct a corresponding proportion of relevant annual management charges payable under the Purchase Agreement. Therefore, in Mr J's case, I think any deduction for fair usage will cancel out any refund of the annual management charges.

With all of that being the case, out of pragmatism, I don't think the Lender needs to refund Mr J any of the annual management charges he paid as a member of the Fractional Club in lieu of any deduction for fair usage.

So, here's what I think needs to be done to compensate Mr J – whether or not a court would award such compensation:

(1) The Lender should refund the repayments Mr J made under the Credit Agreement, including any sum paid to clear the outstanding balance if Mr J has since settled the loan. The Lender can deduct the value of any promotional giveaways that Mr J used or took advantage of.

(2) Simple interest* at 8% per annum should be added to each of the repayments from the date each one was made until the date Shawbrook settles this complaint.

(3) The Lender should remove any adverse information recorded on Mr J's credit file in connection with the Credit Agreement.

(4) If Mr J's Fractional Club membership is still in place at the time of this decision (albeit potentially suspended), as long as he agrees to hold the benefit of his interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify Mr J against all ongoing liabilities as a result of 2,580 of his Fractional Club membership points rights.

*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 the reasons I've explained, I uphold this complaint. Shawbrook Bank Limited should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 10 January 2025.

Phillip Lai-Fang
Ombudsman