DRN-5300433

The complaint

Mr and Mrs E'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 E purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 10 November 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 2,630 fractional points at a cost of £46,100 (the 'Purchase Agreement'). But after trading in their existing timeshare, they ended up paying £10,490 for membership of the Fractional Club.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs E 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 E paid for their Fractional Club membership by taking finance of £10,490 from the Lender in joint names (the 'Credit Agreement').

Mr and Mrs E – using a professional representative (the 'PR') – wrote to the Lender on 13 September 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 the reasons why Mr and Mrs E say 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 in 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.

The Lender dealt with Mr and Mrs E's concerns as a complaint and issued its final response letter on 28 November 2018, rejecting it on every ground.

Mr and Mrs E then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, upheld the complaint on its merits.

The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr and Mrs E 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 E 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.

After initially confirming Mr and Mrs E's acceptance of the Investigator's assessment, the PR later requested that at least £3,000 in compensation be paid to Mr and Mrs E in addition to the redress previously recommended. It said this was for the distress and inconvenience the Lender had caused them in not reaching a fair and reasonable outcome to Mr and Mrs E's complaint (and to others the PR represented).

Having considered everything, I came to the same conclusion as our Investigator and thought Mr and Mrs E's complaint should be upheld. I issued a provisional decision (PD), 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 PD 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 E 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 E's complaint, it isn't necessary to make formal findings on all of them. This includes the allegation, for example, that commission was paid between the Lender and the Supplier but not disclosed to Mr and Mrs E.

That's because, even if other aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs E 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's more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

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

As Section 140A of the CCA is relevant law, 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 E 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 E's membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

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

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

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

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

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

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

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

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in Patel (which was recently approved by the Supreme Court in the

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

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 E 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 E 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 E's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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

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

But Mr and Mrs E say that the Supplier did exactly that at the Time of Sale – saying the following during the course of this complaint:

> *'This new structure was to give us partial ownership of [a] complex and after 19 years the property would be sold, and we would receive our money back with a bit of money on top. The representatives really pushed the idea that this was an investment… we would be in a win win situation by taking these points.'*

Mr and Mrs E allege, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because they were told by the Supplier that they would get their money back and more during the sale of Fractional Club membership.

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

Mr and Mrs E'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 E 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 E, 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 E as an investment. As an example, the 'Member's Declaration' document Mr and Mrs E 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, especially when considering what may have happened during a face-to-face sale. And there are a number of strands to Mr and Mrs E 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 E 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 an 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 E.*

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.*

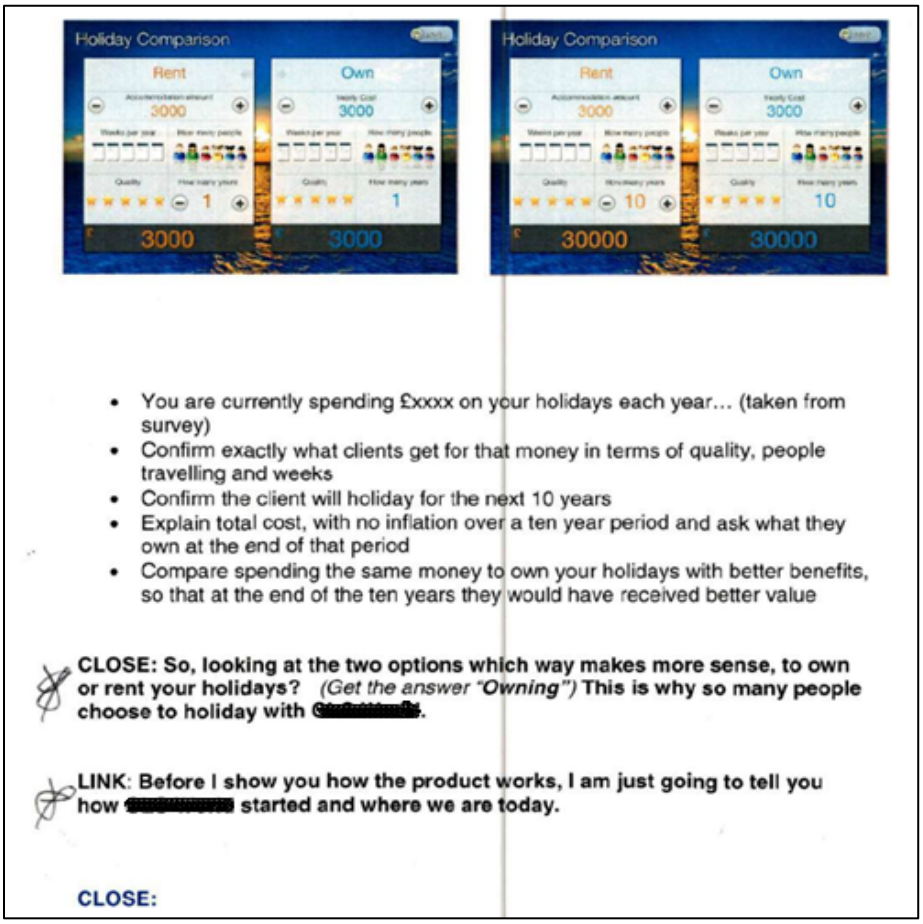
CLOSE: So what you are telling me is that, as long as it's comfortably affordable, you would always choose to own rather than rent, is that correct?

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:



- You are currently spending £xxxx on your holidays each year… (taken from survey)
- Confirm exactly what clients get for that money in terms of quality, people travelling and weeks
- Confirm the client will holiday for the next 10 years
- Explain total cost, with no inflation over a ten year period and ask what they own at the end of that period
- Compare spending the same money to own your holidays with better benefits, so that at the end of the ten years they would have received better value

CLOSE: So, looking at the two options which way makes more sense, to own or rent your holidays? *(Get the answer "**Owning**")* **This is why so many people choose to holiday with [redacted].**

LINK: Before I show you how the product works, I am just going to tell you how [redacted] started and where we are today.

CLOSE:

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

When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that '[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).'[2] *And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.*

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

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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

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, 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 E 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.

This is further supported by the 'Pricing Sheet' Mr and Mrs E provided where presumably the Supplier's representative hand wrote 'Potential Real Estate owner' at the top of the page. The handwritten comparison lower down the page aims to show the differences between Mr and Mrs E's existing timeshare and Fractional Club membership. These include the words 'Rent' and 'Own' respectively. In my view, this strongly indicates the representative in this case followed the sales approach I outlined earlier and corroborates Mr and Mrs E's recollections.

And with that being the case, I don't find it either implausible or hard to believe when Mr and Mrs E say they were told they were being sold an investment. On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mr and Mrs E were led to believe by the Supplier at the relevant time. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

On the subject of Mrs E's initial statement in broad terms, I am aware that the Lender has concerns about it. For example, it points to a lack of detail that brings into question the accuracy of her recollections, particularly as the statement is unsigned. The Lender also considers it likely that the PR shaped the content of the statement.

While I accept that Mrs E didn't sign her statement dated 14 February 2018, and that it's brief in places, I see no reason to doubt that it genuinely reflects Mrs E's recollections from the Time of Sale. And Mr and Mrs E provided a very detailed, 8-page reply to the Lender's final response letter, which they've clearly drafted themselves and which is consistent with Mrs E's earlier statement.

It may well be that some sections of the PR's Letter of Complaint are templated, but I am satisfied that the sections referring to Mr and Mrs E's recollections of the sale broadly reflect and summarise the recollections included within Mrs E's statement.

Taking everything into account, I consider that the written recollections – together with the Letter of Complaint – are balanced and consistent regarding the Fractional Club membership being presented to Mr and Mrs E as an investment. I think I can safely take account of them in my consideration of the circumstances and in concluding that the Supplier breached Regulation 14(3) of the Timeshare Regulations.

Was the credit relationship between the Lender and Mr and Mrs E 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 E 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 E 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 E, 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 E were experienced timeshare members who bought timeshares before this purchase. However, I can't see how that's relevant to whether or not the breach of Regulation 14(3) led to an unfair credit relationship. The Lender hasn't, for example, said that Mr and Mrs E ought not to have relied on or believed what they were told by the Supplier at the Time of Sale due to their previous purchasing history.

On my reading of Mrs E's initial statement, which I find to be plausible and persuasive for the reasons stated earlier, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when Mr and Mrs E decided to go ahead with their purchase. That doesn't mean they were not interested in reducing the term of their existing timeshare. Mrs E's statement indicates what she referred to as 'scare tactics' were employed by the Supplier in that regard. But as Mr and Mrs E 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 a reduced term, on the balance of probabilities, I think their purchase was motivated primarily 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 E 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.

The Lender points out that Mr and Mrs E acquired an additional benefit of 129 points. But that is very few additional points relative to the 2,501 points they already held and the £10,490 extra they paid. As Mr and Mrs E said in their detailed response to the final response letter:

> *'… we didn't need any more points, we already had more points than we could use, and had a high carry-over each year'*

On the other hand, Mr and Mrs E's detailed response emphasised the importance to them of the investment aspect of the membership several times. They say they believed they had bought a share of 'real' property which was an investment and were shocked to learn the Lender was denying it was sold as such.

I have already found that the Supplier breached Regulation 14(3) in marketing the Fractional Club membership as an investment. Given the circumstances and the evidence around Mr and Mrs E's motivations, which I consider as being clearly based on the prospect of a return on investment as a result of that breach, I consider that the credit relationship between them and the Lender was rendered unfair.

While I believe the Lender should compensate Mr and Mrs E for their financial losses, I do not intend to make an 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 E 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 E wanted to accept the Investigator's assessment, 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 disagreed with the Investigator's assessment 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 E in fact suffered distress and inconvenience to such an extent that significant (or any) compensation was warranted in addition to the redress the Investigator had already recommended the Lender pay for their financial losses. I note that I am currently directing the payment of interest to compensate Mr and Mrs E 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.

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 E 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 E 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 E agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs E were existing Vacation Club members and their membership was traded in against the purchase price of Fractional Club membership. Under their Vacation Club membership, they had a certain number of Vacation Club points. And, like Fractional Club membership, they had to pay annual management charges as Vacation Club members. So, had Mr and Mrs E not purchased Fractional Club membership, they would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr and Mrs E from the Time of Sale as part of their Fractional Club membership should amount only to the difference between those charges and the annual management charges they would have paid as ongoing Vacation Club members.

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

(1) The Lender should refund Mr and Mrs E's repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.
(2) In addition to (1), the Lender should also refund the difference between Mr and Mrs E's

Fractional Club annual management charges paid after the Time of Sale and what their Vacation Club annual management charges would have been had they not purchased the Fractional Club membership.

(3) The Lender can deduct

i. *The value of any promotional giveaways that Mr and Mrs E used or took advantage of; and*
ii. *The market value of the holidays* Mr and Mrs E took using their Fractional Points if their annual management charge for the year in which the holidays were taken was more than the annual management charge they would have paid as ongoing Vacation Club members. However, the deduction should be a proportion equal to the difference between those annual management charges. And if any of Mr and Mrs E's Vacation Club annual management charges would have been higher than their equivalent Fractional Club annual management charge, there shouldn't be a deduction for the market value of any holidays taken using Fractional Points in the years in question as they could have taken those holidays as ongoing Vacation Club members in return for the relevant annual management charge.*

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

*(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 E's credit file in connection with the Credit Agreement.
(6) If Mr and Mrs E's Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.

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

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

The Lender said it didn't intend to challenge my PD given the specific facts of this case. It did share its observations on some aspects of the PD that it did not agree with, but it did not ask me to revisit my provisional findings.

Mr and Mrs E were happy with the bulk of my PD but didn't agree with parts of my recommendation on how the Lender should fairly compensate them. Specifically, they mentioned part (3) ii. of that section, where I said the Lender could, if the annual management charge (AMC) for the relevant year was more than the AMC they'd have paid as Vacation Club members, deduct the market value of the holidays they took – on a proportionate basis. For example, if the AMC was 10 per cent more than the AMC they'd have paid as a Vacation Club member, the Lender could deduct 10 per cent of the market value of the holidays they took. Mr and Mrs E say their AMCs were only marginally higher than they'd have been had their Vacation Club membership continued and that the

recommendation doesn't take into account that they could have taken the same holidays with their Vacation Club points allocation.

Mr and Mrs E also say it isn't fair for the Lender to look at each year in isolation because this doesn't reflect the Vacation Club membership rules, which allowed them to roll over unused points into the following year, for up to three years.

In summary, Mr and Mrs E didn't feel that the compensation I proposed put them in the position they'd have been in had the relationship not been rendered unfair.

Put simply, Mr and Mrs E say the Lender should only be allowed to make a deduction for any holidays they took if, when it applies the Vacation Club membership rules, especially those that allow a consumer to carry over and 'borrow' points, Mr and Mrs E used more points than they had as Vacation Club members.

I wrote to the Lender on 3 February 2025. I included a copy of Mr and Mrs E's submissions, and I explained that as I was persuaded by the points they'd made, I was minded to amend the redress accordingly when I made my final decision. I invited the Lender to make further submissions on this point in particular.

The Lender's response was brief and simply said:

'*… we remain of the view that it is fair and reasonable in a redress calculation to make a deduction equivalent to the management charges paid during the years where a holiday was taken and/or where all holiday usage for a year has been used toward holidays taken in other years.*

[The Supplier] *confirmed* [Mr and Mrs E] *used all of their 2014 and 2015 points towards future holidays. Had they not rolled over their 2014 and 2015 points, they would not have been able to enjoy the 14 weeks of holidays they did in 2016 and 2017.*'

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.

I note the points the Lender raises in response to, and about, my provisional decision to uphold this complaint. But, given that the Lender didn't ask me to reconsider my decision and agreed to make an offer, I won't comment further on the aspects it highlighted.

Having considered the points raised by Mr and Mrs E in response to the PD, I think that what they set out broadly represents fair compensation in the circumstances. I think this would put them in the position they'd be in had the credit relationship not been rendered unfair.

I've thought about the comments the Lender provided having had sight of Mr and Mrs E's proposal. However, these don't change my current view of what fair compensation in this case looks like, not least because those comments don't materially address why the redress Mr and Mrs E suggest is unfair and why the redress it seeks to apply instead *is* fair.
My understanding is that, from the start of the Fractional Club membership in November 2014 until its relinquishment in October 2018, no holidays were taken in 2014, 2015 and 2018. Mr and Mrs E then took several holidays in 2016 and 2017 and used around 9,000 points altogether. Prior to their Fractional Club membership, I gather Mr and Mrs E held 2,501 points which would have enabled them to book the holidays that they did as Fractional Club members without having to use any of the extra points they'd acquired.

The suggested method of redress I put to the Lender for comment after I issued my PD means it wouldn't be able to deduct the market value of Mr and Mrs E's holidays in the circumstances described. But it also means, for example, that the Lender's still entitled to refund only the difference between the AMCs they paid as Fractional Club members and the AMCs they'd have paid as Vacation Club members.

Taking everything into account, I remain of the view that the award of compensation I've most recently suggested is fair in the circumstances.

Putting things right

Having found that Mr and Mrs E 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 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 E agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs E were existing Vacation Club members and their membership was traded in against the purchase price of Fractional Club membership. Under their Vacation Club membership, they had a certain number of Vacation Club points. And, like Fractional Club membership, they had to pay annual management charges as Vacation Club members. So, had Mr and Mrs E not purchased Fractional Club membership, they would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr and Mrs E from the Time of Sale as part of their Fractional Club membership should amount only to the difference between those charges and the annual management charges they would have paid as ongoing Vacation Club members.

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

(1) The Lender should refund Mr and Mrs E's repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.
(2) In addition to (1), the Lender should also refund the difference between Mr and Mrs E's Fractional Club annual management charges paid after the Time of Sale and what their Vacation Club annual management charges would have been had they not purchased the Fractional Club membership.
(3) The Lender can deduct the value of any promotional giveaways that Mr and Mrs E used or took advantage of.

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

(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 E's credit file in connection with the Credit Agreement reported within six years of this decision.
(6) If Mr and Mrs E'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 Mr and Mrs E a certificate showing how much tax it's taken off if they ask for one.

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr E and Mrs E to accept or reject my decision before 22 April 2025.

Nimish Patel
Ombudsman