DRN-5319434

The complaint

Miss O's complaint is, in essence, that Clydesdale Financial Services Limited trading as Barclays Partner Finance (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with her under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying claims under Section 75 of the CCA.

As the relevant credit agreement was in Miss O's name only, she is the only eligible complainant here. But, as the timeshare in question was in both her and Mr A's name, I'll refer to them both throughout where relevant.

What happened

In August 2011, Miss O and Mr A purchased a trial membership of a timeshare from a timeshare provider (the 'Supplier'). This purchase was funded by a loan from the Lender in Mr A's name only, but this purchase isn't the subject of this complaint.

In June 2012, they traded in their trial membership towards a full timeshare membership (the 'Fractional Club'). This purchase was funded by a loan from another lender in both Miss O and Mr A's joint names. And, that loan consolidated their previous lending. Their complaint about that purchase is being considered in a separate decision.

Then, on 1 September 2014 (the 'Time of Sale') they traded in their previous membership, thereby 'upgrading' their Fractional Club membership. They entered into an agreement with the Supplier to buy 1,300 fractional points at a cost of £23,589 (the 'Purchase Agreement'). But after trading in their existing timeshare, they ended up paying £9,995 for membership of the Fractional Club. It's this purchase which is the subject of this complaint.

Fractional Club membership was asset backed – which meant it gave Miss O and Mr A more than just holiday rights. It also included a share in the net sale proceeds of a property named on their Purchase Agreement (the 'Allocated Property') after their membership term ends.

Miss O and Mr A paid for their Fractional Club membership by taking finance of £22,162 from the Lender in Miss O's name only (the 'Credit Agreement'). This loan consolidated their previous lending.

Miss O – using a professional representative (the 'PR') – wrote to the Lender on 13 August 2018 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving her a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. A breach of contract by the Supplier giving her a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

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

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

1. told them that Fractional Club membership had a guaranteed end date when that was not true.
2. told them that the Supplier's holiday resorts were exclusive to its members when that was not true.
3. Told them they would receive a high standard of accommodation, when that was not true.
4. Told them the annual management fees would only go up by a certain amount, but that was not true because they increased by significantly more than that year after year.

Miss O says that she has a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Miss O.

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

Miss O also raised some more general concerns with membership which, although not expressed in these exact terms, suggest she feels the Supplier breached the purchase agreement. Namely, because they say they found it difficult to book the holidays they wanted, when they wanted.

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

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

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

1. The contractual terms setting out (i) the duration of their Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of their membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
2. They were pressured into purchasing Fractional Club membership by the Supplier.
3. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.
4. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
5. The Supplier didn't give an adequate or transparent explanation as to the features of the agreement which may have made the credit unsuitable for her or have a significant adverse effect which she would be unlikely to foresee, especially given the length of the term, her age and high interest and total charge for the credit provided.

The Lender did not respond to Miss O's complaint within the eight weeks required by the Regulator. So, the PR referred the complaint on Miss O's behalf to the Financial Ombudsman Service.

The Lender subsequently dealt with Miss O's concerns as a complaint and issued its final response letter on 25 January 2019, rejecting it on every ground.

The complaint was then assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

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

I considered the matter and issued a provisional decision dated 29 January 2025. In that decision, I said:

"*The legal and regulatory context*

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

I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:

- *The CCA (including Section 75 and Sections 140A-140C).*
- *The law on misrepresentation.*
- *The Timeshare Regulations.*
- *The UTCCR.*
- *The 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 Miss O and Mr A as an investment, which, in the circumstances of this complaint, rendered the credit relationship between Miss O and the Lender unfair to her for the purposes of Section 140A of the CCA.

However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I recognise that there are a number of aspects to Miss O's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the Supplier misrepresented the Fractional Club membership and breached the Purchase Agreement and the Lender ought to have accepted and paid those claims under Section 75 of the CCA, and the other reasons why she says the credit relationship was unfair to her.

I say this because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Miss O in the same or a better position than she would be if the redress was limited to misrepresentation or a breach of contract.

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

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

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

Under Section 140A of the CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as "a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]". And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to "finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Miss O and Mr A's membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

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

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

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

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

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

"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator

and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[1]

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

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in Patel (which was recently approved by the Supreme Court in the case of Smith), that determining whether or not the relationship complained of was unfair had to be made "having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination" – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in Plevin (at paragraph 17):

"Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with […] whether the creditor's relationship with the debtor was unfair."

Instead, it was said by the Supreme Court in Plevin that the protection afforded to debtors by Section 140A is the consequence of all of the relevant facts.

I have considered the entirety of the credit relationship between Miss O 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 Miss O and the Lender.

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

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

The Lender does not dispute, and I am satisfied, that Miss O and Mr A's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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

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

But Miss O that the Supplier did exactly that at the Time of Sale – saying the following in a witness statement signed and dated 6 July 2017:

> *"They convinced us that they could trade our current Fractional, which was not really a proper share, for a better one that was 'bricks and mortar' in Tenerife. Tenerife would be a better place to own as it was an all year-round market.*
>
> *[…]*
>
> *As this was a better investment for us to sell and because the interest rate we were being offered by [the Supplier] was based on a Turkish rate, we could easily get a lower 'UK' rate.*
>
> *[…]*
>
> *We now wish to relinquish our Timeshare because we have been miss sold [sic] finance by [the Supplier] for an investment in property, which this is not."*

And, the Letter of Complaint reflects this.

Miss O and Mr A allege, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because it was sold to them by the Supplier as an investment in property, and they would make a profit on the sale of the Allocated Property.

I acknowledge that Miss O and Mr A don't explicitly say they were told they would make a profit, but I think their testimony is clear that they were sold the membership on the basis that they were improving the property that they 'owned' and therefore it was a better investment for them as it would be more saleable in the future. And, in the context of this sale, taking into account that they were upgrading their already existing Fractional Club membership, I can't see what that would refer to apart from a profit on the sale of the Allocated Property.

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

Miss O and Mr A'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 <u>as an investment</u>. It doesn't prohibit the mere existence of an investment element in a

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

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Miss O and Mr A 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 Miss O and Mr A, 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 Miss O and Mr A as an investment.

For example, in the Member's Declaration signed by Miss O and Mr A it said:

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

And, in the Information Statement signed by Miss O and Mr A it said:

> *"The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for the direct purposes of a trade in nor as an investment in real estate. [The Supplier] makes no representation as to the future price or value of the Allocated Property or any Fractional Rights."*

And:

> *"11. Investment advice*
>
> *The Vendor, or any sales or marketing agent and the Manager and their related businesses (a) are not licenced investment advisers authorised 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) all purchasers are advised to obtain competent advice from legal, accounting and investment advisers 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."*

This disclaimer seems to have been aimed at distancing the Supplier from any investment advice that was given by its sales agents, telling customers to take their own investment advice, and repeating the point that the returns from membership from the Fractional Club weren't guaranteed.

Yet I think it would be fair to say that, while a prospective member who read the disclaimer in question might well have thought that they would be wise to seek professional investment advice in relation to membership of the Fractional Club, rather than rely on anything they

might have been told by the Supplier, it wouldn't have done much to dissuade them from regarding membership as an investment. In fact, I think it would have achieved rather the opposite.

It's also difficult to explain why it was necessary to include such a disclaimer if there wasn't a very real risk of the Supplier marketing and selling membership of the Fractional Club as an investment given the difficulty of articulating the benefit of fractional ownership in a way that distinguishes it from other timeshares from the viewpoint of prospective members.

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And there are a number of strands to Miss O and Mr A's allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that membership of the Fractional Club was expressly described as an "investment" in several different contexts and (2) that membership of the Fractional Club could make them a financial gain and/or would retain or increase in value.

So, I have considered:

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

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

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

How the Supplier marketed and sold the Fractional Club membership

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives – including:

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

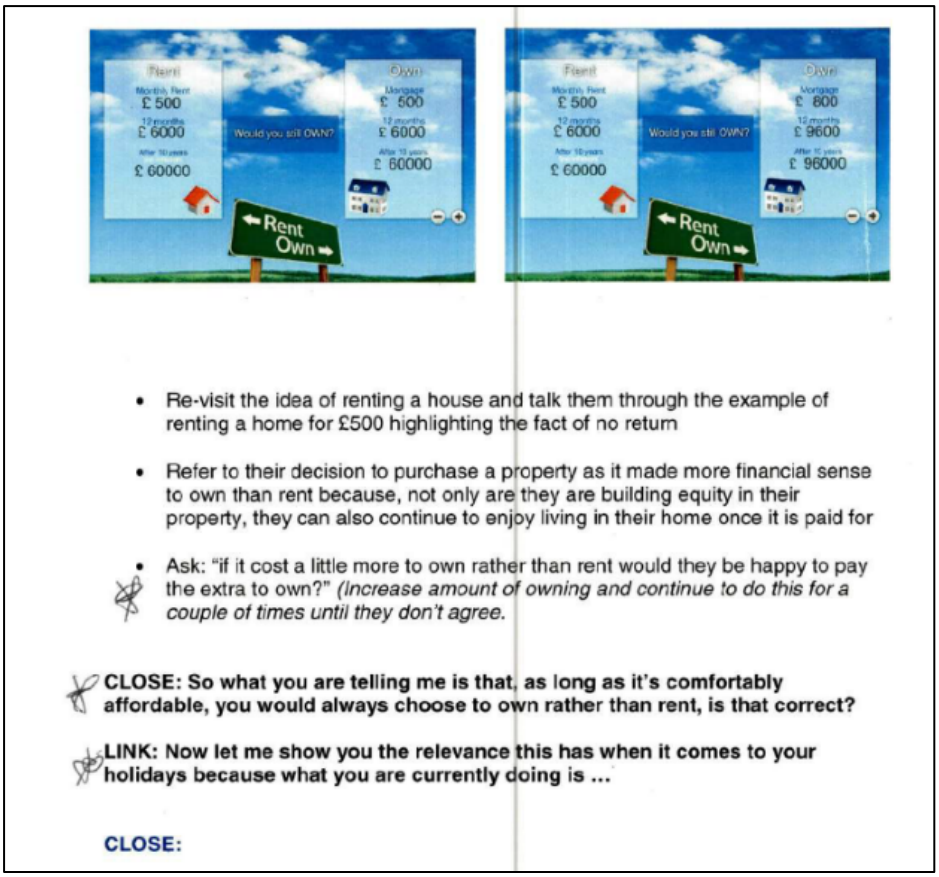
Neither the 2013/2014 Induction Training nor the ESA I've seen included notes of any kind. However, the Fractional Club Training Manual includes very similar slides to those used in the ESA. And according to the Supplier, the Fractional Club Training Manual (or something similar) was used by it to train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

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

(2) *how the sales representatives would have framed the Supplier's multimedia presentation (i.e., the ESA) during the sale of Fractional Club membership to prospective members – including Miss O and Mr A.*

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

Page 32 of the Fractional Club Training Manual covered how the Supplier's sales representatives should address that comparison in more detail – indicating that they would have tried to demonstrate that there were financial advantages to owning property, over 10 years for example, rather than renting:



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

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

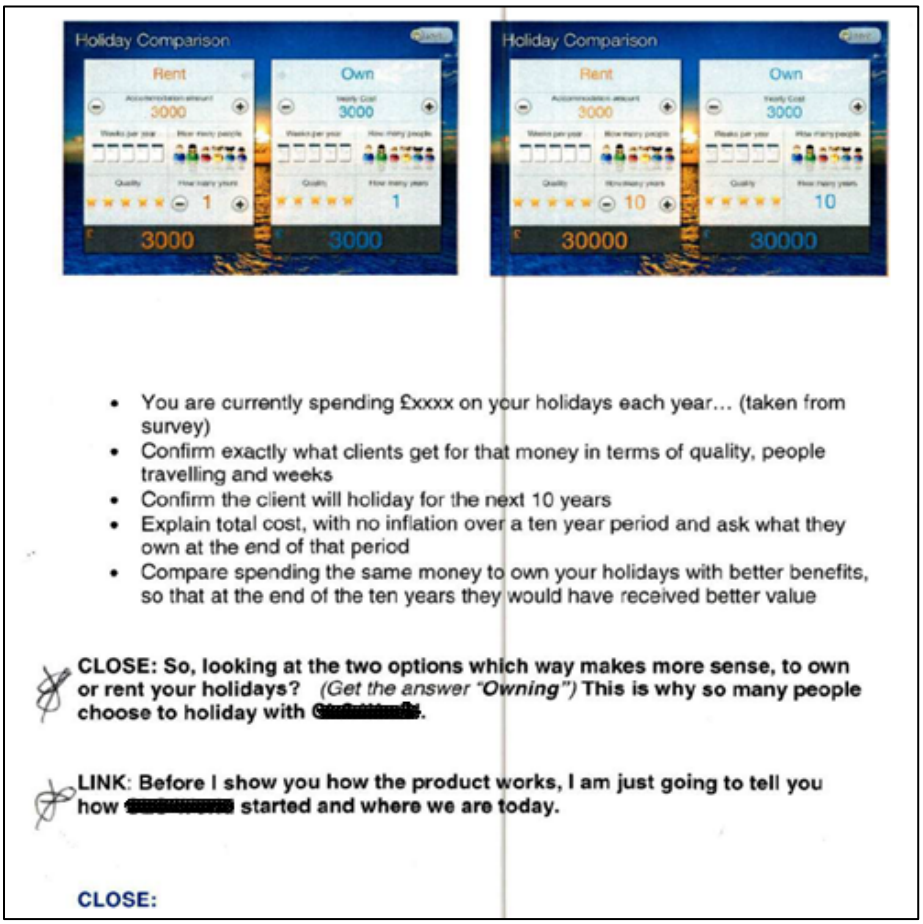
LINK: Now let me show you the relevance this has when it comes to your holidays because what you are currently doing is …

CLOSE:

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

I acknowledge that the slides don't include express reference to the "investment" benefit of ownership. But the description alludes to much the same concept. It was simply rephrased in the language of "building equity". And with that being the case, it seems to me that the approach to marketing Fractional Club membership was to strongly imply that 'owning' fractional points was a way of building wealth over time, similar to home ownership.

Page 33 of the Fractional Club Training Manual then moved the Supplier's sales representatives onto a cost comparison between "renting" holidays and "owning" them. Sales representatives were told to ask prospective members to tell them what they'd own if they just paid for holidays every year in contrast to spending the same amount of money to "own" their holidays – thus laying the groundwork necessary to demonstrating the advantages of Fractional Club membership:



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

> *"FPOC = small piece of […] World apartment which equals* ***ownership of bricks and mortar***
>
> *[…]*
>
> *Major benefit is the property is sold in nineteen years* ***(optimum period to cover peaks and troughs in the market)*** *when sold you will get your share of the proceeds of the sale*

SUMMARISE LAST SLIDE:

FPOC equals a passport to fantastic holidays for 19 years ***with a return at the end of that period.*** *When was the last time you went on holiday and* ***got some money back? How would you feel if there was an opportunity of doing that?***

[…]

LINK: Many people join us every day and one of the main questions they have is ***"how can we be sure our interests are taken care of for the full 19 years?*** *As it is very important you understand how we ensure that, I am going to ask Paul to come over and explain this in more details for you.*

[…]

*"Handover: (Manager's name) John and Mary love FPOC and have told me the best for them is……...****Would you mind explaining to them how their interest will be protected over the next 19 year[s]****?"*

(My emphasis added)

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

"T/O will explain slides emphasising that they only pay a fraction of maintaining the entire property. It also ensures property is kept in peak condition to maximise the return in 19 years['] time.

[…]

CLOSE: ***I am sure you will agree with us that this management fee is an extremely important part of the equation as it ensures the property is maintained in pristine condition so at the end of the 19 year period, when the property is sold, you can get the maximum return.*** *So I take it, like our owners, there is nothing about the management fee that would stop you taking you holidays with us in the future?..."*

(My emphasis added)

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

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

[…]

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

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

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

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

And to consumers (like Miss O and Mr A) 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 Miss O and Mr A the financial value of the proprietary interest they 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."*

[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

"[...] although the point is more latent in the first decision than in the second, it is clear that both ombudsmen viewed fractional ownership timeshares – simply by virtue of the interest they confer in the sale proceeds of real property unattached to any right to stay in it, and the prospect they undoubtedly hold out of at least 'something back' – as products which are inherently dangerous for consumers. ***It is a concern that, however scrupulously a fractional ownership timeshare is marketed otherwise, its offer of a 'bonus' property right and a 'return' of (if not on) cash at the end of a moderate term of years may well taste and feel like an investment to consumers who are putting money, loyalty, hope and desire into their purchase anyway.*** *Any timeshare contract is a promise, or at the very least a prospect, of long-term delight. [...] A timeshare-plus contract suggests a prospect of happiness-plus. And a timeshare plus 'property rights' and 'money back' suggests adding the gold of solidity and lasting value to the silver of transient holiday joy."*

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

Overall, therefore, as the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members, they indicate that the Supplier's sales representative was likely to have led Miss O and Mr A to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e., a profit) in the future. And with that being the case, I don't find them either implausible or hard to believe when they say they were told they could get a 'better share' that was 'bricks and mortar' (which seems to be a specific reference to some of the sales materials outlined above). And, that it 'was a better investment for them to sell' which was an 'investment in property'. On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Miss O and Mr A led by the Supplier to believe at the relevant time. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

Was the credit relationship between the Lender and the Consumer rendered unfair?

Having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Miss O and the Lender under the Credit Agreement and related Purchase Agreement.

As the Supreme Court's judgment in Plevin makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in Carney and Kerrigan (respectively) on causation.

In Carney, HHJ Waksman QC said the following in paragraph 51:

"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"

And in Kerrigan, HHJ Worster said this in paragraphs 213 and 214:

"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court ***may*** *make an order* ***if*** *it determines that the relationship is unfair to the debtor. […]*

[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Miss O 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 Miss O, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender) led her and Mr A to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On my reading of Miss O and Mr A's testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. I note, for example, they've said in their testimony they wish to relinquish their membership "because we have been miss sold [sic] finance by [the Supplier] for an investment in property, which this is not".

That doesn't mean they were not interested in holidays. Their own testimony demonstrates that they quite clearly were. And that is not surprising given the nature of the product at the centre of this complaint.

But as Miss O and Mr A say (plausibly in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit as that share was one of the defining features of membership that marked it apart from the more 'standard' type of timeshare available to them and as per their testimony, upgrading was a way of 'improving' that investment. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

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

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Miss O under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint.

Fair Compensation

Having found that Miss O 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 Miss O (and Mr A) agree to assign to the Lender the additional 553 Fractional Points they bought at the Time of Sale or hold them on trust for the Lender if that can be achieved.

Miss O was an existing Fractional Club member ('FC Membership 1') alongside Mr A and their membership was traded in against the purchase price of Fractional Club membership in question ('FC Membership 2'). Under FC Membership 1, they had 747 Fractional Points. And, like FC Membership 2, they had to pay annual management charges as part of FC Membership 1. So, had Miss O and Mr A not purchased FC Membership 2, 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 Miss O and Mr A from the Time of Sale as part of FC Membership 2 should amount only to the difference between those charges and the annual management charges they would have paid as part of FC Membership 1.

Further, Miss O and Mr A paid for FC Membership 1 using finance ('Loan 1') that they refinanced using the Credit Agreement. So, part of what Miss O borrowed at the Time of Sale was used to repay the borrowing under Loan 1 that always had to be repaid. I recognise that the credit agreement entered into as part of Loan 1 is a related agreement (under Section 140C(4)(a)) for the purposes of an assessment of unfairness under the Credit Agreement. But Miss O and Mr A have complained about Loan 1 separately and I have issued a separate decision upholding that complaint. My proposed redress also deals with any unfairness that there might be in the Credit Agreement arising out of the sale of FC Membership 1. So, I do not think it would be fair for the Lender to refund everything that was paid and, if relevant, due to be repaid under the Credit Agreement, otherwise Miss O will receive compensation twice rising out of the same sale. Given that, I think this ought to be reflected in my redress when remedying the unfairness I have found.

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

(1) The Lender should refund the difference between Miss O's repayments to it under the Credit Agreement and what she and Mr A would have paid under Loan 1, including the difference between any sums paid to settle the debt owing under the Credit Agreement and what would have needed to have been paid to settle Loan 1. The Lender should also reduce any outstanding balance under the Credit Agreement, if there is one, so that Miss O would only owe now what they would have owed under Loan 1 and change any future repayments so that she is making the same repayments she was towards Loan 1.

(2) The Lender should also refund 42% of annual management charges Miss O (and Mr A) actually paid from the Time of Sale 2 to date.*

(3) The Lender can deduct

i. *The value of any promotional giveaways that Miss O and Mr A used or took advantage of from the Time of Sale 2 onwards; and*
ii. *A proportion (42%) of the market value of the holidays** Miss O and Mr A took using their Fractional Club points from the Time of Sale onwards (if any).*

(the 'Net Repayments')

** Miss O and Mr A, having purchased their first Fractional Club membership in June 2012, then made their purchase of this Fractional Club in September 2014. But the Lender is only responsible for the unfairness arising out of this Credit Agreement in relation to the management charges caused by the additional fractional points acquired through this Fractional Club. I think the simplest way to work this out is to refund a proportion of the charges levied from the Time of Sale onwards, expressed as the number of fractional points acquired through Fractional Club divided by the total number of fractional points held at the time the management charge was levied ('the Proportional Management Charges').*

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

*(4) Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.*

(5) The Lender should remove any adverse information recorded on Miss O's credit file in connection with the Credit Agreement reported within six years of this decision.

(6) If Miss O and Mr A'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 42% of any ongoing liabilities accruing from 1 September 2014 onwards as a result of their Fractional Club membership.

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

I do wish to make the Lender aware that I'm taking the redress awarded to Miss O in this complaint into account when making my decision on her and Mr A's other complaint about their other, previous purchase.

This, together with what I've said in the paragraphs above will achieve, as closely as I can in this complaint, the same financial position for Miss O (and Mr A) as if they had never joined the Fractional Club in the first place."

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

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

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

What I've decided – and why

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

Following the responses from both parties, I've considered all the evidence and arguments afresh.

As neither party has provided any new evidence or arguments in relation to whether the complaint should be upheld, and having reconsidered everything, I don't believe there is any reason for me to reach a different conclusion from that which I reached in my provisional decision (outlined above).

I also remain satisfied that the method of redress I proposed in my provisional decision is fair and reasonable in the circumstances of this complaint. I'll explain why and respond to the specific points the Lender has raised in that regard.

The Lender's first point was that they don't feel it's necessary for the fractional points to be assigned to, or to be held on trust for, them. They say they wouldn't directly indemnify Miss O in relation to any future liabilities and they have an established and proven process whereby the Supplier confirms to them post-settlement that membership has been terminated.

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

Secondly, the Lender said they would only remediate the element of the loan which relates to the purchase which is the subject of this complaint. And, they explained that they haven't received any repayments from Miss O since February 2019.

But I believe I already covered this point in my provisional decision where I said:

> "*Further, Miss O and Mr A paid for FC Membership 1 using finance ('Loan 1') that they refinanced using the Credit Agreement. So, part of what Miss O borrowed at the Time of Sale was used to repay the borrowing under Loan 1 that always had to be repaid. I recognise that the credit agreement entered into as part of Loan 1 is a related agreement (under Section 140C(4)(a)) for the purposes of an assessment of unfairness under the Credit Agreement. But Miss O and Mr A have complained about Loan 1 separately and I have issued a separate decision upholding that complaint. My proposed redress also deals with any unfairness that there might be in the Credit Agreement arising out of the sale of FC Membership 1. So, I do not think it would be fair for the Lender to refund everything that was paid and, if relevant, due to be repaid under the Credit Agreement, otherwise Miss O will receive compensation twice rising out of the same sale. Given that, I think this ought to be reflected in my redress when remedying the unfairness I have found.*
>
> […]
>
> *The Lender should refund the difference between Miss O's repayments to it under the Credit Agreement and what she and Mr A would have paid under Loan 1, including the difference between any sums paid to settle the debt owing under the Credit Agreement and what would have needed to have been paid to settle Loan 1. The Lender should also reduce any outstanding balance under the Credit Agreement, if there is one, so that Miss O would only owe now what they would have owed under Loan 1 and change any future repayments so that she is making the same repayments she was towards Loan 1.*"

So, I remain satisfied that the method of redress I proposed in my provisional decision is the fair and reasonable way to resolve this complaint. So, for the avoidance of doubt, upon receipt of notification from this Service of Miss O's acceptance of my final decision and that Miss O (and Mr A) agree to assign to the Lender the additional 553 Fractional Points they bought at the Time of Sale or hold them on trust for the Lender if that can be achieved, the Lender should:

(1) Refund the difference between Miss O's repayments to it under the Credit Agreement and what she and Mr A would have paid under Loan 1, including the difference between any sums paid to settle the debt owing under the Credit Agreement and what would have needed to have been paid to settle Loan 1. The Lender should also reduce any outstanding balance under the Credit Agreement, if there is one, so that Miss O would only owe now what they would have owed under Loan 1 and change any future repayments so that she is making the same repayments she was towards Loan 1.
(2) The Lender should also refund 42% of the annual management charges Miss O (and Mr A) actually paid from the Time of Sale 2 to date*.
(3) The Lender can deduct:

    i. The value of any promotional giveaways that Miss O and Mr A used or took advantage of from the Time of Sale 2 onwards; and
    ii. A proportion (42%) of the market value of the holidays** Miss O and Mr A took using their Fractional Club points from the Time of Sale onwards (if any).

(the 'Net Repayments')

* Miss O and Mr A, having purchased their first Fractional Club membership in June 2012, then made their purchase of this Fractional Club in September 2014. But the Lender is only responsible for the unfairness arising out of this Credit Agreement in relation to the management charges caused by the additional fractional points acquired through this Fractional Club. I think the simplest way to work this out is to refund a proportion of the charges levied from the Time of Sale onwards, expressed as the number of fractional points acquired through Fractional Club divided by the total number of fractional points held at the time the management charge was levied ('the Proportional Management Charges').

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

(4) Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.
(5) The Lender should remove any adverse information recorded on Miss O's credit file in connection with the Credit Agreement reported within six years of this decision.
(6) If Miss O and Mr A'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 42% of any ongoing liabilities accruing from 1 September 2014 onwards as a result of their Fractional Club membership.

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

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss O to accept or reject my decision before 24 March 2025.

Fiona Mallinson
Ombudsman