DRN-5319935

The complaint

Mr and Mrs D'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 D purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 16 September 2013 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,200 fractional points at a cost of £15,349 including membership dues (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs D 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 D paid for their Fractional Club membership by taking finance of £15,349 from the Lender in both their names (the 'Credit Agreement').[1]

Mr and Mrs D – using a professional representative (the 'PR') – wrote to the Lender on 21 August 2018 (the 'Letter of Complaint') to complain about:

- The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

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

The Letter of Complaint set out several reasons why Mr and Mrs D thought 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. Mr and Mrs D were not told that the Lender paid the Supplier commission in relation to the Credit Agreement.

2. They were pressured into entering into the Purchase Agreement and Credit Agreement.

3. The Supplier misled Mr and Mrs D by telling them that:

    a. The availability of holidays was guaranteed.

    b. Only members could stay at the Supplier's resorts.

    c. They had partial ownership of the complex and this was an investment – after 18 years the property would be sold, and they would get their money back and make some profit.

1 Mr and Mrs D went on to upgrade their membership in 2015 – the sale of which is being considered in a separate complaint at this service.

4. Mr and Mrs D were not given any payment options other than using the loan and weren't given time to consider the terms and conditions of the Credit Agreement.

The Lender dealt with Mr and Mrs D's concerns as a complaint and issued its final response letter on 16 October 2018, rejecting it on every ground.

The PR then referred the complaint to the Financial Ombudsman Service on behalf of Mr and Mrs D. It was assessed by an Investigator who, having considered the information on file, recommended the complaint be upheld.

The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr and Mrs D at the Time of Sale in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (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 D was rendered unfair to them for the purposes of section 140A of the CCA.

Mr and Mrs D agreed with the Investigator's assessment. The Lender disagreed and asked for an Ombudsman's decision – which is why it was passed to me. The Lender said that:

- The client statement provided, which set out Mr and Mrs D's recollection of the sale, was not clear and credible.

- The Supplier did not sell or market Fractional Club membership as an investment, and the client statement lacked detail about how it was sold to Mr and Mrs D as an investment.

- Notes made at the time of sale by the Supplier suggest that Mr and Mrs D were motivated to purchase Fractional Club membership for reasons other than as an investment.

Since then, the PR has written to us to request a sum of £3,000 compensation to be paid to reflect the distress and inconvenience caused by the way in which the Lender has dealt with the complaint.

On 27 January 2025, I issued a provisional decision on this complaint. My provisional decision was that the Supplier had sold and/or marketed the Fractional Club to Mr and Mrs D as an investment in breach of Regulation 14(3) of the Timeshare Regulations. And the impact of that breach on Mr and Mrs D's purchasing decision was such that it rendered their resultant credit relationship with the Lender unfair to them for the purposes of Section 140A of the CCA. I explained how I thought the Lender should calculate and pay fair compensation to Mr and Mrs D.

The PR responded to say that Mr and Mrs D agreed with my provisional decision.

The Lender responded at length, disagreeing with my provisional decision. It said, in summary:

- The provisional decision was premised on a material error of law in its approach to the prohibition under Regulation 14(3) of the Timeshare Regulations and erred in its application of that prohibition to the underlying documentation in support of the Fractional Club sale.

- The error(s) above undermined the approach to Mr and Mrs D's witness testimony.

- The provisional decision was premised on a material error of law in its approach to the legal test to determine the existence of an unfair relationship.

The Lender then went on to set out how it thought the provisional decision erred in its approaches above. While I don't intend to repeat its submissions here in detail, in summary the Lender said:

- It is inevitable that the customer would have been told about the return (of monies) following the sale of the Allocated Property as that is a feature of the product, as are the holiday rights and term of the product.

- The wording of the provisional decision is inconsistent with the definition of an "investment" as set out in ('Shawbrook & BPF v FOS')[2].

- The provisional decision errs in conflating the two meanings of the word 'return' – a 'return' on investment (the measure of profit) and being told some money would be 'returned' upon the sale (no connotation of investment or profit). The customer being told that some money would be 'returned' upon sale of the Allocated Property does not breach Regulation 14(3).

- It is not appropriate for the Ombudsman to make inferences about the conduct of the sale based on generic assumptions about the Fractional Club, rather than assess the evidence on this specific complaint.

- There is nothing inherent in the nature of Fractional Club membership which contravenes Regulation 14(3).

    - Selling as an investment requires both the finding of a representation by the seller that the reason, or significant reason, for a customer to purchase the product was the prospect of financial gain/profit, together with a corresponding financial gain/profit motive on the part of the customer. Referring to the prospect of a residual return on net sale proceeds of the Allocated Property does not satisfy that test.

The Lender made submissions regarding the Fractional Club documentation and the Supplier's sales process:

- The documentation in relation to the Fractional Club sale is unobjectionable and does not breach Regulation 14(3). Disclaimers in those documents emphasise that Fractional Club membership should not be seen as an investment. By signing those documents Mr and Mrs D confirmed that they understood this at the Time of Sale.

- The 'prospect of a financial return' does not make something an 'investment' as the latter requires the intention of acquiring more than the initial outlay, and the training material emphasised customers' expectation of receiving only a small part of their initial outlay.

- The Lender does not accept that the Supplier described Fractional Club membership to Mr and Mrs D as an investment because:

2 See below in the Legal and Regulatory Context section.

- The Information Statement signed by them says that Fractional Club membership did not involve *"an investment in real estate"*.

- The contemporaneous materials relevant to the sale doesn't reference the word "investment".

- Telling Mr and Mrs D that there is a specific Allocated Property and there will be an amount returned to them at the end of the timeshare period is merely describing the features of the produce and does not breach Regulation 14(3). Not doing so would likely infringe other parts of the Timeshare Regulations regarding the provision of key information.

- The Ombudsman should give some weight to the County Court decision in *Prankard v Shawbrook Bank Limited (G28YJ515, 8 October 2021)* where, having considered evidence including about the Supplier's training programme, the District Judge found that Fractional Club membership was not sold as an investment.

- The question the Ombudsman should have asked was: "*is there sufficiently clear, compelling evidence that the timeshare product was marketed or sold as an investment (i.e. for intended financial profit or gain as against the initial outlay)?"* That is not the question asked or answered in the provisional decision. The only reasonable answer is that the underlying sales documentation provides no reason to consider there was any such marketing or sale.

The Lender also made the following observations about Mr and Mrs D's recollections of what happened at the Time of Sale, which were provided in a Client Statement dated 21 March 2018:

- The veracity of Mr and Mrs D's recollections (in the form of the unsigned Client Statement) is not considered adequately in the provisional decision, meaning that it is given undue weight. The Lender suggests that any reliance placed on the Client Statement is unsafe.

- The Client Statement is dated 21 March 2018 but was not provided with the Letter of Complaint dated 21 August 2018. The Lender only received a copy of the Client Statement during the course of the Financial Ombudsman Service's investigation into the complaint. The PR refused to provide this to the Lender despite it being requested.

- Mr and Mrs D's allegation that Fractional Club membership was sold as an investment lacks specific details.

- I underestimated the inconsistencies between the testimony and actual events. The Lender suggests that the inaccuracies in the testimony cannot be discounted for certain aspects whilst others are assessed as plausible when taking into account the other evidence.

- The Lender suggests that it is more plausible that the Supplier accurately described the inherent features of the fractional product, i.e. the prospect of a residual return on net sale proceeds, and that Mr and Mrs D simply misremembered what they had been told about this feature.

- The Supplier has concerns that the Client Statement may have been altered by the PR in an attempt to strengthen the complaint, due to discrepancies in the statement's word count (the Supplier says the actual number of words in the Client Statement is 33 more than stated at the bottom of it).

- The UK Government has raised concerns about claims management companies submitting *"significant numbers of poorly evidenced or template responses to the FOS"*[3]. This concern reinforces the need to carefully assess the evidence submitted in each individual complaint.

- The Lender says that the PR purportedly obtained its client testimonies during telephone conversations with its clients. However, there are reasonable grounds to suspect it is tainted by the influence of the PR, including (i) the stock language used and (ii) the stock allegations raised similar to those seen in other complaints where the PR is involved.

- The Ombudsman did not attach sufficient weight to other reasons for Mr and Mrs D entering into the Purchase Agreement and the Lender disagrees with the Ombudsman's analysis and inferences drawn from the Supplier's contemporaneous notes.

- There is no evidence to support the conclusion that Fractional Club membership was sold to Mr and Mrs D as an investment other than the witness testimony, whilst the sales notes are specific. The Lender says the sales notes support the view that Mr and Mrs D's motivation for the purchase was holidays and they had been thinking about purchasing a membership prior to the sale presentation as they left their children in the apartment so they would not know about it.

- It is unreasonable for the Ombudsman to infer that the notes would purposefully omit to *"record that a consumer was motivated by the investment potential."* The Supplier has strongly emphasised that had an investment motivation been mentioned in front of their Client Liaison Officer (who was separate from the sales team), this would have been corrected straight away and it would have been documented in the sales notes.

- The Lender provided copies of Provisional Decisions from other ombudsmen where the Lender considers that those ombudsmen carefully analysed the veracity of witness testimony in cases involving similar sales and training materials.

3 See 'UK claims managers face complaint fees after minister rejects industry plea', Financial Times, 7 November 2024).

The Lender made submissions regarding the legal test applied in the PD when assessing if the relationship is unfair:

- The test to be applied, as stated in Carney v NM Rothschild and Sons Ltd3[4], was whether there was a *"material impact on the debtor when deciding whether or not to enter the agreement"*.

- The Ombudsman has erred by applying a different test – reversing the burden of proof. It is necessary to assess whether there is sufficient evidence of a material impact on the decision to enter the agreement, not to start from the position, as the Ombudsman has done, that the prospect of a financial gain existed, but that this was not insignificant enough for it not to render the relationship unfair.

- The lack of evidence showing the Fractional Club was sold as an investment (as opposed to the prospect of a financial return) means there is no breach of Regulation 14(3) to impact on the fairness of the creditor relationship.

The Lender also commented on my proposal for fair compensation:

- The provisional decision proposed that the Lender needs to refund a proportion of the management charges paid after Mr and Mrs D upgraded to 'Membership 2' in July 2015. The Lender says that this membership superseded the previous membership, and it does not believe it should be liable for such charges as fair compensation for this complaint. There is no evidence to suggest Mr and Mrs D would not have entered into Membership 2 or purchased the same number of fractional points in July 2015, so the proposal fails to put them back in the position they would have been in (but puts them back into a better position).

- The Lender says the complaint about the 2015 purchase has not been upheld by the Financial Ombudsman Service and asks how any liability can extend when that purchase (no matter how it was funded) was not in breach of the Timeshare Regulations.

As the deadline for responses to my PD has now passed, the complaint has come back to me to reconsider. Before I come to my findings, I'll set out what I consider to be the relevant legal and regulatory context.

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.

4 See the Legal and Regulatory Context section.

- The Unfair Terms in Consumer Contracts Regulations ('UTCCR').
- The Finance & Leasing Association ('FLA') Lending Code 2012.
- The Consumer Protection from Unfair Trading Regulations ('CPUT').
- 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*').

I have also taken into account:

- *Prankard v Shawbrook Bank Limited* (8 October 2021, County Court at Cardiff, unreported).

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time – which, in this complaint, includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code').

What I've decided – and why

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

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. Having done that, including considering all of the reasons the Lender gave for why it disagreed with my provisional decision, I am satisfied that this complaint should be upheld.

I think that because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr and Mrs D 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.

As both parties are aware, 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 D complaint, it isn't necessary to make formal findings on all of them, including:

1. Mr and Mrs D were not told that the Lender paid the Supplier commission in relation to the Credit Agreement.

2. They were pressured into entering into the Purchase Agreement and Credit Agreement.

3. The Supplier misled Mr and Mrs D by telling them that:

    a. The availability of holidays was guaranteed.

    b. Only members could stay at the Supplier's resorts.

4. Mr and Mrs D were not given any payment options other than using the loan and weren't given time to consider the terms and conditions of the Credit Agreement.

This is because, the redress I'm directing puts Mr and Mrs D in the same or a better position than they would be if I was upholding the complaint due to those aspects of the complaint.

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.

My provisional findings

Below is a copy of my provisional findings in this complaint, which form part of my final decision.

START OF COPY OF PROVISIONAL FINDINGS

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

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between the Mr and Mrs D 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 D'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."*[5]

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

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

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

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

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

I have considered the entirety of the credit relationship between Mr and Mrs D 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.

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 D and the Lender.

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

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 D'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 D say that the Supplier did exactly that at the Time of Sale – saying during the course of this complaint that they were told Fractional Club membership was an investment, giving them partial ownership of the Allocated Property, and that when the property was sold they would get their money back and make some profit.

Mr and Mrs D allege, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because:

(1) They were told by the Supplier that Fractional Club membership was an investment.

(2) They were told by the Supplier that they would get their money back and make some profit when the Allocated Property was sold.

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 D'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 D 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 D, 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 D as an investment.

The member's declaration included the following points (number 5 of 15):

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

The 12-page information statement included the following on page 8:

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

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And there are a number of strands to Mr and Mrs D's allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including that membership of the Fractional Club was expressly described as an *"investment*", and that membership of the Fractional Club could make them a profit.

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 D 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').

3) A document called the "FPOC2 Fly Buy Induction Training Manual" (the 'Fractional Club Training Manual').

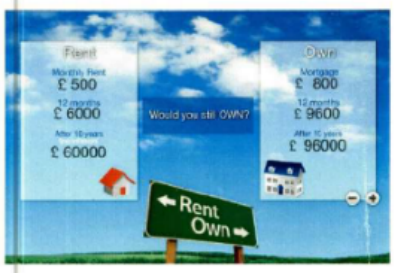
Neither the 2013/2014 Induction Training nor the ESA I've seen included notes of any kind. However, the Fractional Club Training Manual includes very similar slides to those used in the ESA. And according to the Supplier, the Fractional Club Training Manual (or something similar) was used by it to train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

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

b) 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 D.

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?

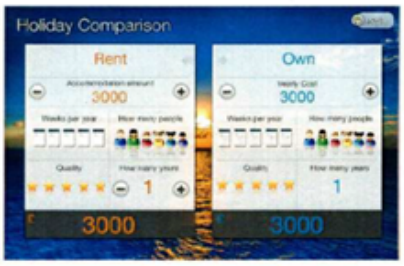
LINK: Now let me show you the relevance this has when it comes to your holidays because what you are currently doing is ...

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 holidays 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 D) 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 D 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)).'"*[6] 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 S*hawbrook & 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.***

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

> ***The problem comes back to the difficulty in articulating the intrinsic benefit of fractional ownership over any other timeshare from an individual consumer perspective****. […]* ***If it is not a prospect of getting more back from the ultimate proceeds of sale than the fractional ownership cost in the first place, what exactly is the benefit?*** *[…] What the interim use or value to a consumer is of a prospective share in the proceeds of a postponed sale of a property owned by a timeshare company – one they have no right to stay in meanwhile – is persistently elusive."*
> "[...] although the point is more latent in the first decision than in the second, it is clear that both ombudsmen viewed fractional ownership timeshares – simply by virtue of the interest they confer in the sale proceeds of real property unattached to any right to stay in it, and the prospect they undoubtedly hold out of at least 'something back' – as products which are inherently dangerous for consumers. **It is a concern that, however scrupulously a fractional ownership timeshare is marketed otherwise, its offer of a 'bonus' property right and a 'return' of (if not on) cash at the end of a moderate term of years may well taste and feel like an investment to consumers who are putting money, loyalty, hope and desire into their purchase anyway.** Any timeshare contract is a promise, or at the very least a prospect, of long-term delight. [...] A timeshare-plus contract suggests a prospect of happiness-plus. And a timeshare plus 'property rights' and 'money back' suggests adding the gold of solidity and lasting value to the silver of transient holiday joy."
>
> (My emphasis added)

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

Overall, therefore, as the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members, they indicate that the Supplier's sales representative was likely to have led Mr and Mrs D 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 that Fractional Club membership was an investment and that they would get their money back plus some profit when the Allocated Property was sold. On the contrary, based on the available evidence, I think that's likely to be what Mr and Mrs D were led by the Supplier to believe at the relevant time. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

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

Having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr and Mrs D 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 D 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 D, 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.

On my reading of Mr and Mrs D's client statement, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. That doesn't mean they were not interested in holidays. The notes made by the Supplier at the Time of Sale make clear that they were. And that is not surprising given the nature of the product at the centre of this complaint. After all, they said:

> *"We were told that as part of this agreement we would have guaranteed availability for whenever we wanted to go on holiday. Although, we quickly found that this was not the case and that we would always have to book in advance and even at that we would have to compromise on most aspects of the holiday. We were also told that we were a part of an exclusive group of members and that only members could stay at the resorts. However, this too was a lie as we found non-members could book online for cheaper than our maintenance fees. As these points were fractional points, we were advised that we had partial ownership of the complex and that this was an investment. After 18 years the property would have been sold for us and we would get our money back and make some profit, therefore it was a win-win situation for us."*

So I have taken this to mean they thought their purchase was '*win-win*', in that they be able to take holidays at exclusive resorts with guaranteed availability, but get back more than what they paid for membership when the term ended, So, plainly the possibility to take holiday was important, but so was the ability to make a profit on what they paid for membership.

If follows that, as Mr and Mrs D say (plausibly in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale as an investment that would lead to them making a profit, I think that was most likely an important motivation for their purchase. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

The Lender has raised some concerns with Mr and Mrs D's client statement, which sets out their recollections of what happened. The Lender says their recollections are not clear and credible and that notes made by the Supplier around the time of sale suggest that Mr and Mrs D were motivated to purchase Fractional Club membership for reasons other than as an investment.

I have considered the Lender's concerns but, taking into account all of the evidence in this case, I do not find that they significantly undermine Mr and Mrs D's recollections about what they were told about Fractional Club membership being an investment, which I find to be both plausible and persuasive.

The Lender suggests the client statement cannot be relied on as it is too similar to what is said in the Letter of Complaint and what other clients of the PR have said in similar complaints. And that this suggests both the client statement and Letter of Complaint were templated, which should call into question whether they are an accurate representation of Mr and Mrs D's memories of what happened during the sale.

But it seems more likely to me that the Letter of Complaint, which is dated later than the client statement, simply repeated what was said in the client statement. That is as I would expect, Mr and Mrs D's complaint, as set out by the PR, flowing from what they recall happening at the Time of Sale. I do not think the similarity between these two documents points to their memories being templated.

Further, I have seen a number of client statements provided by the PR in similar complaints. And, having done so, I do not think Mr and Mrs D's evidence is anything but their own.

However, I have considered their evidence in the round to see how much weight I can place on it in my assessment of what happened and their motivations at the Time of Sale. In this case Mr and Mrs D's appear to have misremembered where the sale took place –

saying they were reliant on the Supplier's representative to get back to their accommodation to illustrate why they felt under pressure to stay and agree to the purchase. But the Supplier says the sale took place in a building opposite Mr and Mrs D's accommodation, so they could've walked back without assistance.

In addition to this, some of Mr and Mrs D's recollections about availability and the exclusivity of resorts do not seem very persuasive. For example, I don't find it plausible that they would have been told there was 'guaranteed' availability to book holidays when and where they wanted, given that common sense dictates that all accommodation is subject to availability (and this was reflected in the contractual documentation). But memories can change over time, and that does not necessarily mean that everything they remember is wrong.

What does seem plausible to me is that there was likely to be a discussion at the Time of Sale about availability of holidays. It seems likely the Supplier would've wanted to assure Mr and Mrs D that there was generally good availability. But Mr and Mrs D remember this in the client statement as being a more definite guarantee of availability.

Likewise, it seems likely that the Supplier may present Fractional Club membership as being an exclusive club (I have seen the Supplier describe it as such in correspondence with the Lender), whereas Mr and Mrs D recall being told the Supplier's resorts were for the exclusive use of members.

This seems to me likely to be a case of Mr and Mrs D misremembering the details of some things there were told. But as I said, that does not necessarily mean that everything in their client statement was misremembered or cannot be relied upon when reaching my decision. Their recollections about the location of the sale are undermined by what the Supplier has said. But the Supplier likely has the benefit of records showing where the sale took place, whereas Mr and Mrs D are relying solely on their memory.

However, Mr and Mrs D's recollections about being told Fractional Club membership was an investment is supported by what I know about how the Supplier sold Fractional Club membership at the Time of Sale. This makes it far more likely that Mr and Mrs D have accurately remembered this aspect of the sale. So, it is not hard for me to believe that Mr and Mrs D's recollections about what they were told about Fractional Club membership are likely to be accurate in this case.

I have considered the disclaimers in the sales documentation. However, in my view, the disclaimers were presumably designed to help ensure compliance with the Timeshare Regulations. But I do not think they are sufficient to negate the other evidence in this case, which tends to support what Mr and Mrs D have said.[7]

The same goes for the notes made by the supplier at the Time of Sale. I think it is inherently unlikely, given the prohibition of selling or marketing Fractional Club membership as an investment, that the Supplier would record that a consumer was motivated by the investment potential of Fractional Club membership. I do not doubt that Mr and Mrs D had some interest in holidays, given the nature of the product and what the notes show. But the Supplier's notes do not lead me to think there could not have been other motivations involved in Mr and Mrs D's decision to purchase.

When looking at the evidence as a whole, there is insufficient evidence here that makes me think, for example, that Mr and Mrs D would have pressed ahead with the purchase had the Supplier not led them to believe that Fractional Club membership was an

[7] See *The Ritz Hotel Casino Ltd v. Geabury* [2015] EWHC 2294 (QB), at [8]

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, I think that the investment potential of Fractional Club membership and the prospect of making a profit was an important motivating factor in Mr and Mrs D's decision to enter into the Purchase Agreement. And that being the case, that an unfair relationship was created between Mr and Mrs D and the Lender.

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 D 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.

The PR's request for compensation for distress and inconvenience

I note the PR's request for a sum of £3,000 to be paid on this and many other complaints raised with the Lender, to reflect the distress and inconvenience caused by the way in which the Lender has dealt with those complaints.

When making such an award, I must consider how what the financial business did wrong has impacted on the individual consumers concerned. I cannot make an award as a way to fine or penalise a business. So, if the PR believes an award is merited on this complaint, it should let us know why, with respect to Mr and Mrs D's particular circumstances and how this has affected them.

More information is contained on our website - https://www.financial-ombudsman.org.uk/consumers/expect/compensation-for-distress-or-inconvenience.

As things stand, I am not persuaded that an award for distress and inconvenience is appropriate in this case.

END OF COPY OF MY PROVISIONAL FINDINGS

My comments on the Lender's response to my provisional decision

I disagree with the Lender's analysis of my provisional decision. As noted above, the Lender has made substantial submissions and my role as an Ombudsman is not to address every single point, rather it is focus on what I think is important to fairly determine this complaint. So, for the avoidance of doubt, I have read everything provided to me, but I have focused on what I think are the salient points that lead to a fair outcome in this complaint.

Definition of investment

In my provisional decision I explained the definition of investment that I was using (the Lender has not suggested the definition was incorrect), and for the avoidance of doubt, that was the definition I had in mind when coming to my provisional findings.

I accept that the sale of Fractional Club membership would involve the features of the product being explained and that it was possible for the Supplier to do this without breaching Regulation 14(3) of the Timeshare Regulations. That is why it is important not to conflate the ideas of a "return" on investment (a profit) with some money being "returned" (no suggestion of a profit). That is why I said:

> *''Mr and Mrs D'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."*

But Mr and Mrs D's recollection of what happened at the Time of Sale is that the Supplier went further than simply saying they would get some money returned. They say that:

> *"…we were advised that we had partial ownership of the complex and that this was an investment. After 18 years the property would have been sold for us and we would get our money back and make some profit, therefore it was a win-win situation for us."*

So, their allegation is that the Supplier described Fractional Club membership to them as an investment, both by using that term, but also in how this was explained to them – that they would get their money back (namely what they paid for the purchase) and make some profit (namely get back more than what they paid for the purchase). In my view, that plainly satisfies the definition of investment as stated in my provisional decision. But it was not just Mr and Mrs D's memories that led me to conclude that there was an unfair credit relationship that required a remedy – I will explore this further.

The legal test

The Lender has set out some questions that it says I should answer when reaching my decision:

1. Is there sufficiently clear, compelling evidence that the timeshare product was marketed or sold as an investment?
2. Was a material impact on the debtor when deciding whether or not to enter the agreement?

Those two questions were two of the matters I considered in my provisional decision, albeit they were expressed differently. But even if I take the Lender's suggested approach to assessing this complaint, I think the answer to both these questions is yes. As explained in my provisional decision, I think the weight of evidence (albeit the Lender disagrees with the weight I have given to different pieces of evidence) points to the Supplier having sold and marketed Fractional club membership to Mr and Mrs D as an investment in breach of Regulation 14(3) of the Timeshare Regulations. And I thought the breach of the regulations did cause them to take out Fractional Club membership – in other words, that if that had not happened, Mr and Mrs D would most likely not have entered into the Purchase Agreement and Credit Agreement.

I have considered what the Lender has said about the disclaimers, two of which I referred to in my provisional decision, and the fact that the marketing material did not use the word 'investment'. But, in my mind, this is too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3). Here, the Supplier did not have to refer to Fractional Club membership expressly as an investment to breach Regulation 14(3). Instead, it is important to consider both the explicit and implicit messaging at the Time of Sale to decide what I think was most likely to have happened. Further, it was

not simply the training materials that led to the finding in my provisional decision that Regulation 14(3) was breached by the Supplier at the Time of Sale, but rather it was a combination of all of evidence available. This included the documents from that time, Mr and Mrs D's evidence, as well as the training material to which I have referred.

With respect to the training material, Shawbrook says that the parts I highlighted in my provisional decision were unobjectionable and that it was unsurprising that there was emphasis on the 19-year period as:

> "...*given that the proceeds of selling the Allocated Property will be returned to customers, it is natural that steps are taken to ensure that the return is as high as possible. Nobody would expect the intention to be that the amount returned at the end of the timeshare period would be as low as possible, or anything other than as much as possible. But the significant point is that there is no comparison between the expected level of the financial return as against the initial outlay in purchasing the product, the primary focus of which was to provide holidays.*"

However, I think it is too narrow an approach to take to only find that there was a breach of Regulation 14(3) if the likely return from the sale of the Allocated Property was expressly quantified by the Supplier. The training material, in my view, was likely to have implied to a prospective purchaser that they were buying an interest in '*bricks and mortar*', with an emphasis on there being a financial return based on the ownership of a tangible asset, the value of which was maximised thanks to the length of the 19-year membership term. When taken together with Mr and Mrs D's memories of the sale, which are not undermined or contradicted by the contents of the training material, I think that there was at least the implication that Fractional Club membership was an investment – which is enough to find there was a breach of Regulation 14(3) by the Supplier in this specific case, bearing in mind all of the evidence.

Further, the disclaimers referred to were in paperwork provided to Mr and Mrs D after they had agreed to take out Fractional Club membership. So, the paperwork is important evidence to consider, but it must be assessed in the round and in relation to the other available evidence. Here, none of the disclaimers in the paperwork were enough to persuade me that the sale, taken as a whole, did not breach Regulation 14(3).

<u>The Lender's concerns about Mr and Mrs D's recollections in the Client Statement</u>

The Lender has said that I should give little evidential weight to Mr and Mrs D's recollections for a number of reasons, including inconsistencies between what they recall and what was likely to have happened at the Time of Sale. But I disagree. I am not minded to simply ignore Mr and Mrs D's recollections completely, neither due to minor inconsistencies with what they remember nor because the Supplier and Lender are concerned about the PR's approach to obtaining and recording their client's recollections. A lot of my thoughts about the weight to be placed on Mr and Mrs D's evidence is set out above in my provisional decision, so I will not repeat it again, however the following comments are relevant.

I find that inconsistencies in evidence are a normal part of someone trying to remember what happened in the past. So, I am not surprised that there are some inconsistencies between what Mr and Mrs D said happened and what other evidence shows. The question to consider is whether there is a core of acceptable evidence from them that the inconsistencies have little to no bearing on, or whether such inconsistencies are fundamental enough to undermine or contradict what they say about what the Supplier said and did to market and sell Fractional Club membership as an investment.

I explained in my provisional findings that although there were some inconsistencies around what Mr and Mrs D said about availability and exclusivity of Fractional Club membership, when considering the evidence as a whole (including the sales and training documents referred to in my provisional findings), I felt that certain aspects of Mr and Mrs D's recollections were both plausible and persuasive. Particularly around what they said about the Supplier describing Fractional Club membership to them as an investment (as defined above). So, although I have considered what the Lender has said, I stand by my provisional findings.

As to the Lender's concerns about the PR's approach to Client Statements, I have seen a number of complaints about Fractional Club membership that involve the PR and others from different representatives. It is correct to say that many complaints share similar complaint points, but that is unsurprising given the product sold by the Supplier, how it was sold and the alleged problems that may arise from that. Given that, I am also not surprised that the PR's letters of claim follow a similar pattern as it is hard (and inefficient) to say similar things in multiple unique ways. But it is important not to confuse submissions with evidence, so whilst the Letter of Complaint may set out what the PR argues on Mr and Mrs D's behalf, their own evidence is central in this complaint. Here, I am satisfied that Mr and Mrs D's evidence is their own and the Lender has not argued or provided evidence that the Client Statements this particular PR has provided in multiple complaints are somehow not the evidence of their clients. Here, Mr and Mrs D's evidence does, in my view, have its own personal recollections and tone of voice that suggests their evidence is their own.

So, it seems to me that what is said in the Client Statement about how Fractional Club membership was described as an investment is likely to be Mr and Mrs D's actual recollections. And those recollections do not seem implausible to me given the other evidence in this case, including what I know about how the Supplier is likely to have 'conducted the sale.

Having considered the Supplier's argument about the word count of the Client Statement, I do not think it assists me in deciding this complaint. The Supplier appears to have miscounted the words in any case, and included in its count the 27 words before the actual statement (including the title of the document, Mr and Mrs D's names, address, phone number and the date) – when it is not clear that the word count typed by the PR at the bottom included those words (which, if it didn't, then by the Supplier's reckoning this would leave a discrepancy of just six words). While it does appear the word count typed by the PR is inaccurate (although not as much as the Supplier suggests), it seems to me that this is more likely down to human error rather than anything else. It is certainly not of such concern that I should ignore the Client Statement altogether.

On balance, having considered everything said about Mr and Mrs D's evidence, I see no reason to depart from my provisional findings that their memories were accurate in so far as they recalled the Supplier presenting, i.e. selling and/or marketing, Fractional Club membership to them as an investment (as defined above).

Other reasons for Mr and Mrs D to enter into the Purchase Agreement

The Lender says I have given insufficient weight to other reasons that Mr and Mrs D had for entering into the Purchase Agreement. This Lender suggests those reasons were taking holidays with their children. And that Mr and Mrs D had an interest in this before attending the presentation – on the basis that the Supplier's notes say they met the Supplier's representative while leaving their children in the apartment (as they didn't want the children to know they had purchased membership yet). But I can see the reference to this in the notes are from a post-sale conversation and are in relation to arranging a meeting with Mr

and Mrs D which took place the day after the sale – rather than being about the sales meeting itself.

The notes do indicate that Mr and Mrs D were interested in using Fractional Club membership for holidays – which I acknowledged in my provisional decision. But that is no surprise given the nature of the product. However, I do not think that excludes the possibility that Mr and Mrs D purchased Fractional Club membership partly because it was sold to them as an investment. Afterall, there were other ways to holiday with their children without the up-front and ongoing cost of Fractional Club membership, had that been their sole interest. So, this evidence does not change my provisional findings on this issue.

Other judgements and ombudsman decisions

I have read and considered the judgment on Prankard v Shawbrook Bank Limited. However, that case was decided by the judge on its own facts and circumstances, and it does not change my own findings that, on balance, Mr and Mrs D's sale did breach Regulation14(3) of the Timeshare Regulations.

I have also read the other decisions of ombudsmen that Shawbrook has highlighted. But again, those cases were decided on their own facts and circumstances.

So, I still think that Shawbrook participated in and perpetuated an unfair credit relationship with Mr and Mrs D 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.

My proposals for fair compensation

The Lender suggests that it should not be liable for any Management Charges in relation to FC Membership 2 (see below under fair compensation), which Mr and Mrs D purchased in July 2015, on the basis that there is no evidence that Mr and Mrs D would not have entered into FC Membership 2 or purchased the same number of fractional points at that time anyway. And that making the Lender reimburse such charges will result in Mr and Mrs D being overcompensated. Not least because the complaint about the 2015 purchase has not been upheld by the Financial Ombudsman Service.

Firstly, the complaint about FC Membership 2 is ongoing, and a final decision has not been made (albeit the Investigator in that case did not recommend it be upheld). Secondly, I remain of the opinion that the unfairness under the Credit Agreement and related Purchase Agreement that stemmed from the acts and/or omissions of the Suppler at the Time of Sale did not end with the purchase of FC Membership 2, given the facts and circumstances of this complaint. So, I still think it is a fair and reasonable outcome for the Lender to be responsible to cover a proportion of the ongoings costs and obligations that relate to the purchase in question.

The PR did not provide any further comments on why an award of compensation for distress and inconvenience would be appropriate in this case. So, I see no reason to make such an award. Similarly, in the absence of any further submissions on my proposed directions, I see no other reason to change my proposed redress.

Fair Compensation

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

On 20 July 2015 (the 'Time of Upgrade'), Mr and Mrs D upgraded their Fractional Club membership ('Fractional Club Membership 1') by trading in their existing 1,200 Fractional Points, paying an additional £6,768 and entering a new purchase agreement for a total of 1,620 Fractional Points ('FC Membership 2'). And the Credit Agreement was refinanced using a new loan taken from the Lender at the time of the upgrade.

Formally, the new purchase agreement superseded the old one, but in my view, it really just supplemented Mr and Mrs D's FC Membership 1, rolling over their existing Fractional Points into the new membership. And I don't think the upgrade ended the unfairness under the Credit Agreement and related Purchase Agreement that stemmed from the acts and/or omissions of the Suppler at the Time of Sale given the facts and circumstances of this complaint. So, I think that there were ongoing effects of unfairness from Mr and Mrs D's original purchase of FC Membership 1 and the Credit Agreement for which the Lender is answerable.

However, I recognise that the upgrade in question was paid for by funding from the Lender, whose responsibility for any acts and/or omissions in the later sales presentation falls outside the scope of this decision. And for that reason, I'm not persuaded the Lender should have to answer for the financial consequences specifically associated with the 420 additional Fractional Points Mr and Mrs D purchased on 20 July 2015.[8]

So, in my view, the Lender needs to refund a proportion of the management charges payable after the Time of Upgrade that relate to the 1,200 Fractional Points Mr and Mrs D held originally – which, in this occasion, equates to 74% of the annual management charges paid after the Time of Upgrade.

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

(1) The Lender should refund Mr and Mrs D'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 annual management charges Mr and Mrs D paid as a result of Fractional Club membership.

(3) The Lender should also refund 74% of the FC Membership 2 annual management charges they paid after the Time of Upgrade.

8 The Lender's liability for this will be considered in a separate decision.

(4) The Lender can deduct:

i. The value of any promotional giveaways that Mr and Mrs D used or took advantage of; and

ii. The market value of the holidays* Mr and Mrs D took using their Fractional Points under FC Membership 1; and

iii. 74% of the market value of holidays Mr and Mrs D took using their Fractional Points under FC Membership 2.

(I'll refer to the output of steps 1 to 4 as the 'Net Repayments' hereafter)

(5) 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.

(6) The Lender should remove any adverse information recorded on Mr and Mrs D's credit file in connection with the Credit Agreement reported within six years of this decision.

(7) I understand Mr and Mrs D's Fractional Club membership came to an end at the Time of Upgrade. However, if that is not the case and their 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 D took using their Fractional Points, deducting the relevant annual management charges (that correspond to the year in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

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

My final decision

For the reasons I've explained, I uphold this complaint. I direct Shawbrook Bank Limited to pay fair compensation to Mr and Mrs D as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D and Mrs D to accept or reject my decision before 19 March 2025.

Phillip Lai-Fang
Ombudsman