DRN-5331347

The complaint

Mr J and Miss S's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

What happened

Mr J and Miss S purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 4 July 2018 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,040 fractional points at a cost of £14,430 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr J and Miss S 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 J and Miss S paid for their Fractional Club membership by taking finance of £14,430 from the Lender both of their names (the 'Credit Agreement 1'). Mr J and Miss S traded in their Fractional Club membership when they made a further purchase with the Supplier in October 2018. They also made a further purchase in June 2019. These further purchases were funded by a different lender and as such are being dealt with in separate decisions.

Mr J and Miss S – using a professional representative (the 'PR') – wrote to the Lender on 18 May 2020 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. The Lender being party to an unfair credit relationship under the Credit Agreement 1 and related Purchase Agreement for the purposes of Section 140A of the CCA.
3. The decision to lend being irresponsible because (1) the Lender did not carry out the right creditworthiness assessment and (2) the money lent to them under the Credit Agreement was unaffordable for them.

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

Mr J and Miss S say 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 Fractional Club membership was an "investment" when that was not true.
3. told them that the Supplier's holiday resorts were exclusive to its members when that was not true.

4. told them that if they changed their mind regarding the membership, they could cancel at any time and would not have to make any further repayments, including towards the loan, when that was not true.

Mr J and Miss S say that they have 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, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr J and Miss S.

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

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

1. Misrepresentations made by the Supplier, as outlined above.
2. The contractual documentation was not provided to Mr J and Miss S until after they had already committed to the purchase and it was not clear or easy to understand.
3. They were subjected to a lengthy and confusing sales presentation.
4. Fractional Club membership was marketed and sold to them as an investment but they were provided no detail about the risks involved or the potential downsides.
5. There were various unfair contract terms, including the contractual term which allowed the Supplier to cancel the membership and retain any money paid towards it if Mr J and Miss S failed to make a payment under the agreement.

Mr J and Miss S then referred the complaint to the Financial Ombudsman Service as they had not received any response to their complaint within the eight-week period required by the regulator.

The Lender subsequently dealt with Mr J and Miss S's concerns as a complaint and issued its final response letter on 30 April 2021, rejecting it on every ground.

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

The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr J and Miss S at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of that breach on their purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr J and Miss S was rendered unfair to them for the purposes of section 140A of the CCA.

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

I considered the matter and issued a provisional decision (the 'PD') dated 30 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 Consumer Rights Act 2015.*
- *The Consumer Protection from Unfair Regulations 2008.*
- *Case law on Section 140A of the CCA – including, in particular:*

    - *The Supreme Court's judgment in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 ('Plevin') (which remains the leading case in this area).*
    - *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
    - *Patel v Patel [2009] EWHC 3264 (QB) ('Patel').*
    - *The Supreme Court's judgment in Smith v Royal Bank of Scotland Plc [2023] UKSC 34 ('Smith').*
    - *Carney v NM Rothschild & Sons Ltd [2018] EWHC 958 ('Carney').*
    - *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm) ('Kerrigan').*
    - *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service [2023] EWHC 1069 (Admin) ('Shawbrook & BPF v FOS').*

Good industry practice – the RDO Code

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

My provisional findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr J and Miss S as an investment, which, in the circumstances of this complaint, rendered the credit relationship between them and the Lender unfair to them for the purposes of Section 140A of the CCA.

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

on all of them. This includes the allegation that the Supplier misrepresented the Fractional Club membership and the Lender ought to have accepted and paid that claim under Section 75 of the CCA.

This is because even if that aspect of the complaint ought to succeed, the redress I'm currently proposing puts Mr J and Miss S in the same or a better position than they would be if the redress was limited to misrepresentation.

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

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

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

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

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

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

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr J and Miss S'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.

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

I have considered the entirety of the credit relationship between Mr J and Miss S and the Lender, along with all of the circumstances of the complaint, and I think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. *The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale; and*
2. *The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*
3. *Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;*
4. *The inherent probabilities of the sale given its circumstances.*

I have then considered the impact of these on the fairness of the credit relationship between Mr J and Miss S and the Lender.

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

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

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

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

But Mr J and Miss S say that the Supplier did exactly that at the Time of Sale – Mr J saying the following in a witness statement drafted when the complaint was first made:

> *"As we were purchasing a part of a property, the purchase should be viewed as an investment for our future; we would own a highly sought after asset that would increase in value over time.*
>
> *We were advised that after a period of 19 years the property would be sold at a greatly increased price and we would therefore receive a profitable return on our investment.*
>
> *[…]*
>
> *We were advised on multiple occasions that the membership was distinct from a timeshare and should be viewed as an investment; it was an asset that would increase in value over time.*
>
> *We expressed some interest in the membership as we believed what we had been told by the representative and believed that purchasing a membership would be a way to enjoy cheaper holidays while also saving for our future."*

Their witness statement is signed and dated July 2020.

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

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

(2) *They were told by the Supplier that Fractional Club membership was the type of investment that would only increase in value.*

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

Mr J and Miss S'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 J and Miss S 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 J and Miss S, 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 J and Miss S as an investment.

For example, in their signed Member's Declaration, it said: "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 Fractional Rights which are personal rights and not interests in real estate."

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

So, I have considered:

(1) *whether it is more likely than not that the Supplier, at the Time of Sale, sold or marketed membership of the Fractional Club as an investment, i.e. told Mr J and Miss S 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

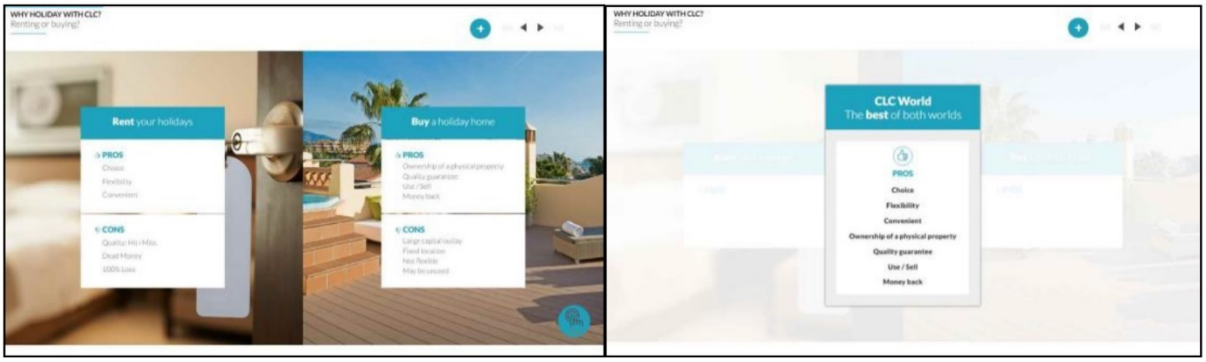
During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier provided information on how it sold membership of timeshares like Mr J and Miss S's – which includes a document called the "Fractional Property Owners Club Fly Buy Manual 2017" (the '2017 Fractional Training Manual').

As I understand it, the 2017 Fractional Training Manual was used from November 2016 onwards during the sale of the Supplier's second version of the Fractional Property Owners Club (which I will continue to refer to as simply the Fractional Club) – which was the version Mr J and Miss S appear to have purchased. It is not entirely clear whether Mr J and Miss S would have been shown the slides included in the Manual. But it seems to me to be reasonably indicative of:

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

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

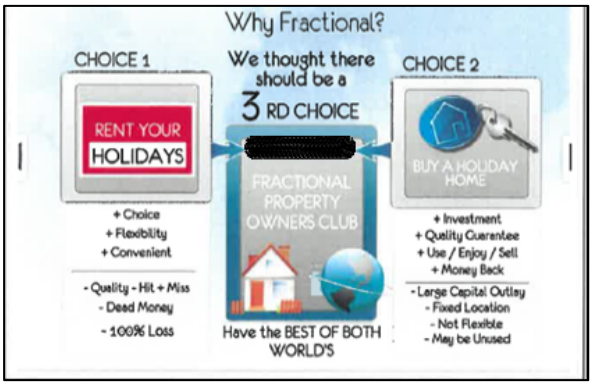
Having looked through the Manual, my attention is drawn first to page 19 (of 74) – which includes two slides called "Why holiday with [the Supplier]? Renting or buying?".



They were the first slides in the Manual that seem to me to set out any information about Fractional Club membership, albeit without expressly referring to the Fractional Club, because they suggest that sales representatives were likely to have made the point to Mr J and Miss S that holidaying with the Supplier combined the best of (1) and (2), including, amongst other things, ownership of a physical property and money back – which were benefits that were only front and centre of Fractional Club membership.

From the off, therefore, it seems likely that sales representatives would have demonstrated that there were financial advantages to Fractional Club membership rather than being a member of a 'standard' timeshare.

Indeed, the slides above presented a very similar prospect to that presented in a slide used in one of the Supplier's earlier training manuals that was used to help it sell the first version of Fractional Property Owners Club:



All three indicate that sales representatives would have taken prospective members through three holidaying options along with their positives and negatives:

(1) *"Rent Your Holidays"*

(2) *"Buy a Holiday Home"*

(3) *The "Best of Both Worlds"*

I acknowledge that the slides incorporated into the 2017 Fractional Training Manual don't include express reference to the 'investment' benefit of Fractional Club membership. But they allude to much the same concept, namely that Fractional Club membership combined the best aspects of taking 'normal' holidays and purchasing a holiday home. Further, for the reasons I will come onto, although the word 'investment' did not appear in the 2017 Fractional Training Manual, I think the idea that Fractional Club membership offered the same benefits as a purchasing an investment property did form part of the sales process.

One of those advantages referred to in the slides on page 19 of the 2017 Fractional Training Manual is the "ownership of a physical 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 any mortgage secured against it, this particular advantage of Fractional Club membership was portrayed in terms that played on the opportunity ownership gave prospective members of the Fractional Club to accumulate wealth in a similar way, especially when combined with the phrase "money back".

When the Manual moved on to describe how membership of the Fractional Club worked between pages 26 and 36, one of the major benefits of Fractional Club membership was described on page 35 as:

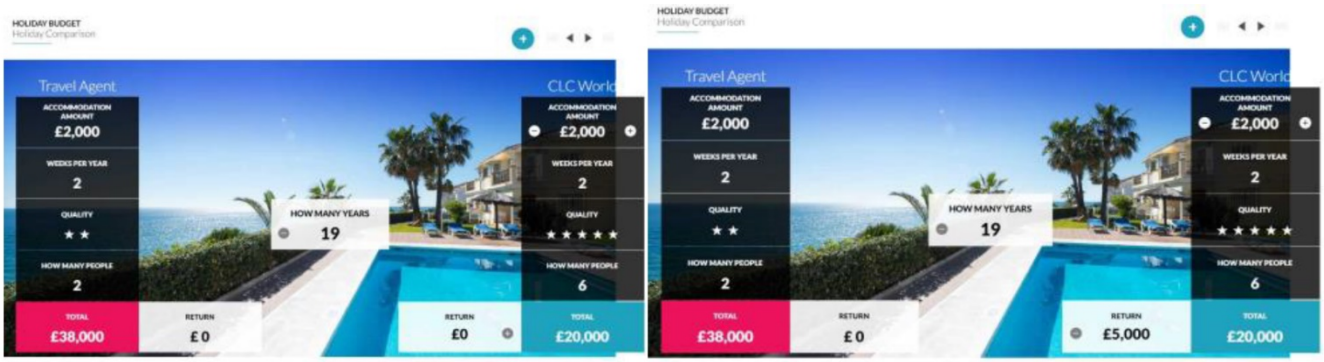
"A major benefit is that after 19 years of fantastic holidays, the property in which you own a fraction is sold and you will receive your share of the sale proceeds according to the number of fractions owned."

And on page 36 there were notes that encouraged sales representatives to summarise this benefit in the following way:

"So really 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?".

After discussing some of the other aspects of membership, such as the different resorts available to members, page 53 of the Manual indicates that sales representatives would have moved onto a cost comparison between "renting" holidays and "owning" them. Sales representatives were encouraged to tell prospective members how much they would spend over 19 years (i.e., the length of Fractional Club membership) on holidays with "no return" in contrast to spending the same amount of money as Fractional Club members – thus demonstrating the financial advantages of membership.

Page 53 included the following slides and accompanying notes:



"We aren't only talking about 10 years, we are talking about 19 years. So in actual fact, with the travel agent over 19 years you would have spent over £… with no return.

However, with [the Supplier] you would still have spent the same £… because once your fraction is paid for, the remaining years of holiday accommodation is taken care of.

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 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 2017 Fractional 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 J and Miss S) 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.

What's more, I think the Supplier's sales representatives were encouraged to make prospective Fractional Club members (like Mr J and Miss S) consider the advantages of owning something and view membership as a way of generating a return, rather than simply paying for holidays in the usual way. That was likely to have been reinforced throughout the Supplier's sales presentations by describing membership as a form of property ownership referring to the prospect of a "return". And with that being the case, 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.

I acknowledge that there may not have been a comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mr J and Miss S the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

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

So, if a supplier implied to consumers that future financial returns (in the sense of possible profits) from a timeshare were a good reason to purchase it, I think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment.

Indeed, if I'm wrong about that, I find it difficult to explain why, in paragraphs 77 and 78 followed by 99 and 100 of Shawbrook & BPF v FOS when, Mrs Justice Collins Rice said the following:

"[…] I endorse the observation made by Mr Jaffey KC, Counsel for BPF, that, whatever the position in principle, ***it is apparently a major challenge in practice for timeshare companies to market fractional ownership timeshares consistently with Reg.14(3). […] Getting the governance principles and paperwork right may not be quite enough.***

The problem comes back to the difficulty in articulating the intrinsic benefit of fractional ownership over any other timeshare from an individual consumer perspective*. […]* ***If it is not a prospect of getting more back from the ultimate proceeds of sale than the fractional ownership cost in the first place, what exactly is the benefit?*** *[…] What the interim use or value to a consumer is of a prospective share in the proceeds of a postponed sale of a property owned by a timeshare company – one they have no right to stay in meanwhile – is persistently elusive."*

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

"[...] 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."*

Given what I've already said about the Supplier's training material and the way in which I think it was likely to have framed the sale of Fractional Club membership to prospective members (including Mr J and Miss S), I think it is more likely than not that the Supplier did, at the very least, imply that future financial returns (in the sense of possible profits) from a Fractional Club membership were a good reason to purchase it

So, overall, I think the Supplier's sales representative was likely to have led Mr J and Miss S to believe that Fractional Club membership was an investment that may lead to a financial gain (i.e., a profit) in the future. And with that being the case, I don't find them either implausible or hard to believe when they say they were told they were 'buying an investment' and would 'own an asset that would increase in value over time' and give them a 'profitable return' enabling them to 'save for their future'. On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mr J and Miss S 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 J and Miss S 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 J and Miss S 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 J and Miss S, 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 them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On my reading of Mr J and Miss S's testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase.

That doesn't mean they were not interested in holidays. Their own testimony demonstrates that they quite clearly were. And that is not surprising given the nature of the product at the centre of this complaint. But as Mr J and Miss S 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. After all, Mr J said, in his witness statement, that he was led to believe that Fractional Club membership was a way of both enjoying cheaper holidays and saving for the future. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

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

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr J and Miss S 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.

Did the unfairness caused by the purchase of Fractional Club end when it was traded in for further purchases?

On 14 October 2018, Mr J and Miss S traded in their first membership ('Fractional Club 1') membership, paying an additional sum and adding a further 330 fractional points to their existing 1,040 by entering into a different purchase agreement for 'Fractional Club 2', thereby 'upgrading' and replacing Fractional Club 1. The credit relationship Mr J and Miss S had with the Lender ended when that loan was consolidated when making their second purchase in October 2018.

On 23 June 2019, Mr J and Miss S also traded in their Fractional Club 2 membership, paying an additional sum and adding a further 250 fractional points to their existing 1,370 by entering into a different purchase agreement for Fractional Club 3, thereby again 'upgrading' and replacing their membership.

As a result of their purchases of Fractional Club 2 and 3, it is necessary to consider whether the unfairness caused to Mr J and Miss S from the purchase of the original Fractional Club at the Time of Sale continued, and if it did continue, what were the ongoing consequences.

While the Supplier gave Mr J and Miss S £13,931 credit for their original Fractional Club 1 membership, this credit wasn't the equivalent of cash. It was a deduction from a starting price set by the Supplier itself for Mr J and Miss S's upgrade to Fractional Club 2. And as there is no information to indicate what the market value was of the Allocated Property connected to their subsequent purchase, there is no evidence that the starting price of that 'upgrade' represented the objective value of the benefits under the new purchase agreement, as opposed to a commercial opening position from which the Supplier would and could profitably offer deductions or discounts. And as £13,931 was almost the same as the purchase price originally attached to their Fractional Club 1 purchase, it cannot be said that the upgrade to Fractional Club 2 on 14 October 2018 improved Mr J and Miss S's position financially.

And, the same applies to their further purchase as the Supplier gave Mr J and Miss S £19,180 credit for their Fractional Club 2 membership. This was almost the same as the original purchase price originally attached to their Fractional Club 2 purchase (for which they ended up paying £5,807 reduced from £19,738 due to the trade in). So, again, it cannot be said that the upgrade to Fractional Club 3 on 23 June 2019 improved Mr J and Miss S's position financially.

However, I have thought about the extent to which responsibility for the situation after their purchase of Fractional Club 2 and 3 must be attributed to the Supplier and the Lender. As the credit agreements associated with the purchase of Fractional Club 2 and 3 were from a different lender, I cannot see it would be fair and reasonable to hold the Lender in this case responsible for any aspect of the Time of Sale 2 or 3 (nor would a court likely do so). So, I do not think that the Lender should have to answer for the financial consequences specifically associated with the 330 additional fractional points Mr J and Miss S purchased in October 2018 and the 250 additional fractional points they purchased in June 2019.

Formally, the agreements Mr J and Miss S entered into in October 2018 and June 2019 were both new contracts that superseded the old ones. But I think the purpose of this upgrade was to continue and supplement their existing Fractional Club membership.

With all of that being the case, I therefore think that the upgrades were really just a top-up of Mr J and Miss S's fractional points by rolling over those that they had and providing them, as members of the Fractional Club 2 and 3, with enough points to enable them to take holidays

in better and more luxurious accommodation, albeit while also holding an interest in the net sales proceeds of a different Allocated Property.

And as the function of the Supplier's £13,931 and £19,180 credits was to roll over Mr J and Miss S's existing fractional points into their upgrade, I'm not persuaded that the purchase of Fractional Club 2 or Fractional Club 3 ended the unfairness to them in their credit relationship with the Lender. I think their original purchase of Fractional Club 1, and the associated Credit Agreement 1 with the Lender had ongoing financial consequences for them, which continued the unfair relationship with the Lender. And for that reason, it is my view that the Lender is still answerable for them.

Fair Compensation

Having found that Mr J and Miss S would not have agreed to purchase Fractional Club membership at the Time of Sale (also referred to below as the 'Time of Sale 1') 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 Mr J and Miss S was unfair under section 140A of the CCA, I think it would be fair and reasonable to put Mr J and Miss S 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 Mr J and Miss S not entered into the Credit Agreement. This is on the proviso that Mr J and Miss S agree to assign to the Lender 1,040 of their Fractional Points or hold them on trust for the Lender if that can be achieved.

I've also referred to Mr J and Miss S's two further purchases in October 2018 and June 2019 below as the 'Time of Sale 2' and the 'Time of Sale 3' respectively.

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

(1) The Lender should refund Mr J and Miss S the repayments that were made to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.

(2) The Lender should also refund 100% of the annual management charges Mr J and Miss S actually paid from the Time of Sale 1 up to the Time of Sale 2.

(3) The Lender can deduct

i. *The value of any promotional giveaways that Mr J and Miss S used or took advantage of from the Time of Sale 1 up to the Time of Sale 2; and*

ii. *The market value of the holidays* Mr J and Miss S took using their Fractional Club 1 points from the Time of Sale 1 up to the Time of Sale 2 (if any).*

(the 'Net Repayments')

**I recognize 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 J and Miss S took using their Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.*

(4) Simple interest[3] at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.

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

However, as I don't think the effects of the unfairness in question ended when Mr J and Miss S upgraded their Fractional Club membership in October 2018 or June 2019, and as I think their original 1,040 fractional points were essentially rolled over into their upgrades and had ongoing financial consequences for them, the compensation needs to reflect that.

So, in my view, the Lender also needs to refund to Mr J and Miss S the proportion of the management charges that they actually paid after 14 October 2018 up to 23 June 2019 that relate to those 1,040 points. These equate to 75%[4] of the 1,370 points Mr J and Miss S actually ended up with at the Time of Sale 2. And, they also need to refund the proportion of the management charges that Mr J and Miss S actually paid from 23 June 2019 onwards that relate to those 1,040 points which equates to 65% of the 1,620 points they ended up with at the Time of Sale 3. So, in addition to the Net Repayments above:

(1) *The Lender should refund 75% of the annual management charge(s) paid by Mr J and Miss S from 14 October 2018 onwards to 23 June 2019 and 65% of these charges from 23 June 2019 onwards, less a proportional deduction for any holiday[5] they took using the fractional points relating to Fractional Club 2 and 3.*

(2) *Simple interest at 8% per annum should be added to this amount from the date each charge was paid until the date of settlement.*

It is possible that the Supplier might pursue Mr J and Miss S for other costs in addition to the annual management charges arising from the Fractional Club 2 and 3 memberships, so there is the possibility of continuing detriment that I think needs addressing. So, in keeping with what I've said above, the Lender should indemnify Mr J and Miss S against 75% of any other liabilities accruing from 14 October 2018 to 23 June 2019 and 65% from 23 June 2019 onwards that result from Mr J and Miss S's ownership of Fractional Rights.

I do wish to make the Lender aware that I'm taking the redress awarded to Mr J and Miss S in this complaint into account when making my decisions on their other complaints about their other, subsequent purchases.

This, together with what I've said in the paragraphs above will achieve, as closely as I can, the same financial position for Mr J and Miss S as if they had never joined the Fractional Club in the first place.

I would like the Lender to provide a calculation of how it would work all of this out in response to my provisional decision."

The responses to my PD

The PR, on behalf of Mr J and Miss S, agreed with my PD and didn't add anything further.

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[3] 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.

[4] All percentages have been rounded to the nearest whole number.

[5] See Section (3) (ii) above

The Lender disagreed. It argued that my PD was based on an error in my approach to the prohibition in Regulation 14(3) and my analysis of the evidence referred to in my PD. In particular, they said:

- The wording in my PD is inconsistent with the premise that there is no prohibition to the sale of fractional timeshares, only a prohibition on the way they were sold, and the definition of 'investment' that I used. It argues that I took the position that "*the mere existence of the "prospect of a financial return" constituted an "investment". In particular, the PD falls into that error by conflating two different meanings of the word 'return': (i) a 'return on investment', which is normally understood to mean the measure of profit (return) on the original investment; and (ii) a customer being told that some money will be 'returned' upon sale, which carries no connotation of investment or profit*".
- The documentation in relation to the Fractional Membership sale is unobjectionable and does not breach Regulation 14(3). The Lender's and Supplier's position is that Mr J and Miss S did not receive or view the sales materials I had referred to in the PD.
- There were relevant disclaimers within the sales documentation to emphasise that the product should not be seen as an investment and Mr J and Miss S confirmed they understood this at the Time of Sale. At no stage was there any representation as to the future price or value of the fractional share, as per those disclaimers.
- The training manual referred to at no stage refers to the presence of the Allocated Property as an investment nor that the purpose or benefit of the product was the opportunity to make a financial gain/profit on the initial outlay.
- The slides on which I based my PD were not seen by Mr J and Miss S and I should refer to the relevant sales presentation (called 'ESA5') sent to our Service by another Lender in 2024. This carried no connotation of building equity in property.
- I should give weight to the decision of the judge in *Prankard v Shawbrook Bank Limited* (8 October 2021, unreported) where having considered documents and heard evidence in relation to the Supplier's training programme at the time, it was held that the product had not been sold as an investment.
- I didn't adequately consider Mr J and Miss S's testimony and therefore gave it undue weight. The Lender raised the following specific points in relation to their testimony:
  - (i) I didn't give sufficient weight to the other reason(s) given by Mr J and Miss S for entering into their purchase and referred to sales notes made at the Time of Sale and in relation to subsequent purchases to support this.
  - (ii) Mr J tried to cancel the membership in October 2019 and within that correspondence the allegation of the product being sold as an investment was not mentioned. And, they engaged their PR shortly after this. This challenges the authenticity of the testimony provided.
- I erred in not applying the test I had highlighted in the judgment of *Carney*, rather I said "*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*", which reverses the burden of proof.
- While the Lender disagrees with my conclusion to uphold the complaint, they also explained that they didn't agree with my proposed method of compensation. I had said in my PD that they needed to refund a proportion of the management charges paid after they upgraded in October 2018 and again in June 2019. But they say these

memberships superseded each previous one so they don't believe they should be liable for such charges as fair compensation for the sale that their loan funded. They also said there is no evidence Mr J and Miss S would not have followed the same path and entered into their further purchases, or purchased the same number of points at those times, so my proposed compensation fails to put them back into the position they would have been in, it puts them back into a better position instead.

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.

Having considered everything afresh, I still uphold Mr J and Miss S's complaint for broadly the same reasons I gave in my PD as set out above. I will also address the matters the Lender raised in response.

Again, my role as an Ombudsman is not to address every single point that has been made in response. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I've read the Lender's further submissions in full, I will confine my findings to what I find are the key points.

In my PD, I noted that to breach Regulation 14(3), the Supplier had to market or sell Fractional Membership as an investment, and I used the following definition of 'investment' when considering whether I thought that provision had been breached: "*a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit*".

The Lender says my PD was inconsistent with the notion that there was no prohibition on the sale of fractional timeshares per se, only a prohibition on the way in which they were sold. But this, in my view, takes too narrow a view of my PD and overlooks the part of my PD that reads:

> "*Mr J and Miss S'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.*"

However, for the avoidance of doubt, I continue to recognise that it was possible to market and sell Fractional Membership without breaching the relevant prohibition in Regulation 14(3). For example, simply telling a prospective customer very factually that Fractional Membership included a share in an allocated property and that they could expect to receive some money back on the sale of that property, but less than what they put in, would not breach Regulation 14(3).

But, with that said, there seem to me to be many ways of marketing and selling a timeshare as an investment, without necessarily referring to (or even including) an allocated property. And if the Supplier said and/or did something in relation to an allocated property and/or

Fractional Membership more generally that at least implied to a prospective member that membership offered them the prospect of a financial gain, that would, in my view, breach Regulation 14(3).[6]

I will therefore first comment on the Supplier's sales and marketing materials and practices more generally, before turning to the evidence Mr J and Miss S have provided in this particular case.

The Lender has again highlighted in their response to my PD the various disclaimers in the sales paperwork which state that the product should not be seen as an investment. And they've said that Mr J and Miss S confirmed (by signing some of the documentation) that they understood this at the Time of Sale.

I acknowledged in my PD, and again I acknowledge here, that the Supplier did try in the sales documentation to avoid describing Fractional Membership as an 'investment' or giving any indication of the likely financial return. And as the Lender has pointed out, Mr J and Miss S signed the relevant documentation confirming they had read and understood these various disclaimers (set out in my PD).

However, as I said before, deciding what happened in practice is often not as simple as looking at the contemporaneous paperwork. Especially when such paperwork was produced and signed *after* a potential customer, such as Mr J and Miss S, had already been through a lengthy sales presentation.

I've considered the additional comments the Lender provided in relation to the Supplier's sales process and materials.

In my PD, I explained that during the course of the Financial Ombudsman Service's work on complaints about the sale of timeshare, the Supplier provided information on how it sold membership of timeshares like Mr J and Miss S's, including a document called the "Fractional Property Owners Club Fly Buy Manual 2017" (the '2017 Fractional Training Manual').

I explained that as I understood it, this was used from November 2016 onwards during the time when the Supplier was selling its second version of the Fractional Club – which is the version Mr J and Miss S appear to have purchased.

The Lender and Supplier, in their response to my PD, said that Mr J and Miss S did not actually receive or view this particular document or the slides and information within it (outlined in my PD). The Lender suggested I had made a conclusion in my PD that they did, but that isn't the case, as I'll go on to explain.

The Lender and Supplier said I should review and consider the relevant sales presentation sent to our Service by another lender in 2024 labelled 'ESA5'. I can confirm I'm aware of this and have reviewed it, and did so prior to issuing my PD.

And, I acknowledge that this didn't contain the same slides I referred to in my PD, and didn't have the same references to 'renting or buying', for example. Although, I do note that the slides in the presentation the Lender has referred to does still continue the concept of 'ownership' and also has slides which are very similar to those I referred to in my PD which were on Page 53 of the 2017 Training Manual, presenting a similar 'holiday comparison' between holidaying in the traditional sense (such as via a travel agent) in contrast to

[6] See paragraphs 73 and 76 of the judgment in *Shawbrook & BPF v FOS*

spending the same amount of money as Fractional Club members – therefore still demonstrating the financial advantages of membership.

Regarding the 2017 Training Manual I referred to, I accepted in my PD that it wasn't entirely clear whether Mr J and Miss S would have been shown the slides included in the aforementioned Manual. But, I explained that this document seemed to me to be reasonably indicative of:

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

(2) How the sales representatives would have framed the sale of Fractional Club membership to Mr J and Miss S

I haven't seen anything in the Lender or Supplier's response to my PD which changes my view on that. And, for the same reasons, I think this is still important evidence to consider in combination with the 'ESA5' presentation the Lender has referred to.

So, I'll now address the specific points the Lender has raised in relation to the 2017 Training Manual.

The Lender said that a failure to clarify that there would be a financial interest in the Allocated Property would likely infringe other parts of the Timeshare Regulations. I agree that this was a challenge for sales representatives - as I noted in my PD, in paragraphs 77 and 78 followed by 99 and 100 of *Shawbrook & BPF v FOS*, Mrs Justice Collins Rice said the following (my emphasis):

"[…] 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."*

The Lender highlighted the part of the Manual I had referred to which said on page 53 (amongst other things):

> "*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 say £5,000, it would still be more than you would get renting your holidays from a travel agent wouldn't it.*"

The Lender said this made no promise as to the amount of the financial return, nor any suggestion that the return would increase. They say it only suggests that the customer would receive 'some' of their money back. But, I don't agree.

I acknowledged in my PD, and continue to do so here, 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, the language did leave open the

possibility that the return could be equal to if not more than the initial outlay. Furthermore, the slides in that section 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 J and Miss S) who were looking to buy holidays anyway, it's still my view that 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.

The Lender also said it was an error for me to make a comparison between the slides on page 19 of the Manual and material that the Supplier used to sell the first version of the Fractional Club, because the slides on page 19 don't make any reference to fractional membership as an investment nor give the expectation of a financial gain or profit.

I already acknowledged in my PD, and continue to do so here, that the slides incorporated into the 2017 Fractional Training Manual don't include express reference to the 'investment' benefit of Fractional Club membership. But I still think they allude to much the same concept, namely that Fractional Club membership combined the best aspects of taking 'normal' holidays and purchasing a holiday home. Further, for the other reasons I explained in my PD in relation to the rest of the Manual, although the word 'investment' did not appear in the 2017 Fractional Training Manual, I think the idea that Fractional Club membership offered the same benefits as purchasing an investment property did form part of the sales process.

One of those advantages referred to in the slides on page 19 of the 2017 Fractional Training Manual is the "ownership of a physical 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 any mortgage secured against it, this particular advantage of Fractional Club membership was portrayed in terms that played on the opportunity ownership gave prospective members of the Fractional Club to accumulate wealth in a similar way, especially when combined with the phrase "money back".

So, I still think the Supplier's sales representatives were encouraged to make prospective Fractional Club members (like Mr J and Miss S) consider the advantages of owning something and view membership as a way of generating a return, rather than simply paying for holidays in the usual way. That was likely to have been reinforced throughout the Supplier's sales presentations by describing membership as a form of property ownership referring to the prospect of a "return". And with that being the case, 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.

I acknowledge in my PD, and continue to do so here, that there may not have been a comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mr J and Miss S 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)).'[7] 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 again, 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 still 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, as I said in my PD, I find it difficult to explain why, in paragraphs 77 and 78 followed by 99 and 100 of Shawbrook & BPF v FOS when, Mrs Justice Collins Rice said the following:

"[…] I endorse the observation made by Mr Jaffey KC, Counsel for BPF, that, whatever the position in principle, ***it is apparently a major challenge in practice for timeshare companies to market fractional ownership timeshares consistently with Reg.14(3). […] Getting the governance principles and paperwork right may not be quite enough.***

The problem comes back to the difficulty in articulating the intrinsic benefit of fractional ownership over any other timeshare from an individual consumer perspective*. […]* ***If it is not a prospect of getting more back from the ultimate proceeds of sale than the fractional ownership cost in the first place, what exactly is the benefit?*** *[…] What the interim use or value to a consumer is of a prospective share in the proceeds of a postponed sale of a property owned by a timeshare company – one they have no right to stay in meanwhile – is persistently elusive."*

"[...] although the point is more latent in the first decision than in the second, it is clear that both ombudsmen viewed fractional ownership timeshares – simply by virtue of the interest 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."*

Given what I've already said about the Supplier's training material and the way in which I still think it was likely to have framed the sale of Fractional Club membership to prospective members (including Mr J and Miss S), I think it is more likely than not that the Supplier did, at the very least, imply that future financial returns (in the sense of possible profits) from a Fractional Club membership were a good reason to purchase it.

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[7] 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

In combination with Mr J and Miss S's own testimony, I think there is sufficient evidence to conclude that at least on the specific occasion the Supplier sold them Fractional Club membership, the Supplier's sales representative was likely to have led Mr J and Miss S to believe that Fractional Club membership was an investment that may lead to a financial gain (i.e., a profit) in the future. As I noted in my PD, Mr J and Miss S have said in writing (separately to the Letter of Complaint), in their own words "*we would therefore receive a profitable return on our investment*".

In my view, this would have fallen foul of the prohibition on marketing or selling timeshares as an investment, and I remain of the view, on balance, taking all the evidence into account, that the Supplier was therefore in breach of Regulation 14(3) of the Timeshare Regulations when it sold the Fractional Club membership to Mr J and Miss S.

I have read and considered the Lender's other concerns.

They said that on 16 October 2019, Mr J wrote to the Supplier by email to cancel their membership. And, they highlighted that the email didn't list any allegation that the membership had been sold as an investment. So, the Lender says this challenges the authenticity of their witness statement, particularly since they engaged their PR shortly afterwards. But, this was only after Mr J and Miss S had made two further purchases which aren't the subject of this complaint. And, the purpose of the email in question wasn't to explain their full recollections of what happened at the Time of Sale or what motivated their purchase at that particular time. Indeed, the email doesn't differentiate between the different purchases they made. From the email, it also appears that it was sent following a conversation with the Citizen's Advice Bureau and suggests that they had potentially given Mr J and Miss S some advice on what to include in their email.

I think the email likely only reflects their unhappiness which led to the complaint and I don't think is particularly relevant to whether their testimony can be relied on. I've considered what the Lender has said regarding the involvement of the PR but, again, while it may be relevant to a discussion of the PR's business practices, I don't think the point they've made here is particularly relevant to whether or not Mr J and Miss S's testimony can be relied on.

So, I remain of the view, on balance, that their testimony is likely to be a genuine reflection of their recollections from the Time of Sale.

The Lender also says I attached little weight to the other reasons given by Mr J and Miss S for entering into the purchase referred to in their testimony, namely that of enjoying holidays. The Lender also says, as I noted in my PD, that the Supplier's breach of Regulation 14(3) had to be material to Mr J and Miss S's purchasing decision in order for the credit relationship between them and the Lender to have been rendered unfair. The Lender says I reversed the burden of proof when arriving at my conclusions here, taking issue with a particular paragraph in which I said "*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*".

But I don't accept the Lender's overall point here, and I don't think it's taken sufficient account of the following paragraphs of my PD where I said the following (my emphasis):

> "*On my reading of Mr J and Miss S's testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase.*

That doesn't mean they were not interested in holidays. Their own testimony demonstrates that they quite clearly were. And that is not surprising given the nature of the product at the centre of this complaint. But as Mr J and Miss S 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. After all, Mr J said, in his witness statement, that he was led to believe that Fractional Club membership was a way of both enjoying cheaper holidays and saving for the future. 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 section of my PD that I've quoted above sets out clearly, in my view, why I found provisionally that the Supplier's breach of Regulation 14(3) was material to Mr J and Miss S's purchasing decision and therefore rendered their credit relationship with the Lender unfair. I've seen no reason to depart from those provisional findings, and it follows that my findings and conclusions remain the same on this point.

I have also read and considered the judgment in *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 J and Miss S's sale did breach Regulation 14(3).

So, overall, given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr J and Miss S under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. I therefore remain of the view that it is fair and reasonable that I uphold this complaint.

In relation to the method of redress I proposed in my PD, the Lender said there was no evidence to suggest that Mr J and Miss S would not have made their further, subsequent purchases (not the subject of this complaint) and therefore my proposal failed to put them back into the position they should have been in, but actually puts them into a better position.

But, I've also upheld both of Mr J and Miss S's two other complaints about their two other, subsequent purchases. So, with that being the case, I'm satisfied that the redress I've outlined in my PD (and have outlined again below for the avoidance of doubt) is fair and reasonable as in combination with my redress on those other two complaints, it achieves, as closely as possible, the same financial position for Mr J and Miss S as if they had never joined the Fractional Club in the first place. Which, since I'm also upholding their other complaints, I'm satisfied is the position they should be in.

The Lender also objected to my proposal that they should refund a proportion of the management charges Mr J and Miss S paid after their subsequent purchases. But I think I clearly explained in my PD why I thought that was fair and reasonable where I said:

"***Did the unfairness caused by the purchase of Fractional Club end when it was traded in for further purchases?***

On 14 October 2018, Mr J and Miss S traded in their first membership ('Fractional Club 1') membership, paying an additional sum and adding a further 330 fractional points to their existing 1,040 by entering into a different purchase agreement for 'Fractional Club 2', thereby 'upgrading' and replacing Fractional Club 1. The credit relationship Mr J and Miss S had with the Lender ended when that loan was consolidated when making their second purchase in October 2018.

On 23 June 2019, Mr J and Miss S also traded in their Fractional Club 2 membership, paying an additional sum and adding a further 250 fractional points to their existing 1,370 by entering into a different purchase agreement for Fractional Club 3, thereby again 'upgrading' and replacing their membership.

As a result of their purchases of Fractional Club 2 and 3, it is necessary to consider whether the unfairness caused to Mr J and Miss S from the purchase of the original Fractional Club at the Time of Sale continued, and if it did continue, what were the ongoing consequences.

While the Supplier gave Mr J and Miss S £13,931 credit for their original Fractional Club 1 membership, this credit wasn't the equivalent of cash. It was a deduction from a starting price set by the Supplier itself for Mr J and Miss S's upgrade to Fractional Club 2. And as there is no information to indicate what the market value was of the Allocated Property connected to their subsequent purchase, there is no evidence that the starting price of that 'upgrade' represented the objective value of the benefits under the new purchase agreement, as opposed to a commercial opening position from which the Supplier would and could profitably offer deductions or discounts. And as £13,931 was almost the same as the purchase price originally attached to their Fractional Club 1 purchase, it cannot be said that the upgrade to Fractional Club 2 on 14 October 2018 improved Mr J and Miss S's position financially.

And, the same applies to their further purchase as the Supplier gave Mr J and Miss S £19,180 credit for their Fractional Club 2 membership. This was almost the same as the original purchase price originally attached to their Fractional Club 2 purchase (for which they ended up paying £5,807 reduced from £19,738 due to the trade in). So, again, it cannot be said that the upgrade to Fractional Club 3 on 23 June 2019 improved Mr J and Miss S's position financially.

However, I have thought about the extent to which responsibility for the situation after their purchase of Fractional Club 2 and 3 must be attributed to the Supplier and the Lender. As the credit agreements associated with the purchase of Fractional Club 2 and 3 were from a different lender, I cannot see it would be fair and reasonable to hold the Lender in this case responsible for any aspect of the Time of Sale 2 or 3 (nor would a court likely do so). So, I do not think that the Lender should have to answer for the financial consequences specifically associated with the 330 additional fractional points Mr J and Miss S purchased in October 2018 and the 250 additional fractional points they purchased in June 2019.

Formally, the agreements Mr J and Miss S entered into in October 2018 and June 2019 were both new contracts that superseded the old ones. But I think the purpose of this upgrade was to continue and supplement their existing Fractional Club membership.

With all of that being the case, I therefore think that the upgrades were really just a top-up of Mr J and Miss S's fractional points by rolling over those that they had and providing them, as members of the Fractional Club 2 and 3, with enough points to enable them to take holidays in better and more luxurious accommodation, albeit while also holding an interest in the net sales proceeds of a different Allocated Property.

And as the function of the Supplier's £13,931 and £19,180 credits was to roll over Mr J and Miss S's existing fractional points into their upgrade, I'm not persuaded that the purchase of Fractional Club 2 or Fractional Club 3 ended the unfairness to them in their credit relationship with the Lender. I think their original purchase of Fractional Club 1, and the associated Credit Agreement 1 with the Lender had ongoing financial consequences for them, which continued the unfair relationship with the Lender. And for that reason, it is my view that the Lender is still answerable for them."

I haven't seen anything to persuade me to reach a different conclusion on this point, so I've outlined below what I still consider to be the fair and reasonable way to resolve this complaint.

Fair Compensation

Having found that Mr J and Miss S would not have agreed to purchase Fractional Club membership at the Time of Sale (also referred to below as the 'Time of Sale 1') 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 Mr J and Miss S was unfair under section 140A of the CCA, I still think it would be fair and reasonable to put Mr J and Miss S 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 Mr J and Miss S not entered into the Credit Agreement. This is on the proviso that Mr J and Miss S agree to assign to the Lender 1,040 of their Fractional Points or hold them on trust for the Lender if that can be achieved.

I've also referred to Mr J and Miss S's two further purchases in October 2018 and June 2019 below as the 'Time of Sale 2' and the 'Time of Sale 3' respectively.

Here's what the Lender needs to do to compensate Mr J and Miss S with that being the case – whether or not a court would award such compensation:

(1) The Lender should refund Mr J and Miss S the repayments that were made to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.

(2) The Lender should also refund 100% of the annual management charges Mr J and Miss S actually paid from the Time of Sale 1 up to the Time of Sale 2.

(3) The Lender can deduct

   i. The value of any promotional giveaways that Mr J and Miss S used or took advantage of from the Time of Sale 1 up to the Time of Sale 2; and

   ii. The market value of the holidays* Mr J and Miss S took using their Fractional Club 1 points from the Time of Sale 1 up to the Time of Sale 2 (if any).

   (the 'Net Repayments')

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

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

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

[8] 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.

However, as I don't think the effects of the unfairness in question ended when Mr J and Miss S upgraded their Fractional Club membership in October 2018 or June 2019, and as I think their original 1,040 fractional points were essentially rolled over into their upgrades and had ongoing financial consequences for them, the compensation needs to reflect that.

So, in my view, the Lender also needs to refund to Mr J and Miss S the proportion of the management charges that they actually paid after 14 October 2018 up to 23 June 2019 that relate to those 1,040 points. These equate to 75%[9] of the 1,370 points Mr J and Miss S actually ended up with at the Time of Sale 2. And, they also need to refund the proportion of the management charges that Mr J and Miss S actually paid from 23 June 2019 onwards that relate to those 1,040 points which equates to 65% of the 1,620 points they ended up with at the Time of Sale 3. So, in addition to the Net Repayments above:

(1) The Lender should refund 75% of the annual management charge(s) paid by Mr J and Miss S from 14 October 2018 onwards to 23 June 2019 and 65% of these charges from 23 June 2019 onwards, less a proportional deduction for any holiday[10] they took using the fractional points relating to Fractional Club 2 and 3.

(2) Simple interest at 8% per annum should be added to this amount from the date each charge was paid until the date of settlement.

It is possible that the Supplier might pursue Mr J and Miss S for other costs in addition to the annual management charges arising from the Fractional Club 2 and 3 memberships, so there is the possibility of continuing detriment that I think needs addressing. So, in keeping with what I've said above, the Lender should indemnify Mr J and Miss S against 75% of any other liabilities accruing from 14 October 2018 to 23 June 2019 and 65% from 23 June 2019 onwards that result from Mr J and Miss S's ownership of Fractional Rights.

My final decision

I uphold Mr J and Miss S's complaint against Shawbrook Bank Limited and direct it to work out and pay fair compensation as outlined above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J and Miss S to accept or reject my decision before 4 April 2025.

Fiona Mallinson
Ombudsman

[9] All percentages have been rounded to the nearest whole number.
[10] See Section (3) (ii) above