DRN-5334662

The complaint

Mr and Mrs H'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 and Mrs H purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 6 September 2016 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,040 fractional points, which they could use on a bi-annual basis, at a cost of £11,990 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs H 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 H paid for their Fractional Club membership by taking finance of £11,990 from the Lender in their joint names (the 'Credit Agreement').

Mr and Mrs H traded in their Fractional Club for a further fractional membership (the 'Fractional Club 2') from the Supplier on 23 August 2017, thereby revoking their rights to the Allocated Property.

Mr and Mrs H – using a professional representative (the 'PR') – wrote to the Lender on 13 November 2019 (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 and related Purchase Agreement for the purposes of Section 140A of the CCA.

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

Mr and Mrs H say that the Supplier made pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. Told them that Fractional Club membership would allow them to travel around the world, including Florida, and that availability would always be secured, when that was not true.
2. Told them that Fractional Club membership was a good "investment" which would not lose its value.

Mr and Mrs H say that they have a claim against the Supplier in respect of one or both 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 and Mrs H.

(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 and Mrs H 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. The misrepresentations set out above.
2. The Supplier acted recklessly and did not apply due care towards their needs and financial circumstances.
3. They were pressured into purchasing Fractional Club membership by the Supplier.

The Lender dealt with Mr and Mrs H's concerns as a complaint and issued its final response letter on 27 November 2020, rejecting it on every ground.

Mr and Mrs H then referred the complaint to the Financial Ombudsman Service. While it was waiting for assessment Mr and Mrs H told our Service that they no longer wished to be represented by the PR.

An Investigator, having considered the information on file, upheld the complaint on its merits. They thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr and Mrs H 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 H 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.

On 30 January 2025 I issued a Provisional Decision (the 'PD') on this complaint. In it I set out that I thought the Supplier had sold and/or marketed the Fractional Club to Mr and Mrs H as an investment in breach of Regulation 14(3) of the Timeshare Regulations. And I thought the impact of that breach on their 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 then went on to say how I thought the Lender should calculate and pay fair compensation to Mr and Mrs H.

Mr and Mrs H had nothing to add in response to my PD. The Lender responded at length, disagreeing with my provisional findings. It said, in summary:

- The PD was premised on a material error of law in its approach to the prohibition under Regulation 14(3) of the Timeshare Regulations. And it 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 H's witness testimony; and
- The PD 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 PD erred in its approaches above. While I don't intend to repeat its submissions here in detail, I will summarise them:

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

- The wording of the PD is inconsistent with the definition of an "*investment"* as set out in ('*Shawbrook & BPF v FOS*')[1].
- The customer being told that some money would be 'returned' upon sale of the Allocated Property does not breach Regulation 14(3).
- Neither the testimony nor the contemporaneous materials referred to by the Ombudsman reference the word 'investment', so it is irrational in law to say the witness evidence described it as such.
- The Supplier only gave the consumers information about the sale of the Allocated Property, merely describing its features.
- Selling an investment requires the prospect of a financial gain/profit, and the corresponding motive on the part of the consumer. Referring to the prospect of a residual return does not satisfy this test.

The Lender continued by making submissions regarding the Fractional Club documentation and the Supplier's sales processes:

- The signed disclaimers referenced show there was at no stage any representation as to the future price or value of the fractional share, and the 'advice disclaimer' referenced would lead the consumer to understand that the product was not being sold to them as an investment.
- The training manual referenced made no mention of the presence of the Allocated Property being an investment, nor that the purpose or benefit of the product was the opportunity to make a profit – the material indicated that there would be a "*return"* of money after 19 years.
- 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.
- Referring to the Allocated Property as 'ownership of bricks and mortar' is unobjectionable.
- There was no comparison between the expected level of financial return against the initial outlay in purchasing the product, the primary focus of which was to provide holidays.
- Any fair analysis of the training and contractual materials would conclude that the customer was told that their investment was in holidays, and that "some money" would be returned, which may be a "small part of your initial outlay".
- *Prankard v Shawbrook Bank Limited* considered documents and evidence regarding the training programme operated by the Supplier at the time and concluded that the product was not sold as an investment.

The Lender then assessed the witness testimony. It said, in summary:

- The veracity of Mr and Mrs H's testimony is not considered adequately, and as such it is given undue weight.
- The Ombudsman ought to have assessed whether the evidence is clear, consistent and contemporaneous, and that it is an accurate reflection of Mr and Mrs H's recollections.

[1] Set out below in the Legal and Regulatory Context section

- The statement consisted of less than one page of text from Mrs H made upon the request of the Investigator. This was over seven years after the sale and compiled after the judgement in ('*Shawbrook & BPF v FOS*')[2].
- The Ombudsman has erred in his assessment of how much weight can be placed on the statement because:
    - Contrary to the Ombudsman's opinion, it appears that a professional representative has influenced Mrs H's testimony, as it follows almost verbatim a letter of complaint sent in by a second PR on their behalf in November 2021.
    - There is a material inconsistency between how the allegation is framed in the Letter of Complaint and how it is made in the statement.
    - The statement fails to articulate in detail how the Fractional Club was specifically sold as an investment beyond generic allegations, which are a hallmark of many complaints submitted by claims management companies.
- The Ombudsman has not attached sufficient weight to the contemporaneous evidence which points to holidays being the reason for Mr and Mrs H's purchase of the Fractional Club.
- Mr and Mrs H upgraded their Fractional Club in August 2017 providing them additional holiday rights, and referred a total of 21 family and friends to the Supplier. This is contrary to their witness statement saying that in 2016 they *"felt trapped as the points are never enough and [they] felt deceived."*
- Other than the unsafe witness testimony there is no evidence to support that Fractional Club was sold to Mr and Mrs H as an investment. The sales notes make it clear that Mr and Mrs H were looking forward to using the membership for its intended purpose – holidays.

And finally, it 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 Ltd,* was whether there was a "material impact on the debtor when deciding whether or not to enter the agreement".
- The Ombudsman has erred here and applied 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.

It concluded that given the lack of evidence coupled with unsafe testimony of the Fractional Club being marketed or sold as an investment, it meant there was no material impact on Mr and Mrs H's decision to purchase the Fractional Club at the Time of Sale. Thus, the Lender considered that the relationship was fair.

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 still consider to be the relevant legal and regulatory context.

[2] Set out below in the Legal and Regulatory Context section.

The legal and regulatory context

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

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

- The CCA (including Section 75 and Sections 140A-140C).
- The law on misrepresentation.
- The Timeshare Regulations.
- The Unfair Terms in Consumer Contracts Regulations (the 'UTCCR').
- The Consumer Protection from Unfair Trading Regulations (the 'CPUT' regulations).
- Case law on Section 140A of the CCA – including, in particular:
    - The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') (which remains the leading case in this area).
    - *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
    - *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*').
    - The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*').
    - *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
    - *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
    - *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').

I have also taken into account:

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

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.

And having done that, and having read and considered all of the reasons the Lender gave for why it disagreed with my PD, I am satisfied that this complaint should be upheld. I think it is more likely than not that the Supplier breached Regulation 14(3) of the Timeshare

Regulations by marketing and/or selling Fractional Club membership to Mr and Mrs H as an investment. And, in the circumstances of this complaint, this breach rendered the credit relationship between them and the Lender unfair to them for the purposes of Section 140A of the CCA.

However, and 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 H's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the Supplier misrepresented the Fractional Club membership to Mr and Mrs H, and all of the other alleged reasons there was an unfair debtor-creditor relationship, save for the allegation that the membership was sold as an investment. This is because, even if those aspects of the complaint ought to succeed, the redress I'm proposing puts Mr and Mrs H in the same or better position than they would be if the redress was limited to those matters.

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 and Mrs H 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 H'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 Section140(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."[3]

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

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

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 H and the Lender along with all of the circumstances of the complaint. When carrying out my analysis, and in coming to my conclusion, 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 the above on the fairness of the credit relationship between Mr and Mrs H and the Lender. And having done so, and having considered everything that has been submitted in response to my PD, I think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. I will explain why.

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 H'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 H say that the Supplier did exactly that at the Time of Sale – saying so in their Letter of Complaint, and saying the following in an email they sent to this Service on 13 October 2023 in response to the Investigator asking them for their account of what happened:

> *"We were told that we had purchased an investment and that the timeshare would appreciate in value. We were told that we would have a share of a property and its value would increase, therefore we were promised a considerable return on investment. We were also told that we could sell the timeshare back to the resort or easily sell it at a profit."*

Mr and Mrs H 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 they would get their money back or more during the sale of Fractional Club membership.

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

Mr and Mrs H'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, like I said in the PD, 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, and as the Lender correctly pointed out in response to the PD, 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 H 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.

When I completed the PD, I had not seen the standard documentation associated with this particular sale. So, I relied upon the standard documentation which the Supplier would likely have provided to purchasers, such as Mr and Mrs H. In response to the PD the Lender submitted all the contemporaneous paperwork associated with this Fractional Club purchase, and I am grateful to it for doing so.

And having considered this paperwork, I can see there is evidence 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 H, 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 H as an investment.

For example, in the Member's Declaration document it states:

> "*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.*"

And in the Information Statement, it states:

> "*Fractional Rights have been designed to be used and enjoyed and not bought with the expectation or necessity of future financial gain.*" And: "*The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for the direct purposes of*

a trade in nor as an investment in real estate. The Supplier makes no representation as to the future price or value of the Allocated Property or any Fractional Rights."

And:

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

In response to my PD, the Lender says these disclaimers show there was at no stage any representation as to the future price or value of the fractional share, and the 'advice disclaimer' that is referenced above would lead the consumer to understand that the product was *not* being sold to them as an investment.

I agree that the disclaimer's aim seems to be to ensure purchasers didn't rely on what they were told as investment advice, or a warranty as to the future value of the Allocated Property. So, I agree with the Lender, in that the disclaimer, on its own, cannot be construed as a representation that the Fractional Club is an investment. But I still regard its contents as more relevant to the sale of an investment than a holiday product, because it says those making the timeshare sale obtained information "*from their own experience as investors*" and recommends purchasers seek advice from "*investment advisors*" about their "*investment needs*". But in any event, the disclaimer doesn't seem to have been focussed on by Mr and Mrs H at the Time of Sale, so doesn't advance either side's case anyway.

As I said in my PD, 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 H's allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that membership of the Fractional Club was expressly described as an *"investment*" and (2) that membership of the Fractional Club could make them a financial gain and/or would retain or increase in value.

So, for the avoidance of doubt following my PD, 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 H 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 constituted a breach of Regulation 14(3).

And for reasons I'll now come on to, given the facts and circumstances of this complaint, and having considered everything the Lender has said in response to my PD, I think the answer to both of these questions is 'yes'.

How the Supplier marketed and sold the Fractional Club membership

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

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

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

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

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

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?

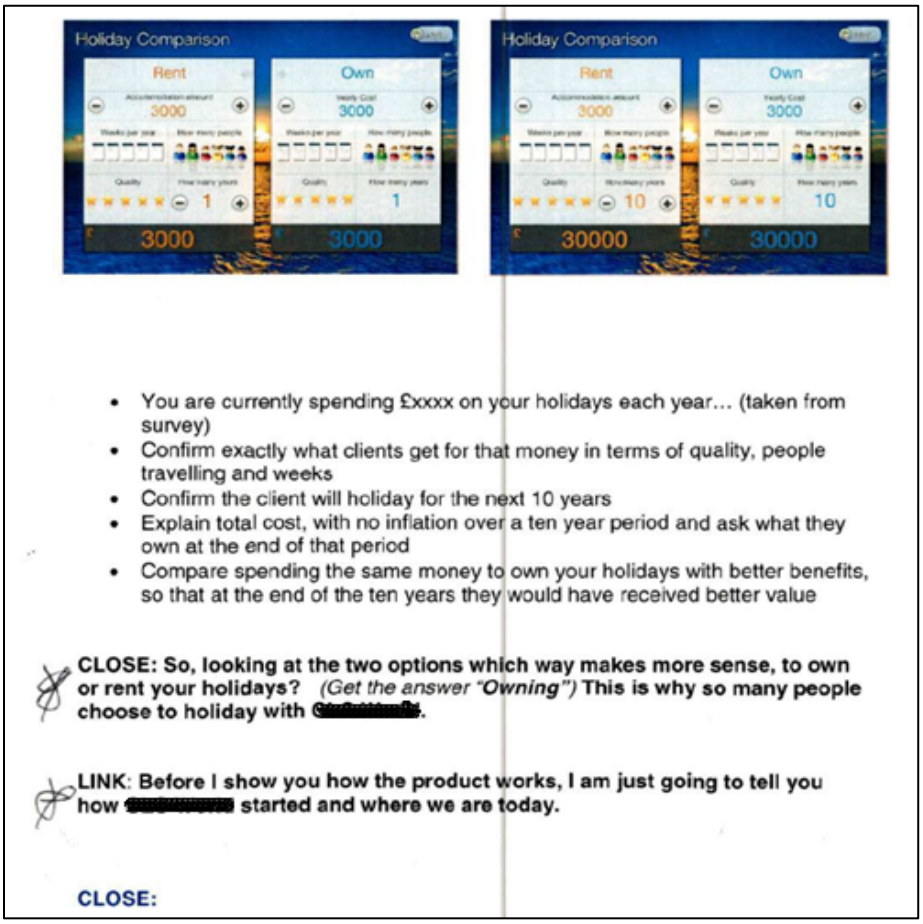
LINK: Now let me show you the relevance this has when it comes to your holidays because what you are currently doing is ...

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 the point made by the Lender, 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 2013/2014 Induction Training then moved the Supplier's sales representatives onto a cost comparison between "renting" holidays and "owning" them. Sales representatives were told to ask prospective members to tell them what they'd own if they just paid for holidays every year in contrast to spending the same amount of money to "own" their holidays – thus laying the groundwork necessary to demonstrating the advantages of Fractional Club membership:



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

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

SUMMARISE LAST SLIDE:

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

[…]

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

[…]

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

(My emphasis added)

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

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

[…]

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

(My emphasis added)

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

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

[…]

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

I acknowledged in the PD, and I do again 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 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 H) 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.

The Lender also argues that, given that a prospective Fractional Club member could expect a financial return at the end of their membership term, it isn't surprising that attempts should be made by the Supplier to ensure that the amount in question is as high as it could be by maintaining the quality and condition of the property. It said that nobody would expect the amount returned at the end of the membership term to be as low as possible, or anything other than as much as possible. But the significant point, in the Lender's view, is that there was no comparison between the expected level of financial return and the initial outlay when purchasing membership.

And I acknowledge that, as I did in my PD. However, if I were to only concern myself with express efforts to quantify to Mr and Mrs H 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)).'*[4] 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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[4] 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."*

I have considered the findings in *Prankard v Shawbrook Bank Limited* where the County Court found, that after considering the contractual documents and evidence regarding the training programme operated by the Supplier at the time, the product was not sold as an investment. But as that case was decided on its own facts, while I have read and considered it, it doesn't change my assessment of the evidence given the facts and circumstances of *this* complaint.

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.

The Lender, in response to the PD, has said there is, other than the witness testimony, simply no evidence to suggest that Fractional Club membership was sold and/or marketed to Mr and Mrs H as an investment. And it has questioned the veracity of the statement from Mrs H upon which I have placed some reliance. It has said that it is almost identical to a letter of complaint that a different PR wrote on Mr and Mrs H's behalf in 2021, so it has questioned whether the words used are Mrs H's own. This, it says, is good reason to doubt its credibility. But I don't agree.

Mr and Mrs H have set out their recollections of the way the Supplier sold Fractional Club membership to them, and their motivation for their purchase. I have considered how much weight I can put on this evidence. I have born in mind that it relates to events some seven years before it was written, and that memories fade over time. I am also aware that it was written after the judgement in *Shawbrook & BPF v FOS* so there is a risk that Mr and Mrs H's memories may have been affected by this. And as I have said above, I have taken into

consideration the similarities between what they have said and what was written, apparently on their behalf, by a PR in 2021. But the fact that it appeared to have been written on their behalf suggests that it was a record (albeit written by a third party) of what they recollected from the Time of Sale. And it is not materially different to what was included in the Letter of Complaint before that, so they have been consistent throughout. So, having considered everything afresh in light of the Lenders submissions, and whilst remaining cognisant of any possible material errors, I am still satisfied that I am able to place weight on, and rely on, the contents of the email. It was, after all, sent at a time when they were no longer professionally represented, and it has not adduced anything new – it just expands on what was submitted in the Letter of Complaint.

Overall, therefore, as the slides and training material 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 H 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 whilst I accept it is *possible* that Mr and Mrs H would have purchased the Fractional Club membership even if the Supplier hadn't led them to believe that there was the prospect of a financial gain from the membership, I don't think that's *probable* based on what I've seen.

And with that being the case, I remain of the opinion as set out in my PD - I don't find Mr and Mrs H either implausible or hard to believe when they say:

> *"We were told that we had purchased an investment and that the timeshare would appreciate in value. We were told that we would have a share of a property and its value would increase, therefore we were promised a considerable return on investment. We were also told that we could sell the timeshare back to the resort or easily sell it at a profit."*

On the contrary, given what I know about the training material used to prepare its sales representatives, and how Fractional Club membership was likely presented to Mr and Mrs H, I think that's likely to be what Mr and Mrs H 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 H 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 H and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3)[5] led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On my initial reading of the Letter of Complaint and then Mr and Mrs H's testimony, I thought 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. And I remain of that opinion now. They have said in their email to this Service:

> *"We were made to believe that timeshare was an investment and would increase in value. We believed in it, relied on it and as a result were induced to enter into contract, which otherwise would not have done. Were materially influenced by misrepresentation, because relying on this representation decided to enter into the contract."*

That doesn't mean they were not interested in holidays – they have made clear in the Letter of Complaint that they were, which is not surprising given the nature of the product at the centre of this complaint. But Mr and Mrs H have said that they would not have pressed ahead with the purchase in question if the Supplier had not led them to believe that Fractional Club membership was an appealing investment opportunity.

So, as I said in my PD, Mr and Mrs H have said (plausibly in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale as something that offered them not only holiday rights, but a share in the Allocated Property and the possibility of a profit. So, on the balance of probabilities, and whilst taking everything into account, I think their purchase was motivated by this share and the possibility of a profit when the Allocated Property came to be sold.

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[5] which, having taken place during its antecedent negotiations with Mr and Mrs H, 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

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 am not persuaded that they would have pressed ahead with their purchase regardless. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made. This is the basis upon which I have decided that the credit relationship between Mr and Mrs H and the Lender was unfair to them.

As I've said, given that it was, on the balance of probabilities, likely that the sale of Fractional Club was pitched as an investment in breach of Regulation 14(3), and I think it likely that the potential for a profit was an important driver for Mr and Mrs H in their purchase of the Fractional Club membership, it follows that the associated credit relationship under the Credit Agreement with the Lender was rendered unfair to Mr and Mrs H.

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 H 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 am satisfied 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 a further purchase?

As I've said, on 23 August 2017, Mr and Mrs H traded in their Fractional Club membership, paying an additional £5,554 and purchasing 870 fractional points, which they could use on an annual basis, by entering into a different purchase agreement for Fractional Club 2, thereby 'upgrading' and replacing their original Purchase Agreement.

As a result of their purchase of Fractional Club 2, it is necessary to consider whether the unfairness caused to Mr and Mrs H from the purchase of the original Fractional Club at the Time of Sale continued, and if it did continue, what were the ongoing consequences. The Lender, in response to the PD, said it would be unfair on it to say it was responsible for redressing any unfairness following the upgrade to Fractional Club 2 as this would risk Mr and Mrs H being put in a better position than they should be. But as I will go on to explain, I don't agree.

While the Supplier gave Mr and Mrs H a trade-in credit for their original Fractional Club membership, this credit wasn't the equivalent of cash. It was a deduction from a starting price set by the Supplier itself for Mr and Mrs H'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. So, I don't think it can be said that the upgrade to Fractional Club 2 on 23 August 2017 improved Mr and Mrs H's position financially.

However, I have thought about the extent to which responsibility for the situation after their purchase of Fractional Club 2 must be attributed to the Supplier and the Lender. As the credit agreement associated with the Purchase of Fractional Club 2 was from a different provider, I cannot see it would be fair and reasonable to hold the Lender responsible for any aspect of the purchase at the Time of Sale 2. So, I do not think that the Lender should have to answer for the financial consequences specifically associated with the additional fractional points Mr and Mrs H purchased in August 2017.

Formally, the agreement Mr and Mrs H entered into in August 2017 was a new contract that superseded the old one. But I think the purpose of this upgrade was to continue and supplement their existing Fractional Club membership. So, I think that the upgrade was really just a top-up of Mr and Mrs H's fractional points by rolling over those that they had and providing them, as members of the Fractional Club 2, with enough points to enable them to take annual holidays, albeit while also holding an interest in the net sales proceeds of a different Allocated Property.

And as the function of the Supplier's trade-in credit was to roll over Mr and Mrs H's existing fractional points into their upgrade, I'm not persuaded that the purchase of Fractional Club 2 ended the unfairness to Mr and Mrs H in their credit relationship with the Lender. I think their original purchase of Fractional Club, and the associated Credit Agreement 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.

Putting things right

Having found that Mr and Mrs H 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 Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr and Mrs H agree to assign to the Lender the equivalent to their 1,040 bi-annual fractional points or hold them on trust for the Lender if that can be achieved.

On 23 August 2017 (the 'Time of Upgrade'), Mr and Mrs H upgraded their Fractional Club membership by trading in their existing 1,040 bi-annual fractional points, paying an additional £5,554 and entering a new purchase agreement for a total of 870 Fractional Points (Fractional Club 2) which they could use on an annual basis. And the Credit Agreement was settled by being refinanced using a new loan taken from a different lender at the Time of Upgrade.

Formally, the new purchase agreement superseded the old one, but in my view, it really just supplemented Mr and Mrs H's Fractional Club membership, rolling over their existing bi-annual fractional points into the new membership. And as I've already said, 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 Supplier 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 H's original purchase of the Fractional Club and the Credit Agreement for which the Lender is answerable.

However, I recognise that the upgrade in question was paid for by funding from a new lender who does bear some responsibility for any acts and/or omissions in the sales presentation for Fractional Club 2. A complaint about the sale and credit agreement associated with the purchase of Fractional Club 2 has been considered by this Service and has been upheld against that business. So, I'm not persuaded the Lender should have to answer for the financial consequences specifically associated with the additional fractional rights Mr and Mrs H purchased on 23 August 2017. As I've said, Mr and Mrs H originally had 1,040 bi-annual fractional points. These were, in effect, equivalent to 520 annual fractional points. So, the upgrade on 23 August 2017 provided Mr and Mrs H 350 additional annual fractional points.

So, in my view, the Lender needs to refund the annual management charges paid by Mr and Mrs H relating to their Fractional Club membership, and a proportion of the management charges payable after 23 August 2017 that relate to the 1,040 bi-annual fractional points Mr and Mrs H held originally – which here equates to 60% of the annual management charges paid relating to Fractional Club 2 (rounded to the nearest whole number).[6]

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

(1) The Lender should refund Mr and Mrs H's repayments to it under the Credit Agreement, including any sums paid to settle the debt.

(2) The Lender should refund the annual management charges actually paid by Mr and Mrs H relating to the Fractional Club membership.

(3) The Lender should also refund 60% of the Fractional Club 2 annual management charges paid by Mr and Mrs H after 23 August 2017.

(4) The Lender can deduct:

   i. The value of any promotional giveaways that Mr and Mrs H used or took advantage of at the Time of Sale;

   ii. the market value of the holidays* Mr and Mrs H took using their bi-annual fractional points before 23 August 2017; and

   iii. the market value of the holidays* Mr and Mrs H took after 23 August 2017 using up to 520 fractional points and then a proportion of the market value of any holidays taken using more than 520 fractional points where the proportion is to be worked out as (520/number of points used to take holiday x100) % of the market value.

   (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 H's credit files in connection with the Credit Agreement reported within six years of this decision.

(7) If Mr and Mrs H's Fractional Club 2 membership is still in place at the time of this decision, the Lender must ask the Supplier to reduce the number of fractional points they hold by 350 fractional points. What's more, the Lender must indemnify Mr and Mrs H against 60% of all ongoing liabilities as a result of their Fractional Club 2 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 H 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.

[6] In the complaint regarding Fractional Club 2 the lender in that complaint has been required to refund 40% of the annual management charges associated with Fractional Club 2, so Mr and Mrs H are not being double-compensated here.

**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(s) a certificate showing how much tax it's taken off if they ask for one.

My final decision

Mr and Mrs H's complaint is upheld, and I direct Shawbrook Bank Limited to calculate and pay fair compensation to Mr and Mrs H as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H and Mr H to accept or reject my decision before 17 March 2025.

Chris Riggs
Ombudsman