DRN-5395153

The complaint

Mr and Mrs M'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 M purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 10 September 2013 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,890 fractional points at a cost of £25,400 (the 'Purchase Agreement'). But after trading in their existing timeshare, they ended up paying £8,889 for membership of the Fractional Club.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs M 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 M paid for the Fractional Club membership by taking finance of £8,889 from the Lender (the 'Credit Agreement').

Mr and Mrs M – using a professional representative (the 'PR') – wrote to the Lender on 13 August 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.
3. The decision to lend being irresponsible because the Lender did not carry out the right creditworthiness assessment.
4. The Credit Agreement being unenforceable because it was not arranged by a credit broker regulated by the Financial Conduct Authority (the 'FCA') to carry out such an activity.

<u>Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale</u>

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

1. told them that taking Fractional Club membership would enable them to exit from their existing timeshare when that was not true.
2. told them that Fractional Club membership had a guaranteed end date after 19 years when that was not true.
3. told them that Fractional Club membership was an "investment" when that was not true because timeshares in general had no re-sale value on the second-hand market.
4. told them that the Supplier's holiday resorts were exclusive to its members when that was not true.

Mr and Mrs M 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 and Mrs M.

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

The Letter of Complaint set out the reasons why Mr and Mrs M 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 contractual terms setting out, for example, the obligation to pay annual management charges for the duration of their membership or else risk termination of the membership by the Supplier were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
2. Payment by the Lender of secret commission to the Supplier.

The Lender dealt with Mr and Mrs M's concerns as a complaint and issued its final response letter on 1 October 2019, rejecting it on every ground.

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

The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr and Mrs M at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of that breach on their purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr and Mrs M 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.

Having considered everything, I came to the same conclusion as our Investigator and thought Mr and Mrs M's complaint should be upheld. I issued a provisional decision (PD), setting out my thoughts and invited both parties to respond with anything further they wished me to consider before I issued a final decision. The PD included the following:

'***The legal and regulatory context***

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

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

- *The CCA (including Section 75 and Sections 140A-140C).*
- *The law on misrepresentation.*
- *The Timeshare Regulations.*
- *The UTCCR.*
- *The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations').*

- *Case law on Section 140A of the CCA – including, in particular:*

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

Good industry practice – the RDO Code

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

My provisional findings

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

However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I recognise that there are a number of aspects to Mr and Mrs M's complaint, it isn't necessary to make formal findings on all of them. This includes the allegation, for example, that commission was paid between the Lender and the Supplier but not disclosed to Mr and Mrs M.

That's because, even if other aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs M in the same or a better position than they would be if the redress was limited to commission or any of the other points of complaint raised.

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

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

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between Mr and Mrs M 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 M's membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

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

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

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

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

In the case of Scotland & Reast, the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that "negotiations are deemed to have been conducted by

the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law" before going on to say the following in paragraph 74:

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

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

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

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

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

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

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

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

I have then considered the impact of these on the fairness of the credit relationship between Mr and Mrs M and the Lender.

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs M's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for

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

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 M say that the Supplier did exactly that at the Time of Sale – saying the following during the course of this complaint about what the Supplier told them:

> *'Unlike the Vacation Club, the Fractional Ownership club was an investment. With the Fractional Ownership, we would own a fraction of property within [the Supplier's] portfolio of resorts. It could be viewed as an asset rather than a holiday product.*
>
> *The Fractions would increase in value year on year so, for example a £29,000 apartment would sell for £35,000 in a years' time making it a great investment opportunity.*
>
> *[…]*
>
> *We would be able to sell our Fractional membership at any point and we would still be able to make a profit on our purchase.'*

Mr and Mrs M allege, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because 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 and Mrs M's share in the Allocated Property clearly, in my view, constituted an investment as it offered him the prospect of a financial return – whether or not, like all investments, that was more than what he first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr and Mrs M as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs M, 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 was, for instance, a statement in the Member's Declaration document Mr and Mrs M signed to the effect that they understood the primary purpose of their purchase related to holidays, was not specifically for direct purposes of a trade-in and that the Supplier made no representations as to the future price or value of the Allocated Property.

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork, especially when considering what may have happened during a face-to-face sale. And there are a number of strands to Mr and Mrs M's allegation that the Supplier marketed and sold the Fractional Club membership as an investment, which in turn would have amounted to a breach of Regulation 14(3) at the Time of Sale, including that membership of the Fractional Club could make Mr and Mrs M a financial gain.

So, I have considered:

(1) *whether it is more likely than not that the Supplier, at the Time of Sale, sold or marketed membership of the Fractional Club as an investment, i.e. told Mr and Mrs M or led them to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered them the prospect of a financial gain (i.e., a profit); and, in turn*
(2) *whether the Supplier's actions constitute a breach of Regulation 14(3).*

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

How the Supplier marketed and sold the Fractional Club membership

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

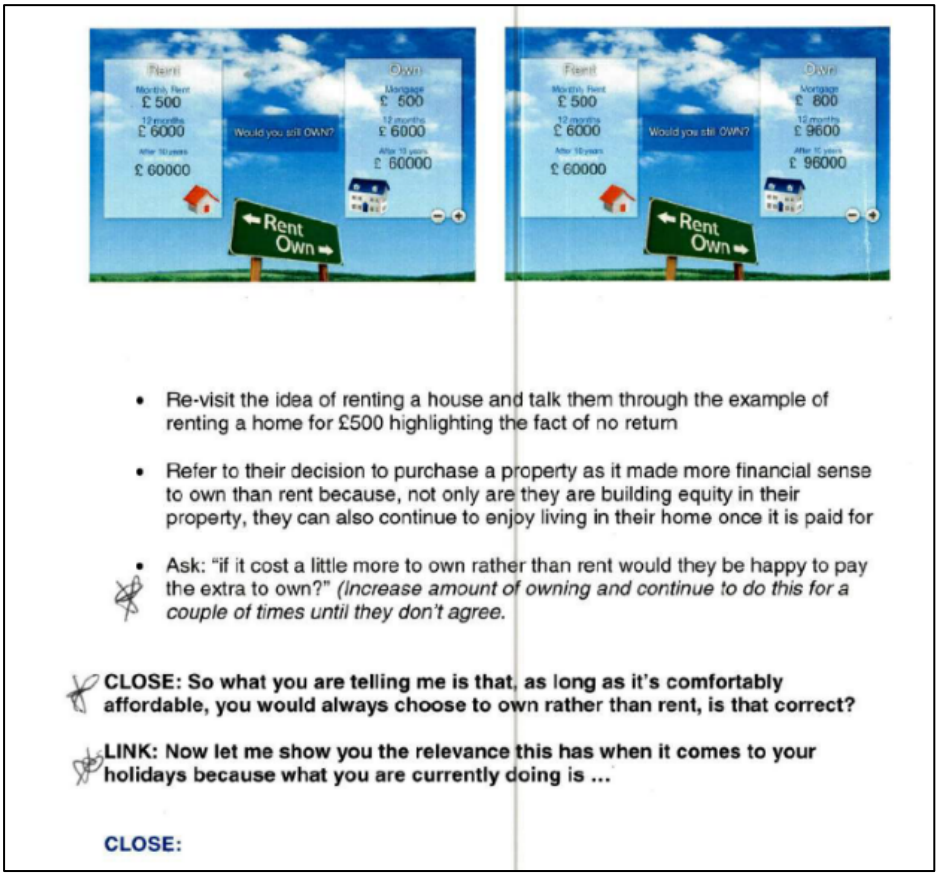
1. *a document called the 2013/2014 Sales Induction Training (the '2013/2014 Induction Training');*
2. *screenshots of an Electronic Sales Aid (the 'ESA'); and*
3. *a document called the "FPOC2 Fly Buy Induction Training Manual" (the 'Fractional Club Training Manual')*

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

(1) *the training the Supplier's sales representatives would have got before selling Fractional Club membership; and*
(2) *how the sales representatives would have framed the Supplier's multimedia presentation (i.e., the ESA) during the sale of Fractional Club membership to prospective members – including Mr and Mrs M.*

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

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



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

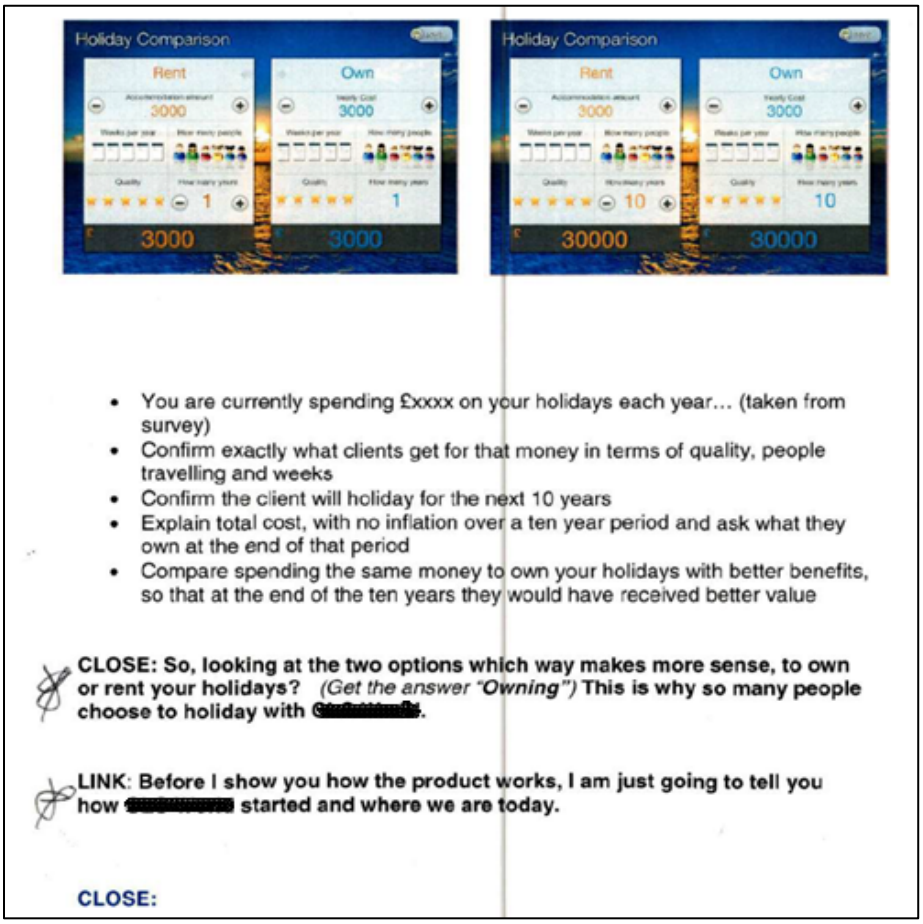
CLOSE: So what you are telling me is that, as long as it's comfortably affordable, you would always choose to own rather than rent, is that correct?

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

CLOSE:

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

I acknowledge that the slides don't include express reference to the "investment" benefit of ownership. But the description alludes to much the same concept. It was simply rephrased in the language of "building equity". And with that being the case, it seems to me that the approach to marketing Fractional Club membership was to strongly imply that 'owning' fractional points was a way of building wealth over time, similar to home ownership.
Page 33 of the Fractional Club Training Manual then moved the Supplier's sales representatives onto a cost comparison between "renting" holidays and "owning" them. Sales representatives were told to ask prospective members to tell them what they'd own if they just paid for holidays every year in contrast to spending the same amount of money to "own" their holidays – thus laying the groundwork necessary to demonstrating the advantages of Fractional Club membership:



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

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

SUMMARISE LAST SLIDE:
FPOC equals a passport to fantastic holidays for 19 years ***with a return at the end of that period.*** *When was the last time you went on holiday and* ***got some money back? How would you feel if there was an opportunity of doing that?***
[…]
LINK: Many people join us every day and one of the main questions they have is ***"how can we be sure our interests are taken care of for the full 19 years?*** *As it is very important you understand how we ensure that, I am going to ask Paul to come over and explain this in more details for you.*

[…]

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

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

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

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

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

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

[…]

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

I acknowledge that the slides above set out a "return" that is less than the total cost of the holidays and the "initial outlay". But that was just an example and, given the way in which it was positioned in the Training Manual, the language did leave open the possibility that the

return could be equal to if not more than the initial outlay. Furthermore, the slides above represent Fractional Club membership as:

(1) *The right to receive holiday rights for 19 years whose market value significantly exceeds the costs to a Fractional Club member; plus*
(2) *A significant financial return at the end of the membership term.*

And to consumers who, for example, were looking to buy holidays anyway, the comparison the slides make between the costs of Fractional Club membership and the higher cost of buying holidays on the open market was likely to have suggested to them that the financial return was in fact an overall profit.

I also acknowledge that there was no comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mr and Mrs M the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

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

So, if a supplier implied to consumers that future financial returns (in the sense of possible profits) from a timeshare were a good reason to purchase it, I think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment. Indeed, if I'm wrong about that, I find it difficult to explain why, in paragraphs 77 and 78 followed by 99 and 100 of Shawbrook & BPF v FOS when, Mrs Justice Collins Rice said the following:

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

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

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

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

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

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

This is particularly the case in light of the circumstances of Mr and Mrs M's sale. They were already members of the Supplier's Vacation Club at the Time of Sale – holding 1,501 Vacation Club points. They traded in those points for £11 each point, on average. And if they simply wanted to increase their holiday rights, I don't understand why they would have paid nearly £23, on average, for each of the 389 additional points they acquired, for a relatively modest increase in holiday rights, unless the Supplier had relied on other aspects of Fractional Club membership to promote its sale. I would emphasise Mr and Mrs M's recollections in this regard, where they say:

> *'… we had our usual compulsory meeting with [the Supplier's representative]. This time, the meeting was slightly different, we were told about a new product that [the Supplier] had to offer called the 'Fractional Ownership Club'. The representative made the following representations about the Fractional Ownership Club:*
>
> *Unlike the Vacation Club, the Fractional Ownership club was an investment. With the Fractional Ownership, we would own a fraction of property within [the Supplier's] portfolio of resorts. It could be viewed as an asset rather than a holiday product.*
>
> *The Fractions would increase in value year on year so, for example a £29,000 apartment would sell for around £35,000 in a years' time making it a great investment opportunity.*
>
> *[…]*
>
> *We would be able to sell our Fractional membership at any point and we would still be able to make a profit on our purchase.'*

The investment elements of membership were plainly major parts of the Supplier's rationale and justification for its cost. And as it was designed to offer its members a way of making a financial return from the money they invested – whether or not, like every investment, the return was more, less or the same as the sum invested, it would not have made much sense

if the Supplier included the features in the product without relying on them to promote sales – especially when the reality was that, as existing Vacation Club members with significant holiday rights, the principal benefits to Mr and Mrs M of the move to Fractional Membership were its investment elements i.e., the share in the net sale proceeds of the Allocated Property.

Overall, therefore, as the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members, they indicate that the Supplier's sales representative was likely to have led Mr and Mrs M to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e., a profit) in the future. And with that being the case, I don't find them either implausible or hard to believe when they say they were told, for example, that they were investing in property, the sale of which years later would lead to a profit. On the contrary, given the available evidence, I think that's likely to be what Mr and Mrs M were led to believe by the Supplier at the relevant time. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

I am aware that the Supplier has concerns about some of the contents of Mr and Mrs M's witness statement. For example, it says they purchased additional timeshare points in 2004 and not 2003 as Mr and Mrs M claim. It isn't clear if the Lender shares those concerns. And, while I accept that some details in the statement may not be entirely accurate, I don't find that surprising given the fact that many of the events Mr and Mrs M tried to recall took place several years before the statement was made. I wouldn't expect Mr and Mrs M's recollections to be faultless in the circumstances. Further, I don't believe the relatively minor inaccuracies the Supplier refers to would warrant dismissing the contents of the statement in their entirety, which I consider to be otherwise reliable.

Was the credit relationship between the Lender and Mr and Mrs M 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 M 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 M and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) – which, having taken place during its antecedent negotiations with Mr and Mrs M, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender – lead them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On my reading of Mr and Mrs M's witness statement, which I find to be plausible and persuasive for the reasons stated earlier, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. That doesn't mean they were not interested in holidays. Their time as members of the Supplier's Vacation Club clearly suggests they were. And that is not surprising given the nature of the product at the centre of this complaint. But as Mr and Mrs M 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 their existing membership. As Mr and Mrs M put it in their witness statement:

> *'At this time, the Representations that were made to us appealed to myself and my wife. My wife and I saw the purchase of the Fractional Ownership as an investment, not only to help with our retirement, but to help clear our debts from previous purchases we had made with [the Supplier].*
>
> *[…]*
>
> *Although the representative was friendly, he was extremely pushy and pressuring. He kept reassuring us that this was a fantastic option for us and that we would be making the best decision for our future. Given the representations that had been made we decided that we would purchase into fractional ownership.'*

With all of that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision Mr and Mrs M ultimately made.

After all, Mr and Mrs M 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 – what they have said amounts, in my view, to quite the opposite. 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'm not persuaded that they would have pressed ahead with their purchase regardless.

I have thought about the Lender's comments in response to the Investigator's assessment, which included the Supplier's contact notes from September 2012. Those notes, the Lender said, indicated that Mr and Mrs M were 26 points short of being able to book the holiday they wanted at that time. It also says that Mr and Mrs M's decision to trade in all of their Vacation Club points for Fractional Club membership a year later, in September 2013, demonstrated their desire for more points.

However, as I've said earlier, I find it unlikely that Mr and Mrs M would have been happy to trade in their existing points and take out a loan for an additional £8,889 merely to acquire the extra 389 points that they did. I think, on balance, that other factors played a significant part in their decision to transfer to Fractional Club membership – most notably, the opportunity to make an investment.

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

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 M 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.'

At that point in my PD, I then set out what I thought the Lender should do to put things right for Mr and Mrs M.

While reviewing the case again, I reflected on what would constitute fair compensation, which led me to the conclusion that it was necessary to make small amendments to my redress directions. I shared these proposals with both parties. The PR said Mr and Mrs M were happy with the approach to redress I intended to take. The Lender didn't respond.

In response to the original PD, the PR confirmed Mr and Mrs M had nothing to add to it.

The Lender disagreed with my PD. It argued that my PD was based on an error in my approach to the prohibition in Reg.14(3) and my analysis of the evidence. Most notably, the Lender argued:

- 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 (the 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.
- I did not engage with the specific facts of Mr and Mrs M's sale and erred by making generic assumptions about their particular Fractional Club membership and sale.

- None of the sales materials or documents from Mr and Mrs M's sale described Fractional Club membership as an 'investment' and their evidence on the issue was generic in nature and failed to explain how it was sold to them as an 'investment'.
- Telling a customer that they would get a financial return from the sale of the Allocated Property would not breach Reg.14(3).
- Mr and Mrs M were not shown the sales presentation documents I referred to in my PD but, in any event, they did not demonstrate a breach of Reg.14(3).
- Mr and Mrs M confirmed, at the Time of Sale, that they understood the relevant disclaimers that Fractional Club membership was not an investment.
- The parts of the training materials to which I referred were unobjectionable, in particular, reference to 'bricks and mortar' was demonstrating that the return on the sale of the Allocated Property was secured on property, and it was unsurprising that there was emphasis on the 19-year period as '*given that the proceeds of selling the Allocated Property will be returned to customers, it is natural that steps are taken to ensure that the return is as high as possible. Nobody would expect the intention to be that the amount returned at the end of the timeshare period would be as low as possible, or anything other than as much as possible. But the significant point is that there is no comparison between the expected level of the financial return as against the initial outlay in purchasing the product, the primary focus of which was to provide holidays.*' Further, there was no promise on the amount to be returned and the suggestion was that there would be 'some' money back and no indication of a profit.
- I ought to follow the judgment a District Judge reached when considering a similar sale, where it was held there was no breach of Reg.14(3) (Prankard v Shawbrook Bank Limited, 8 October 2021, unreported).
- Mr and Mrs M's evidence contains material – and more than minor – inconsistencies and mistakes that mean I ought not to place significant weight on what was said. The Lender argues that the evidence suggests that Mr and Mrs M purchased Fractional Club membership due to a desire to acquire more points and book better holidays as a result.
- I ought to take into account decisions reached by other Ombudsmen in relation to the sale of similar memberships where the complaints were not upheld.
- I erred in not applying the test I had highlighted in the judgment of *Carney*, rather I said '*I'm not persuaded that they would have pressed ahead with their purchase regardless*', which reverses the burden of proof.

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 again, I still uphold Mr and Mrs M's complaint for the reasons set out above in the extract of my PD. I will also deal with the matters the Lender raised in response. In doing so, I note again that 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 have read the Lender's response in full, I will confine my findings to what I consider to be the salient points.

In my PD I noted that, to breach Reg.14(3), the Supplier had to market or sell Fractional Club membership as an investment and I used the following definition of 'investment' when considering whether that provision was 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 they were sold. But this, in

my view, takes too narrow a view of my PD and overlooks that part of my PD that reads:

'*Mr and Mrs M'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 does not 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 any doubt, I recognise that it was possible to market and sell Fractional Club membership without breaching the relevant prohibition in Reg.14(3). For instance, simply telling a prospective customer very factually that Fractional Club 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 Reg.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 Club 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 Reg.14(3).

With that in mind, therefore, I will first consider the sales and marketing materials more generally, before turning to the evidence Mr and Mrs M have supplied in this case.

Sales and marketing materials

As I acknowledged in my PD, the Supplier did try, in the sales documentation, to avoid describing Fractional Club membership as an 'investment', and giving any indication of the likely financial return. As the Lender has pointed out, Mr and Mrs M signed the Member's Declaration confirming that they had read and understood its contents. I do not think however that they signed the document to say they understood that Fractional Club membership was not an investment, as that is not what the Member's Declaration said.

In any event, 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 and Mrs M, had already been through a lengthy sales presentation. So, that is why the training materials referred to in my PD are important.

In response to my PD, the Lender says that it does not accept that the training material I relied on I was shown to Mr and Mrs M. However, I don't think that makes a difference to my findings on this point since, for the reasons I've already provided, I believe the training material is indicative of how sales representatives were trained and, in turn, how they would have presented Fractional Club membership through the use of the ESA.

The Lender also says that the relevant training material did not expressly refer to Fractional Club membership as an investment. And I agree with that observation. But the Lender continues to take too narrow a view of the prohibition against marketing and selling

timeshares as an investment in Reg.14(3). As I have suggested before, the Supplier did not have to refer to Fractional Club membership expressly as an investment to breach Reg.14(3). Instead, it is important to consider both the explicit and implicit messaging at the Time of Sale to decide what I think was most likely to have happened. Further, I also want to make clear that it was not simply the training materials that led to the finding in my PD that Reg.14(3) was breached by the Supplier at the Time of Sale, but rather it was a combination of all of the evidence available, which included the documents from that time, Mr and Mrs M's evidence as well as the training material to which I have referred.

With respect to the training material, the Lender says that the parts I highlighted in my PD were unobjectionable and that it was unsurprising that there was emphasis on the 19-year period as '*given that the proceeds of selling the Allocated Property will be returned to customers, it is natural that steps are taken to ensure that the return is as high as possible. Nobody would expect the intention to be that the amount returned at the end of the timeshare period would be as low as possible, or anything other than as much as possible. But the significant point is that there is no comparison between the expected level of the financial return as against the initial outlay in purchasing the product, the primary focus of which was to provide holidays.*' However, as I explained in my PD, I think it is too narrow an approach to take to only find that there was a breach of Reg.14(3) if the likely return from that sale of the Allocated Property was expressly quantified by the Supplier.

The training material to which I referred in my PD indicates that the Supplier was likely to have implied to a prospective purchaser that they were buying an interest in 'bricks and mortar', with an emphasis on there being a financial return based on the ownership of a tangible asset, the value of which was maximised thanks to the length of the 19-year membership term. When taken together with Mr and Mrs M's memories of the sale, which are not undermined or contradicted by the contents of the training material, I think that there was at least the implication that Fractional Club membership was an investment – which is enough to find there was a breach of Reg.14(3) by the Supplier.

Mr and Mrs M's evidence

Mr and Mrs M have provided a witness statement setting out their memories of the sale. On balance, I think the document sets out enough detail and nuance (that the PR couldn't itself have known) to indicate that it sets out Mr and Mrs M's actual memories.

In considering the weight to place on Mr and Mrs M's recollections and evidence I have considered the judgment in *Smith v Secretary of State for Transport* [2020] EWHC 1954 (QB), where it was held (at para 40):

> "*At the start of the hearing, I raised with Counsel the issue of how the Court should assess his oral evidence in light of his communication difficulties. Overnight, Counsel agreed a helpful note setting out relevant case law, in particular the commercial case of Gestmin SPGS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) (Leggatt J as he then was at paragraphs 16-22) placed in context by the Court of Appeal in Kogan v Martin [2019] EWCA Civ 1645 (per Floyd LJ at paragraphs 88-89). In the context of language difficulties, Counsel pointed me to the observations of Stuart-Smith J in Arroyo v Equion Energia Ltd (formerly BP Exploration Co (Colombia) Ltd) [2016] EWHC 1699 (TCC) (paragraphs 250-251). Counsel were agreed that I should approach Mr Smith's evidence with the following in mind:*
>
> a. *In assessing oral evidence based on recollection of events which occurred many years ago, the Court must be alive to the unreliability of human memory. Research has shown that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. The process of civil litigation itself subjects the memories of witnesses to*

powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts (Gestmin and Kogan).

b. *A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence (Kogan).*

c. *The task of the Court is always to go on looking for a kernel of truth even if a witness is in some respects unreliable (Arroyo).*

d. *Exaggeration or even fabrication of parts of a witness' testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony (Arroyo).*

e. *The mere fact that there are inconsistencies or unreliability in parts of a witness' evidence is normal in the Court's experience, which must be taken into account when assessing the evidence as a whole and whether some parts can be accepted as reliable (Arroyo).*

f. *Wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, may be neither reliable nor even truthful, the difficulty of discerning where the truth actually lies, what findings he can properly make, is often one of almost excruciating difficulty yet it is a task which judges are paid to perform to the best of their ability (Arroyo, citing Re A (a child) [2011] EWCA Civ 12 at para 20).*"

Although that judgment relates to assessing oral evidence, I think it is also important guidance to consider when undertaking an assessment of written evidence, as I must in Mr and Mrs M's case.

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

So, for example, I do not find it in any way material that Mr and Mrs M describe a previous timeshare as having provided them with points when, the Lender says, that wasn't the case. Even if there was an inconsistency in the evidence on this point, remembering how that product operated around 10 years before the Time of Sale and around 16 years before they complained about the sale of their Fractional Club membership is not, in my view, material to Mr and Mrs M's memories of what happened so many years later.

Similarly, the Lender highlights that, in Mr and Mrs M's recollections, they say that they purchased a previous timeshare when in fact they were provided with a two-year free enrolment. But again, even if they were mistaken about that, that does not mean their evidence on the sale of the subsequent membership, sold 13 years later, should be discounted.

I have again considered what Mr and Mrs R said in their evidence. In their witness statement, they said at the Time of Sale the Supplier told them the following:

> '*Unlike the Vacation Club, the Fractional Ownership club was an investment. With the Fractional Ownership, we would own a fraction of property within* [the Supplier's] *portfolio of resorts. It could be viewed as an asset rather than a holiday product.*
>
> *The Fractions would increase in value year on year so, for example a £29,000 apartment would sell for £35,000 in a years' time making it a great investment opportunity.*
>
> *[…]*
>
> *We would be able to sell our Fractional membership at any point and we would still be able to make a profit on our purchase.*'

It is clear to me that Mr and Mrs M are saying that the Supplier sold them Fractional Club membership as an investment.

On balance, I find there is a consistent and believable recollection that Fractional Club membership was sold as an investment and, when considered alongside the other evidence, I find the Supplier did breach Reg.14(3) at the Time of Sale.

I acknowledge the Lender's arguments as to how the product served Mr and Mrs M's desire to increase their holiday rights. I also recognise that this appears to be supported by, for example, the Supplier's sales notes from that time which don't mention an investment or similar. But I wouldn't have expected the Supplier to have recorded anything in those notes that would suggest it sold the Fractional Club membership in breach of Reg.14(3). In my view, Mr and Mrs M's testimony points to there being a stronger motivation behind their purchase than just taking more or better holidays.

In conclusion, it is my view that the evidence suggests that (1) Fractional Club membership being presented to Mr and Mrs M as an investment was a material part of their purchasing decision and (2) I am not persuaded that they would have continued with their purchase had it not been presented as an investment.

Other matters

I have read and considered the judgment on Prankard v Shawbrook Bank Limited. However, that case was decided by the judge on its own facts and circumstances, and it does not change my own findings that, on balance, Mr and Mrs M's sale did breach Reg.14(3).

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

Having done the same, and decided this complaint on its facts, it follows that I still think that the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs M 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.

Putting things right

Having found that Mr and Mrs M would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I

think it would be fair and reasonable to put them back in the position they would have been in had they not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr and Mrs M agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs M were existing Vacation Club members and their membership was traded in against the purchase price of Fractional Club membership. Under their Vacation Club membership, they had 1,501 Vacation Club points. And, like Fractional Club membership, they had to pay annual management charges as Vacation Club members. So, had Mr and Mrs M not purchased Fractional Club membership, they would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr and Mrs M from the Time of Sale as part of their Fractional Club membership should amount only to the difference between those charges and the annual management charges they would have paid as ongoing Vacation Club members.

While the Supplier gave Mr and Mrs M credit of £16,511 for their Vacation Club membership, in the absence of any evidence to suggest otherwise, that credit wasn't the equivalent of cash. It was a deduction that simply reflected the fact that the starting price of Fractional Club membership was a commercial opening position from which the Supplier would and could profitably offer deductions or discounts such as that granted to Mr and Mrs M.

After all, had Mr and Mrs M tried to sell their Vacation Club membership without joining the Fractional Club, I've seen nothing to demonstrate that they would have got anything like £16,511 for it given its objective value and the state of the secondary timeshare market at that time.

What's more, the purchase price Mr and Mrs M paid for their Vacation Club membership was akin to one-off membership fees paid by those who join, for instance, a golf club and whose ongoing access to that club is predicated on keeping up with its ongoing costs – like the Vacation Club annual management charges. Indeed, under their original membership agreement, Mr and Mrs M weren't entitled to any sort of refund of what they first paid for membership if they were to relinquish it. In practice, the purchase price was lost to the Supplier the moment Mr and Mrs M's 14-day rescission period expired, regardless of whether they chose to take advantage of the membership benefits or not.

With all of that in mind, I don't think it would be fair or reasonable to place Mr and Mrs M in a better position than the one they would be, had they not joined the Fractional Club by including in their compensation the trade-in value attributed to their Vacation Club membership.

In the Letter of Complaint, the PR asked the Lender to pay 'Legal costs estimated at £2000 plus vat'. I haven't seen any supporting evidence showing it was necessary for Mr and Mrs M to have sought legal advice either to complain to the Lender in the first instance or subsequently to this service. And while some of the PR's submissions may have been helpful to Mr and Mrs M, the same can't be said of all of them. Taking all of this into account, I don't make an award for this, which is in-line with the recommendations of my PD.

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

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

(2) In addition to (1), the Lender should also refund the difference between Mr and Mrs M's Fractional Club annual management charges paid after the Time of Sale and what their Vacation Club annual management charges would have been had they not purchased the Fractional Club membership.

(3) The Lender can deduct:

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

ii. The market value of the holidays* Mr and Mrs M took using their Fractional Points *if* the Points value of the holiday(s) taken amounted to more than the total number of Vacation Club Points they would have been entitled to use at the time of the holiday(s) as ongoing Vacation Club members. However, this deduction should be proportionate and relate only to the additional Fractional Points that were required to take the holiday(s) in question.
For example, if Mr and Mrs M took a holiday worth 2,550 Fractional Points and they would have been entitled to use a total of 2,500 Vacation Club Points at the relevant time, any deduction for the market value of that holiday should relate only to the 50 additional Fractional Points that were required to take it. But if they would have been entitled to use 2,600 Vacation Club Points, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

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

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

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

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

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

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

My final decision

I uphold Mr and Mrs M's complaint about Shawbrook Bank Limited and require it to put things right for them as explained above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M and Mrs M to accept or reject my decision before 10 April 2025.

Nimish Patel
Ombudsman