DRN-5501112

The complaint

Mr Z'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 him 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.

The timeshare in question was bought in the joint names of Mr and Mrs Z. But, as the product was paid for by a loan taken in Mr Z's sole name, he is the only eligible complainant here. I will, however, refer to both of them where appropriate to do so.

What happened

Mr and Mrs Z purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 10 October 2013 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,500 fractional points at a total cost, including their first year's management fee, of £18,049 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs Z 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 Z paid for their Fractional Club membership by taking finance of £18,049 from the Lender in his sole name (the 'Credit Agreement').

Mr Z – using a professional representative (the 'PR') – wrote to the Lender on 10 December 2020 (the 'Letter of Complaint') to complain about:

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

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

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

- Told them that Fractional Club membership had a guaranteed end date when that was not true.
- Told them that they were buying an interest in a specific piece of "real property" when that was not true.

- Told them that Fractional Club membership was an “investment” when that was not true.

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

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

Although not set out in these exact terms, the Letter of complaint sets out the problems that Mr and Mrs Z experienced with their Fractional Club membership. These suggest that they think that the Supplier was not living up to its end of the bargain.

Mr Z says that they found it difficult to book the holidays they wanted, when they wanted, and the resorts were not exclusive to members.

As a result of the above, Mr Z says that he has a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr Z.

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

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

- The contractual terms setting out (i) the duration of their Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of their membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the ‘UTCCR’).
- The Supplier engaged in unfair commercial practices, aggressive sales practices, misleading actions and omissions, contrary to The Consumer Protection from Unfair Trading Regulations 2008 (the ‘CPUT Regulations’).
- The decision to lend was irresponsible because the Lender didn’t carry out the right creditworthiness assessment.
- The Supplier failed to provide sufficient information in relation to the Fractional Club’s terms.

The Lender dealt with Mr Z’s concerns as a complaint and issued its final response letter on 1 April 2021, rejecting it on every ground.

The PR, on Mr Z’s behalf 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 Z 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 Z was rendered unfair to him 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.

And having considered everything on file, I agreed with the Investigator in that I thought the complaint ought to be upheld. But I reached that conclusion having expanded somewhat on the reasons for doing so. So, in order to give everyone the opportunity to respond to my initial thoughts, I set them out in a provisional decision (the 'PD') and invited all parties to submit any new evidence or arguments that they wished me to consider before I made my final decision.

The provisional decision

In the PD I started by setting out what I considered to be the legal and regulatory context that is relevant to this complaint:

"*The legal and regulatory context*

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

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

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

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time – which, in this complaint,

includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code')."

I then addressed the merits of Mr Z's complaint and explained why I thought it ought to be upheld. I said:

"*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, 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 Z as an investment, which, in the circumstances of this complaint, rendered the credit relationship between Mr Z and the Lender unfair to him 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 Z's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the Supplier made misrepresentations at the Time of Sale, and breached the Purchase Agreement because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr Z in the same or a better position than he would be if the redress was limited to misrepresentation and/or breach of contract.

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

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

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

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

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 Z and the Lender, along with all of the circumstances of the complaint. When coming to my conclusion, and in carrying out my analysis, I have looked at:

1. *The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale;*
2. *The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*
3. *Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; and*
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 Z and the Lender. And having done so, I think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A.

<u>The Supplier's breach of Regulation 14(3) of the Timeshare Regulations</u>

The Lender does not dispute, and I am satisfied, that Mr Z'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 Mrs Z, in a statement dated 11 August 2020, setting out her recollections of their relationship with the Supplier, says that the Supplier did exactly that at the Time of Sale:

> *"We were told about Fractional Property Owners Club, which they said involved buying a share in a property in Tenerife. The property would sell after 19 years, and the sale proceeds shared between the owners.*

In the meantime, we could use the Points we would get to have holidays, either in the apartment we had a share in, as well as other properties all over the world.

At the presentation, it was explained to us that fractions are the best way for us to get holidays for less than we were spending at that time. We would also get our money back, at the end, and might even make a profit on the investment, depending on property prices at point of sale. We were told that it was kind of an investment."

And in the Letter of Complaint, the PR alleges that the Supplier sold the Fractional Club membership to Mr and Mrs Z as an investment. Therefore, Mr Z alleges 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 Z's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr and Mrs Z 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 Z, 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 Z 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 Mr and Mrs Z have initialled and signed this document to say they have read and understood it.

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."*

When read on their own and together, these disclaimers go some way to making the point that the purchase of Fractional Rights shouldn't be viewed as an investment. But they weren't to be read on their own. They had to be read in conjunction with what else the Standard Information Form had to say, which included the following disclaimer:

> *"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."*

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

Yet I think it would be fair to say that, while a prospective member who read the disclaimer in question might well have thought that they would be wise to seek professional investment advice in relation to membership of the Fractional Club, rather than rely on anything they might have been told by the Supplier, it wouldn't have done much to dissuade them from regarding membership as an investment. In fact, I think it would have achieved rather the opposite.

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

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And there are a number of strands to Mr Z'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, 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 Z 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'.

<u>How the Supplier marketed and sold the Fractional Club membership</u>

The type of membership being sold here was the Supplier's second version of what it called the Fractional Property Owners Club – FPOC2 (I shall continue to refer to it as the Fractional Club).

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 for FPOC 2 – including:

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

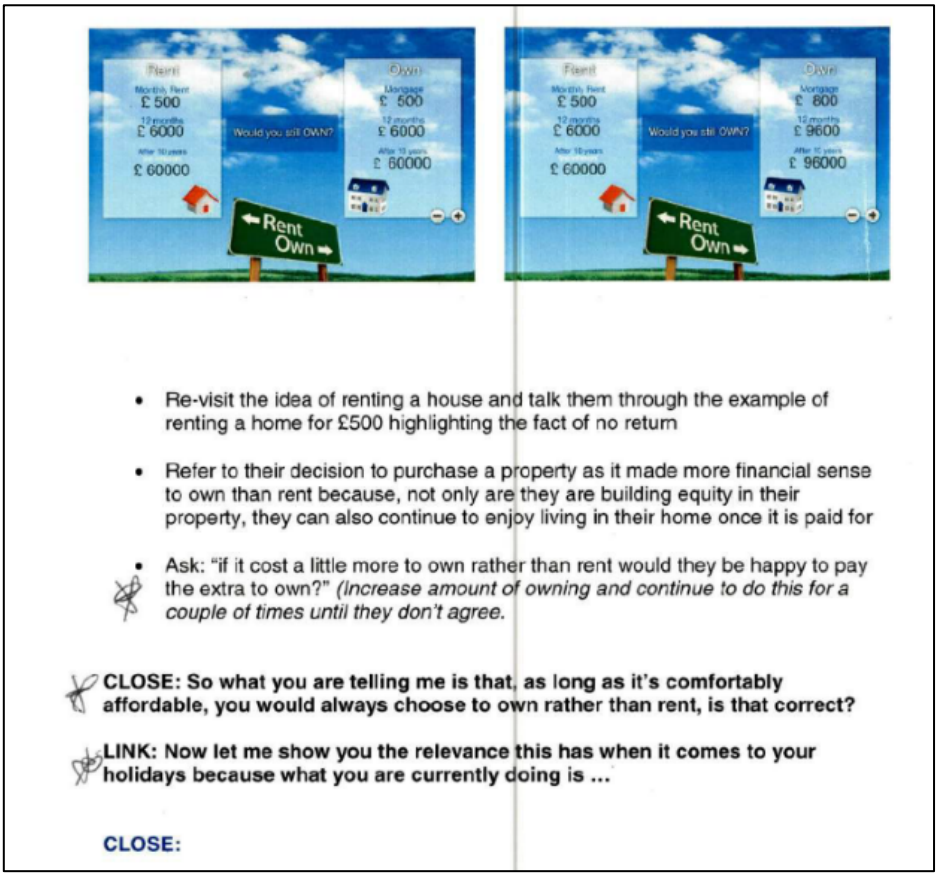
Neither the 2013/2014 Induction Training nor the ESA I've seen included notes of any kind. However, the Fractional Club Training Manual includes very similar slides to those used in the ESA. And according to the Supplier, the Fractional Club Training Manual (or something similar) was used by it to train 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 FPOC2 to 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?

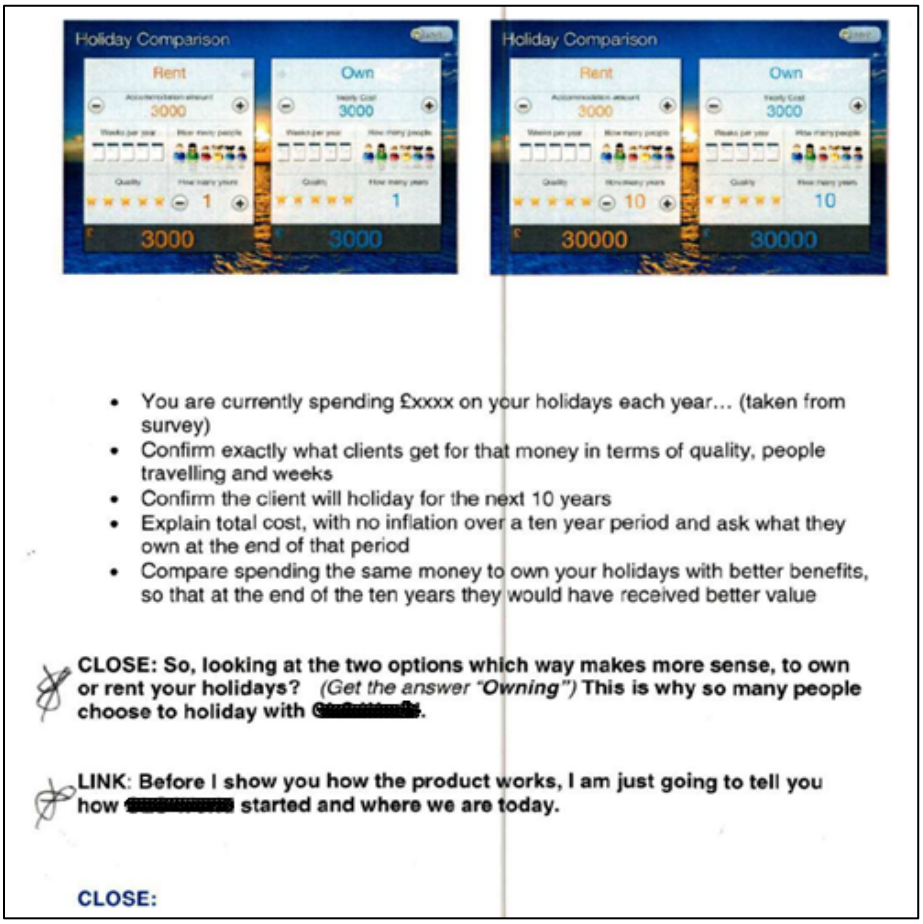
LINK: Now let me show you the relevance this has when it comes to your holidays because what you are currently doing is ...

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:



- You are currently spending £xxxx on your holidays each year… (taken from survey)
- Confirm exactly what clients get for that money in terms of quality, people travelling and weeks
- Confirm the client will holiday for the next 10 years
- Explain total cost, with no inflation over a ten year period and ask what they own at the end of that period
- Compare spending the same money to own your holidays with better benefits, so that at the end of the ten years they would have received better value

CLOSE: So, looking at the two options which way makes more sense, to own or rent your holidays? *(Get the answer "**Owning**")* **This is why so many people choose to holiday with [redacted].**

LINK: Before I show you how the product works, I am just going to tell you how [redacted] started and where we are today.

CLOSE:

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

"FPOC = small piece of […] World apartment which equals ***ownership of bricks and mortar***

[…]

Major benefit is the property is sold in nineteen years ***(optimum period to cover peaks and troughs in the market)*** *when sold you will get your share of the proceeds of the sale*

SUMMARISE LAST SLIDE:

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

[…]

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

[…]

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

(My emphasis added)

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

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

[…]

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

(My emphasis added)

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

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

[…]

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

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

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

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

And to consumers (like Mr and Mrs Z) 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. And Mrs Z seems to allude to this exact idea in her statement. She said:

> *"We were shown a printed sheet with columns on it, showing various prices for various amounts of Points, and they wrote comparisons on it, between that and what equivalent holidays would cost privately. It seemed to show that buying fractions was cheaper, especially as we would get something back at the end."*

I 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 Z 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

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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

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

Overall, therefore, as the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members, they indicate that the Supplier's sales representative was likely to have led Mr and Mrs Z 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 Mrs Z either implausible or hard to believe when she says:

> *"We were told about Fractional Property Owners Club, which they said involved buying a share in a property in Tenerife. The property would sell after 19 years, and the sale proceeds shared between the owners.*
>
> *In the meantime, we could use the Points we would get to have holidays, either in the apartment we had a share in, as well as other properties all over the world.*
>
> *At the presentation, it was explained to us that fractions are the best way for us to get holidays for less than we were spending at that time. We would also get our money back, at the end, and might even make a profit on the investment, depending on property prices at point of sale. We were told that it was kind of an investment."*

On the contrary, on the balance of probabilities, I think that's likely to be what Mr and Mrs Z 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 at Time of Sale.

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 Z 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 Z and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3)[3] lead Mr and Mrs Z to enter into the Purchase Agreement and Mr Z into the Credit Agreement is an important consideration.

As I've said, Mrs Z has submitted a statement to this Service dated 11 August 2020 setting out her recollections of the Time of Sale. Although not signed I have no reason to doubt its veracity, and the Letter of Complaint seems to follow in general terms what has been included in the statement. It also includes personal recollections that only Mrs Z (and Mr Z) could have known.

The Lender, in response to the Investigator's view, has pointed to inconsistencies and inaccuracies in the statement which it says means it cannot be relied upon.

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[3] which, having taken place during its antecedent negotiations with Mr and Mrs Z, 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

When considering how much weight I can place on Mrs Z's statement, I am assisted by the judgement in the case of Smith v Secretary of State for Transport [2020] EWHC 1954 (QB).

At paragraph 40 of the judgment, Mrs Justice Thornton helpfully summarised the case law on how a court should approach the assessment of oral evidence. Although in this case I have not heard direct oral evidence, I think this does set out a useful way to look at the evidence Mrs G has provided. Paragraph 40 reads as follows:

> *"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 (Gestin 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)."*

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'm not surprised that there are some inconsistencies between what Mrs Z said happened and what other evidence shows. The question to consider, therefore, is whether there is a core of acceptable evidence from Mrs Z that the inconsistencies have little to no bearing on whether her testimony can be relied on, or whether such inconsistencies are fundamental enough to undermine, if not contradict, what she says 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 Mrs Z says that they were given alcoholic drinks during the sales process, whereas the Supplier says this only happened when then sales process was concluded. Even if there was an inconsistency in the evidence on this point (and I'm not sure there was one), remembering at what point alcoholic drinks were offered during a long sales process which occurred seven years earlier is not, in my view material to whether the membership was sold as an investment or not.

Similarly, the Lender has highlighted that Mrs Z has talked about an occasion where they had to cancel a booking, and lost their fractional points as a result. The Lender says there is no record of Mr and Mrs Z having cancelled a booking in this way. It is unclear what exactly is being referred to here, but again, even if Mrs Z is mistaken about this, that does not mean her evidence on how the membership came to be sold should be discounted.

So overall, whilst being mindful that memories fade over time, I am satisfied that I can place weight on Mrs Z's testimony when considering what most likely happened at the Time of Sale.

And on my reading of her testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. That doesn't mean they were not interested in holidays - her own testimony demonstrates that they quite clearly were, which is not surprising given the nature of the product at the centre of this complaint. But as Mrs Z says (plausibly in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit as that share was one of the defining features of membership that marked it apart from the more 'standard' type of timeshare available to them.

Mrs Z has not said or suggested, for example, that they would have pressed ahead with the purchase in question had the Supplier not led them to believe that Fractional Club membership was an appealing investment opportunity. And as Mr Z faced the prospect of borrowing and repaying a substantial sum of money while subjecting himself and Mrs Z 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.

So, taking all of the above into account, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr Z 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 the conclusion of the PD, I set out what I considered to be a fair and reasonable way for the Lender to calculate and pay fair compensation to Mr Z.

The responses to the provisional decision

The PR, on Mr Z's behalf, said he accepted the findings in the PD and made no further comment. The Lender did not accept it, and responded at length, disagreeing with my provisional findings. It provided copies of some decisions from other Ombudsmen which, it said, showed the careful analysis of the veracity of witness testimony in similar circumstances to this complaint. In addition, 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 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 the witness testimony supporting Mr Z's complaint; 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 PD's conclusion was based on unsigned and undated witness testimony which was not from its customer, and which contains factual inaccuracies. These factors appear not to have been taken into account when considering the reliability of the testimony.

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:

- It is inevitable that the customer will be told about the return (of monies) following the sale of the Allocated Property, as it is a feature of the product, as are the holiday rights and term of the product.
- 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*. The PD errs in conflating the two meanings of the word 'return' – a 'return' on investment (the measure of profit) and being told some money would be 'returned' upon the sale (no connotation of investment or profit). The customer being told that some money would be 'returned' upon sale of the Allocated Property does not breach Regulation 14(3).
- The PD said *"…there are a number of strands to Mr and Mrs Z's allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that membership of the Fractional Club was expressly described as an "investment" in several different contexts and (2) that membership of the Fractional Club could make them a financial gain and/or would retain or increase in value."*
    - As regards point 1, it does not accept that Fractional Club was described as an *"investment"* because the Information Statement signed by [Mr Z[4]] states the sale did not involve an *"investment in real estate"* and the contemporaneous materials and Mrs Z's witness statement do not reference the word *"investment".* It is simply wrong for the Ombudsman to suggest it did.
    - As regards point 2, being told that there is a specific Allocated Property and that there will be an amount returned at the end of the membership is not selling it as

[4] In its response the Lender made an erroneous reference to a different customer at this point

an investment. It is merely accurately describing a feature which has been held by the Court to be not inherently objectionable.

Selling an investment requires a finding of a representation by the seller that the reason, or significant reason for the purchase is 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. If this was an investment, then Mr and Mrs Z would have been informed of the return. This has not been alleged in either the Letter of Complaint or the testimony.
The Lender continued by making submissions regarding the Fractional Club documentation and the Supplier's sales processes:

- The documentation in relation to the Fractional Club sale is unobjectionable and does not breach Regulation 14(3). Mr and Mrs Z did not receive or view the sales presentation documents referred to.
- The disclaimers referenced show that the Fractional Club should not be seen as an investment, and Mr and Mrs Z confirmed they understood this at the Time of Sale. There was no representation made as to the future price or value of the fractional share.
- Any reasonable assessment of the 'advice disclaimer' would suggest it, along with the other disclaimers, would lead the consumer to understand that the product was not being sold to them as an investment.
- The training materials referenced in the PD at no stage refer to the presence of the Allocated Property as an *"investment".* Only that there would be a *"return"* of money after 19 years which may only be a small part of their initial outlay.
- 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 the customers' expectation of receiving a return and/or some money back. This carried no connotation of an *"investment"* or *"profit".*
- Referring to the Allocated Property as 'ownership of bricks and mortar' is unobjectionable.
- It is unsurprising that the Supplier would want to keep the properties in pristine condition, given that the proceeds of selling the Allocated Property will be returned to customers, so it is a natural step to ensure that return is as high as possible.
- Any fair analysis of the training and contractual materials would conclude that the customer was told that they would receive "*some"* of their money back and this may only 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 question the Ombudsman should have considered is whether there is sufficiently clear, compelling evidence that the timeshare product was marketed and sold as an investment (i.e., for intended financial profit or gain as against the initial outlay). The reasonable answer is that the sales documentation provides no reason to consider there was any such marketing or sale.

The Lender then assessed the witness statement from Mrs Z. It said, in summary:

- Only Mr Z is a customer of the Lender. As such it does not understand why the Ombudsman has relied on witness testimony from Mrs Z who has no contractual relationship with it.
- The testimony is also unsigned and undated.
- The witness testimony is given limited importance given that the Ombudsman concluded that a breach of Regulation 14(3) can be inferred from the materials relating to the sale. However, the Ombudsman has referenced that he does not find the allegations made in that testimony implausible or hard to believe.
- There is good reason to doubt the credibility of the testimony – it is neither signed nor dated, was not received by it or the Supplier until May 2024, over 10 years after the sale. Given the passage of time it lacks detail and is very generic. There are also inconsistencies between it and the actual events, including:
    - It is stated that Mr and Mrs Z were fractional members since 10 June 2013, when this is actually incorrect. Mr Z purchased the membership in October 2013, four months after the testimony claims.
    - Mrs Z states that Mr Z used a card to pay a small deposit. This is incorrect as no deposit was taken for this purchase.
    - The man described as a *"…smartly dressed British man, who said he was a lawyer"* was in fact a "Compliance Officer".
    - The majority of Mr and Mrs Z's bookings were made less than 10 months from the travelling dates.
    - No alcohol is served or consumed during the presentation.
- The Ombudsman's application of the case of *Smith v Secretary of State for Transport* is incorrect.
- In light of the inaccuracies, it is not credible that Mr and Mrs Z were assured that they would *"get their money back"*, nor is it credible that the sale of the Fractional Club membership was in pursuit of such an investment objective.
- For these reasons any reliance on Mrs Z's testimony is unsafe.

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 in the PD 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.
- Mr Mrs Z's circumstances and their motivations for the purchase meant the actual sale process did not have a material impact on their decision to purchase. Therefore, the credit relationship was fair.

The Lender concluded by saying that there is no clear, compelling evidence that the Fractional Club was sold to Mr and Mrs Z with the intention of financial gain.

As the deadline for responses to my PD has now passed, the complaint has come back to

me to reconsider.

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 considered everything again, I still uphold Mr Z's complaint for the reasons set out in the extract of my PD above. I will also deal with the matters that 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 find are the salient points.

The Lender said my PD was inconsistent with the idea 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 the part which reads:

> *"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 Mrs Z's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.*
>
> *In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold."*

However, for the avoidance of doubt, I recognise that it was possible to market and sell the Fractional Membership without breaching the relevant prohibition in Regulation 14(3). For instance, depending on the circumstances and when considering what an *investment* is, there is every chance that 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, would not breach Regulation 14(3).

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

The 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. For example, in the Member's Declaration, it said:

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

As the Lender has pointed out, Mr and Mrs Z 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 the Fractional Club membership was not an investment, as that is not what the Member's Declaration said at point 5. Had the Supplier wanted to clarify this in the paperwork it could have simply said that Fractional Club membership was not, or was not to be treated as, an investment, and explained why. But it did not do this.

The Lender has, in its response, misquoted what I said in the PD here, and has added the words in bold to the following sentence "…*Fractional Club was expressly described as an "investment"* ***in several different contexts****…".*

In the Information Sheet it says:

> *"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."*

These disclaimers go some way to making the point that the purchase of Fractional Club membership should not be viewed as an investment. But they had to be read along with other things in the Information Sheet, which included the following disclaimer:

> *"The Vendor, any sales or marketing agent and the Manager and their related businesses (a) are not licensed investment advisers authorized by the Financial Conduct 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 Z the Time of Sale, so doesn't advance either side's case anyway.

However, as I said before, deciding what happened in practice is often not as simple as looking at the contemporaneous paperwork. Especially when such paperwork was produced and signed *after* potential customers, such as Mr and Mrs Z, had already been through a lengthy sales presentation. So, it is important to balance it with what I think it is likely that Mr and Mrs Z were told about Fractional Club membership.

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 Z. However, I have not been provided with any slides or other marketing material that the Supplier says would have been shown to them. In light of

that, I repeat my finding from my PD that the material in question is (1) reasonably indicative of the training the Supplier's sales staff received around the Time of Sale and (2) how the sale staff were likely to have framed any presentation during the sale.

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 Regulation 14(3). Instead, it is important to consider both the explicit and implicit messaging at the Time of Sale to decide what I think was most likely to have happened. And as I've said before, the description in the training materials alludes to much the same concept. It was simply rephrased in the language of "building equity".

Further, I also want to make clear that it was not simply the training materials that led to the finding in my PD that Regulation14(3) was breached by the Supplier at the Time of Sale, but rather it was a combination of all of evidence available, which included the sales documents from that time, Mrs Z's testimony, as well as the training material to which I have referred.

And in addition, the training material to which I referred to 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 nineteen-year membership term.

When taken together with Mrs Z's memories of the sale, which are not undermined or contradicted by the contents of the training material, I think that there was at least the implication that Fractional Club membership was an investment – which is enough to find there was a breach of Regulation 14(3) by the Supplier.

I have also 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 Z's sale did breach Regulation 14(3). And the same goes for the other decisions that the Lender has highlighted. Again, those cases were decided on their own facts and circumstances.

<u>Mrs Z's witness evidence</u>

The Lender has questioned how Mrs Z's evidence can be relied upon, or even if it should be relied upon given that she was not a customer of the Lender, and therefore had no contractual relationship with it. But that is inconsistent with a fair assessment of *all* the available evidence and indeed natural justice. Mrs Z was present and witness to the sale, as well as joint owner of the timeshare along with Mr Z, so it is only right that her testimony is considered, irrespective of whether or not she was party to the Credit Agreement.

The Lender has also called into question Mrs Z's description of the sales process, but it has provided no sales notes from the Time of Sale, nor any evidence from the Supplier as to what it says happened.

But as I've said, I've considered Mrs Z's testimony closely. Although it is unsigned, it is dated 11 August 2020. I have also considered its veracity given the inconsistencies identified both in my PD and highlighted by the Lender in response.

As I said, it is unsurprising that there are some inconsistencies, but having thought about them, I remain of the opinion that they do not fundamentally undermine what Mrs Z says

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 Mrs Z made an error of four months when recalling the date of a previous sale of a timeshare, nor that she recalled Mr Z making a small deposit payment with a credit card. I don't think these, and the errors cited by the Lender, undermine the overall veracity and reliability of Mrs Z's testimony. I continue to find it persuasive.

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

The legal test to determine whether the credit relationship was unfair.

The Lender has said that despite citing *Carney,* where the test is described as whether there was a *"material impact on the debtor when deciding whether or not to enter the agreement"* in the PD, I appeared to reverse the burden of proof. It said that I had started from the position that the prospect of a financial gain existed, but this was not insignificant enough for it not to render the relationship unfair. It said the starting point in *Carney* was to assess whether there is sufficient evidence of a material impact on the decision to enter the agreement.

But as I said in the PD, I was not persuaded that Mr and Mrs Z would have purchased Fractional Club membership had it not been for the Supplier's breach of Regulation 14(3). And I remain of that opinion. I am persuaded, after considering all of the evidence submitted, that the Supplier's breach of Regulation 14(3) was material to the decision Mr and Mrs Z ultimately made. And this is the basis upon which I have decided that the credit relationship between the Lender and Mr Z was unfair to him.

Conclusion

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

The Lender, in its response to my PD, made no comment regarding how I thought it should calculate and pay fair compensation to Mr Z. So, having considered everything afresh, I see no reason to depart from what I set out in my PD in that regard, which was as follows:

Having found that Mr and Mrs Z 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 Mr Z was unfair under section 140A of the CCA, I think it would be fair and reasonable to put Mr Z back in the position he would have been in had they not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and he therefore not entered into the Credit Agreement, provided Mr and Mrs Z agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

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

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

(2) In addition to (1), the Lender should also refund the annual management charges Mr and Mrs Z paid as a result of Fractional Club membership.

(3) The Lender can deduct:

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

   ii. The market value of the holidays* Mr and Mrs Z took using their Fractional Points.

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

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

(6) If Mr and Mrs Z'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 Z 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 the consumer a certificate showing how much tax it's taken off if they ask for one.

My final decision

I uphold this complaint and direct that Shawbrook Bank Limited should calculate and pay fair compensation to Mr Z as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr Z to accept or reject my decision before 3 June 2025.

Chris Riggs
Ombudsman