DRN-5521087

The complaint

Mr P and Mrs 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 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 P and Mrs Z purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 24 April 2019 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,540 fractional points, and after trading in their existing trial membership they ended up paying £18,521 (the 'Purchase Agreement') for membership of the Fractional Club.

Fractional Club membership was asset backed – which meant it gave Mr P 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 P and Mrs Z paid for their Fractional Club membership by taking finance of £22,052 from the Lender in Mr P and Mrs Z's joint names (the 'Credit Agreement') which consolidated the outstanding balance of a loan from another lender taken out to purchase the trial membership.

Mr P and Mrs Z – using a professional representative (the 'PR') – wrote to the Lender on 19 May 2020 (the 'Letter of Complaint') to complain about:

1. Misrepresentation 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. A breach of contract by the Supplier giving them 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 (1) the Lender did not carry out the right creditworthiness assessment and (2) the money lent to them under the Credit Agreement was unaffordable for them.

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

Mr P and Mrs Z say that the Supplier made a pre-contractual misrepresentation at the Time of Sale – namely that the Supplier told them that Fractional Club membership was an "investment" when that was not true.

Mr P and Mrs Z say that they have a claim against the Supplier in respect of the misrepresentation 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 P and Mrs Z.

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

Mr P and Mrs Z say that the Supplier breached the Purchase Agreement because it ceased trading, and as such they would be unable to recover any monies owed to them.

As a result, Mr P and Mrs Z say that they have a breach of contract claim against the Supplier, 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 P and Mrs 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 P and Mrs Z 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 Supplier was paid commission by the Lender which was not disclosed to them.
2. They were pressured into purchasing Fractional Club membership by the Supplier.
3. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment, and the loan was unaffordable for them.

The Lender was unable to give a substantive answer to Mr P and Mrs Z's complaint within the eight weeks required by the regulator, so the PR referred the complaint on their behalf to the Financial Ombudsman Service.

On 30 April 2021 the Lender issued its response to the complaint, rejecting it on every ground.

The complaint was then assessed by an Investigator at this Service 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 P 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 P and Mrs Z 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.

The provisional decision

Having considered everything that had been submitted, I thought Mr P and Mrs Z's complaint ought to be upheld for the same reason as the Investigator. However, I thought there were some additional arguments to be made as to why it should be upheld, so I set out my initial thoughts in the form of a provisional decision (the 'PD') and invited all parties to respond with any new evidence or arguments that they wished me to consider before I made my final decision.

In the PD I began by setting out the legal and regulatory context that I thought were of particular relevance to the 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 Consumer Rights Act 2015.*
- *The Consumer Protection from Unfair Trading 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 went on to consider the merits of Mr P and Mrs Z's complaint. 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 P and Mrs Z 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 P and Mrs Z's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the Supplier misrepresented the nature of Fractional Club, or breached the terms of the Purchase Agreement because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr P and Mrs Z in the same or a better position than they 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 Mr P and Mrs 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 P 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.

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."

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

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

1. *The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale;*
2. *The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*
3. *Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; 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 P and Mrs Z 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 P and Mrs 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 Mr P and Mrs Z say that the Supplier did exactly that at the Time of Sale – saying the following during the course of this complaint:

> *"The salesman then started saying how these apartments will be worth much more in a few years. Basically, guaranteed profit. He told us a story about one of their members who made a business out of it and how [the Supplier] doesn't mind that, and that the member is making a lot of money every year. He said there are members who brought more than one share of an apartment because it was such a great investment. He said our profit could be like 4 times what we put into it, after some years."*

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

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

(2) *They were told by the Supplier that they would get their money back or more during the sale of Fractional Club membership.*

(3) *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 P 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 P 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 P 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 P 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 Fractional Rights which are personal rights and not interests in real estate..."*

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 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."

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 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.

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 P 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" 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 P 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>

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier provided information on how it sold membership of timeshares like it did to Mr P and Mrs Z – which includes a document called the "Fractional Property Owner's Club Fly Buy Manual 2019" (the '2019 Fractional Training Manual').

As I understand it, the 2019 Fractional Training Manual was used from January 2019 (up to November 2019 when the product stopped being sold by the Supplier) during the sale of the Supplier's second version of the Fractional Property Owners Club (which I will continue to refer to as simply the Fractional Club) – which was the version Mr P and Mrs Z appear to have purchased.

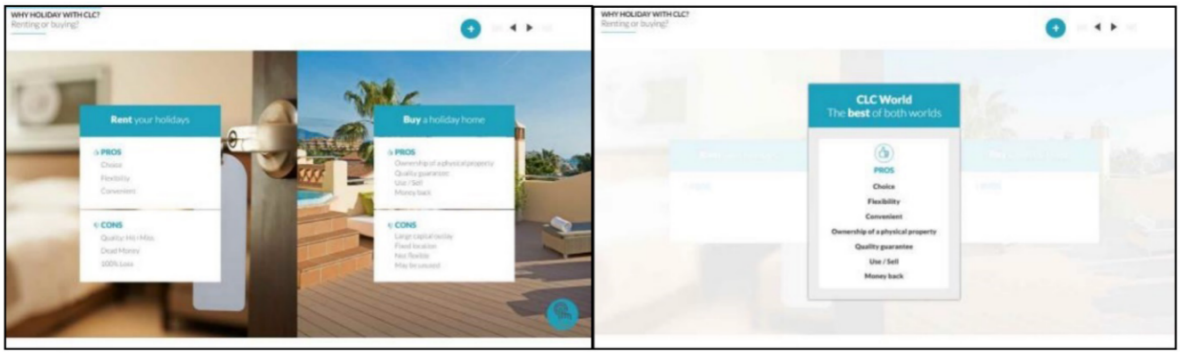
It is not entirely clear whether Mr P and Mrs Z would have been shown the slides included in

the Manual. But they seem to me to be reasonably indicative of:

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

(2) how the sales representatives would have framed the sale of Fractional Club membership to Mr P and Mrs Z.

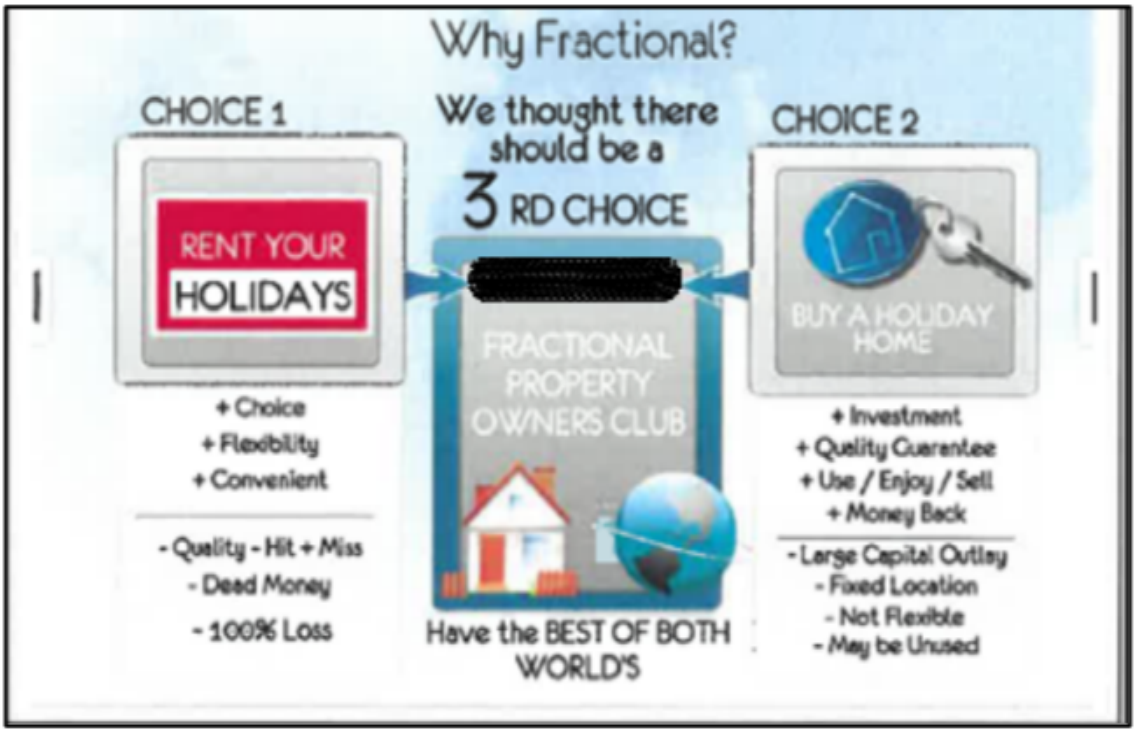
Having looked through the 2019 Manual, my attention is drawn first to page 16 (of 68) – which includes two slides called "Why holiday with [the Supplier]? Renting or buying?".



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

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

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



Both sets of slides indicate to me that sales representatives would have taken prospective members through three holidaying options along with their positives and negatives:

(1) "Rent Your Holidays"

(2) "Buy a Holiday Home"

(3) Fractional membership - the "Best of Both Worlds"

I acknowledge that the slides incorporated into the 2019 Fractional Training Manual don't include express reference to the 'investment' benefit of Fractional Club membership. But they allude to much the same concept, namely that Fractional Club membership combined the best aspects of taking 'normal' holidays and purchasing a holiday home.

One of those advantages referred to in the slides on page 16 of the 2019 Fractional Training Manual is the "ownership of a physical property". And as an owner's equity in their property is built over time as the value of the asset increases relative to the size of any mortgage secured against it, this particular advantage of Fractional Club membership was portrayed in terms that played on the opportunity ownership gave prospective members of the Fractional Club to accumulate wealth in a similar way, especially combined with the phrase "money back".

When the 2019 Manual moved on to describe how membership of the Fractional Club worked between pages 25 and 32, one of the major benefits of Fractional Club membership was described on page 32 as:

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

And on page 32 of the 2019 Manual there were notes that encouraged sales representatives to summarise this benefit in the following way:

"So really FPOC equals a passport to fantastic holidays for 19 years with a return at the end of that period. When was the last time you went on holiday and got some money back?"

What's more, from looking at the Manual, I think the Supplier's sales representatives were encouraged to make prospective Fractional Club members (like Mr P and Mrs Z) consider the advantages of owning something and view membership as a way of generating a return, rather than simply paying for holidays in the usual way. That was likely to have been reinforced throughout the Supplier's sales presentations by describing membership as a form of property ownership referring to the prospect of a "return". And with that being the case, I think the language used during the Supplier's sales presentations was likely to have been consistent with the idea that Fractional Club membership was an investment.

I acknowledge that there may not have been a comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mr P and Mrs Z the financial value of the proprietary interest they were offered, I think that would involve taking to 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."*

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

So, overall, I think the Supplier's sales representative was likely to have led Mr P and Mrs Z at the Time of Sale to believe that Fractional Club membership was an investment that may lead to a financial gain (i.e., a profit) in the future. And with that being the case, I don't find them either implausible or hard to believe when they say they were told:

> *"The salesman then started saying how these apartments will be worth much more in a few years. Basically, guaranteed profit. He told us a story about one of their members who made a business out of it and how [the Supplier] doesn't mind that, and that the member is making a lot of money every year. He said there are members who brought more than one share of an apartment because it was such a great investment. He said our profit could be like 4 times what we put into it, after some years."*

Overall, therefore, as the slides and training material I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members, they indicate that the Supplier's sales representative was likely to have led Mr P 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 this is supported by what Mrs Z has said in her statement.

And for those reasons, I think it more likely than not that the Supplier breached Regulation 14(3) of the Timeshare Regulations.

<u>Was the credit relationship between the Lender and the Consumer rendered unfair?</u>

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

Having considered Mrs Z's testimony closely, I find it persuasive. Although it is not signed or dated, the PR has provided evidence which, in my opinion, shows satisfactorily that it was submitted by Mr P and Mrs Z at the same time as other dated documentation, in May 2020. And the level of detail, including what she was thinking and feeling at the time, shows a good recall of events. So, whilst being mindful of how memories can fade over time, I am satisfied I can place weight on its contents when deciding what it most likely to have happened and what was said at the Time of Sale.

And on my reading of Mrs Z's testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they ultimately decided to go ahead with their purchase. For example, throughout the testimony it is set out that Mr P and Mrs Z did not feel that they were realistically in a position to make a significant purchase such as Fractional Club. They had a new home and child, and decided to take the free holiday that the Supplier had offered them whilst understanding that the membership was not for them. Indeed, as set out in the testimony they didn't seem too impressed by the quality or cleanliness of the accommodation they were given to stay in, which further persuaded them that they would not take up the membership.

However, this appears to have changed when the sales person began talking about the value of the Allocated Property. The testimony suggests that the Supplier positioned the Allocated Property as one that would increase in value, and as something that others had

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[3] which, having taken place during its antecedent negotiations with Mr P 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

used as a vehicle to make a profit. And Mrs Z sets out that they were told that the level of profit could be four times what they put in. And this was what made the purchase of Fractional Club start to be appealing to them. She says:

> *"This I think started appealing to us although when he started talking about the monthly cost of it, he could probably see from our face expressions that it was too much for us. We were very exhausted by this meeting at this point. Then, he said he remembered about an e-mail that he had recently received from customers whose very unfortunate family situation meant that they had to withdraw their membership (and saying that should anything happen we may withdraw at any point) and therefore, we could purchase this "recycled" membership at a 15% discount!"*

That doesn't mean they were not interested in holidays. Her own testimony and the fact that they were there 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 was affordable, and 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 the membership that marked it apart from the more 'standard' type of timeshare available to them.

Mr P and Mrs Z 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. In fact, Mrs Z's testimony sets out that they were not interested as they weren't particularly impressed with the accommodation, and they didn't think they could afford it until it was positioned as something that would likely make them money and its initial price was reduced. 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.

And taking all of this 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 P and Mrs 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."

I then went on to set out what I thought was a fair and reasonable way for the Lender to calculate and pay compensation to Mr P and Mrs Z.

The response to the provisional decision

The Lender 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 P and Mrs 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 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*[4]. 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 P 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 P and Mrs Z 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 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.
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 P and Mrs Z did not receive or view the sales presentation documents referred to.

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

- The disclaimers referenced show that the Fractional Club should not be seen as an investment, and Mr P and Mrs Z confirmed they understood this at the Time of Sale.
- 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 potentially be *"money back".*
- 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".*
- The reference to *"ownership of a physical property"* when related to the Allocated Property is unobjectionable.
- Any fair analysis of the training and contractual materials is that the customer was told their only investment was in holidays, and that *"some money"* would be returned. This does not constitute an *"investment".*
- *Prankard v Shawbrook Bank Limited*[5] 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 underlying sales documentation provide no reason to consider there was any such marketing or sale as an investment.

The Lender then assessed the witness statement from Ms B. It said, in summary:

- The witness testimony is unsigned and undated and only in Mrs Z's name. How is the Ombudsman able to establish if the statement is in her own words?
- 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 October 2023, over 10 months after the Letter of Complaint and one year after the sale. Given the close proximity to the sale it would expect to see more detail about the sale. The witness testimony is vague, and contains material inconsistencies between it and the actual events, including:
    - When describing the purchase of the trial membership, Mrs Z says they were *"persuaded"* however the Supplier's sale notes from the day suggest they were *"happy to proceed"* and *"*[Mr P] *still had questions about the upgrade".*
    - The testimony suggests that both Mr P and Mrs Z had made their minds up and "*didn't want to buy the membership*". The Supplier's notes confirm that they *"seemed very happy with the purchase. They confirmed that they had enough time to consider everything and they [were] happy to proceed with the purchase today."*

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

These notes are in stark contrast to the testimony. Reliance should be placed on the notes as they accurately reflect the events from the date of sale.

- They were not pressured. They were offered the opportunity to go back home and look for other finance before signing the agreement, but they opted to proceed. This demonstrates that neither of them were pressured.
- The testimony differs from the customers' position in both the Letter of Complaint and the complaint form. The former mainly focussed on undisclosed commission and not being sold as an investment, and the latter on the alleged unaffordability of the monthly payments, with again, no reference to the Allocated Property being sold as an investment.
- Mr P and Mrs Z were under no obligation to make the purchase and could have left the presentation at any time.

- When the above inconsistencies are considered, it is not credible that Mr P and Mrs Z were pressured or even assured they would receive a *"guaranteed profit",* nor is it credible that the purpose of the purchase was for investment purposes as opposed to meeting their holiday needs.

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 P and Mrs Z's circumstances (this was their second timeshare purchase; they expressed their happiness with the purchase) 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 that there is no clear, compelling evidence that the Fractional Club was sold to Mr P and Mrs Z with the intention of financial gain, either at all, or alternatively not in a manner that was of importance, as against their purpose of upgrading their points for holiday entitlement.

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 P and Mrs 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 P 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."

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 a financial return or 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 P 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 was 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 P 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."

This disclaimer is, in my view, an attempt to ensure that prospective members do not take and rely on what they were told by the Supplier as investment advice and a declaration that no assurance was given as to the future value of the Allocated Property. However, the disclaimer does suggest that (1) the "Vendor's" and "Manager's" experience as investors had fed into the information provided during the sales presentations and (2) prospective members might be wise to consult an investment adviser. And, in my view, both of those suggestions, particularly the latter, ran the risk of giving a prospective Fractional Club member the impression that there was investment potential to what was being sold. Further, if during the course of the sale a prospective member was given the impression that Fractional Club membership was an investment, I do not think this disclaimer would have done much to disabuse them of that idea.

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 P 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 P 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 P 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. 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 documents from that time, Mr P and Mrs Z's evidence 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 Mr P and 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 P 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.

Mr P and Mrs Z's evidence

The Lender has questioned the veracity of, and inconsistencies in the testimony from Mrs Z, and has provided sales notes from the Supplier that were made following the sale of Fractional Club membership to Mr P and Mrs Z.

The Lender has said that the descriptions given in these sales notes is in stark contrast to what Mrs Z has said. But I don't agree with this. The sales notes describe Mr P and Mrs Z's demeanour and state of mind *after* the sale was concluded, and does not assist or contradict what Mrs Z has said they were thinking or told whilst the sales process was ongoing. Mrs Z said they weren't going to make the purchase as couldn't afford the monthly payments, but the price was then reduced. So, it is perhaps unsurprising that Mr P and Mrs Z have been recorded as being happy with the purchase.

I said in the PD, having considered Mrs Z's testimony closely, I found it persuasive. Although it is not signed or dated, the PR has provided evidence which, in my opinion, shows satisfactorily that it was submitted by Mr P and Mrs Z at the same time as other dated documentation, in May 2020. And the level of detail, including what she was thinking and feeling at the time, shows a good recall of events. So, whilst being mindful of how memories can fade over time, I am satisfied I can place weight on its contents when deciding what it most likely to have happened and what was said at the Time of Sale. And having considered what the Lender has said and submitted in response to the PD, I remain persuaded by Mrs Z when she says:

> *"The salesman then started saying how these apartments will be worth much more in a few years. Basically, guaranteed profit. He told us a story about one of their members who made a business out of it and how [the Supplier] doesn't mind that, and that the member is making a lot of money every year. He said there are members who brought more than one share of an apartment because it was such a great investment. He said our profit could be like 4 times what we put into it, after some years."*

And:

> *"This I think started appealing to us although when he started talking about the monthly cost of it, he could probably see from our face expressions that it was too much for us. We were very exhausted by this meeting at this point. Then, he said he remembered about an e-mail that he had recently received from customers whose very unfortunate family situation meant that they had to withdraw their membership (and saying that should anything happen we may withdraw at any point) and therefore, we could purchase this "recycled" membership at a 15% discount!"*

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. And to support its position the Lender quoted part of the PD as follows:

> *"…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. And taking all of this into account, I think the Supplier's breach of Regulation 14(3) unimportant to the decision they ultimately made."*

But the Lender has again misquoted what I said in the PD – in a significant way. What I actually said was (bold my emphasis):

> *"…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.*
>
> *And taking all of this into account, I think the Supplier's breach of Regulation 14(3)* ***was material*** *to the decision they ultimately made."*

By misquoting me in this way, the Lender has significantly altered my original finding. What I actually said was that the breach *was* important, as it had a material impact on Mr P and Mrs Z's decision to make the purchase of the Fractional Club. And I remain of that opinion.

So, having considered what the Lender has said here, and having reconsidered everything submitted, it is my view that the evidence suggests that (1) Fractional Club membership being presented to Mr P and Mrs Z 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.

It follows that I remain persuaded that the Lender participated in and perpetuated an unfair credit relationship with Mr P and Mrs Z under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA. 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

My PD set out what I considered to be a fair and reasonable way for the Lender to calculate and pay fair compensation to Mr P and Mrs Z. In its response to the PD the Lender made no comment on my proposed redress. Having received no representations from any party, and having reconsidered everything, I see no reason to depart from what I said in my PD. I have reproduced this here:

Having found that Mr P 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 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 P 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.

Mr P and Mrs Z were trial members before purchasing Fractional Club membership. As I understand it, trial membership involved the purchase of a fixed number of week-long holidays that could be taken with the Supplier over a set period in return for a fixed price. The purpose of a trial membership was to give prospective members of the Supplier's longer-term products a short-term experience of what it would be like to be a member of, for example, the Fractional Club. According to an extract from the Supplier's business plan, roughly half of trial members went on to become timeshare members.

If, after purchasing trial membership, a consumer went on to purchase membership of one of the Supplier's longer-term products, their trial membership was usually cancelled and traded in against the purchase price of their timeshare – which was what happened at the Time of Sale. Mr P and Mrs Z's trial membership was, therefore, a precursor to their Fractional Club membership. With that being the case, the trade-in value acted, in essence, as a deposit on this occasion and I think this ought to be reflected in my redress when remedying the unfairness I have found.

So, given all of the above, here's what needs to be done to compensate Mr P and Mrs Z – whether or not a court would award such compensation:

(1) The Lender should refund Mr P and Mrs 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:

   i. The annual management charges Mr P and Mrs Z paid as a result of Fractional Club membership.

   ii. The trade-in value given to Mr P and Mrs Z's trial membership.

(3) The Lender can deduct:

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

   ii. The market value of the holidays* Mr P 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 P and Mrs Z's credit files in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr P 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 P 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 Shawbrook Bank Limited to calculate and pay fair compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P and Mrs Z to accept or reject my decision before 28 May 2025.

Chris Riggs
Ombudsman