DRN-5778207

The complaint

Mr R'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.

What happened

Mr R and his wife, Mrs W, purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 22 May 2018 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,590 fractional points at a cost of £17,530 (the 'Purchase Agreement') after trading in their existing trial timeshare points.

Fractional Club membership was asset backed – which meant it gave Mr R and Mrs W 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 R paid for the Fractional Club membership by taking finance of £21,821 from the Lender in his sole name (the 'Credit Agreement'). This included an additional £4,291 of borrowing to consolidate his previous loan taken in relation to the trial timeshare. As the Credit Agreement was in Mr R's sole name, I'll refer mainly to Mr R in this decision apart from where it's more appropriate to refer to both Mr R and Mrs W.

Mr R – using a professional representative (the 'PR') – wrote to the Lender on 10 November 2021 (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. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.
3. The decision to lend being irresponsible because the Lender did not carry out the right creditworthiness assessment.
4. Not being advised of any commissions that may have been paid between the Lender and the Supplier.

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

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

1. told him that Fractional Club membership had a guaranteed sale and end date when that was not true.
2. told him that he was buying ownership of a property when that was not true.
3. told him that Fractional Club membership was an "investment" when that was not true.

Mr R 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 R.

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

The Letter of Complaint set out several reasons why Mr R 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:

1. Fractional Club membership was marketed and sold to him as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. The contractual terms setting out (i) the duration of his Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of his membership were unfair contract terms under the Consumer Rights Act 2015 ('CRA').
3. He was pressured into purchasing Fractional Club membership by the Supplier.
4. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.
5. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
6. He wasn't told about out any commission paid by the Lender to the Supplier for arranging the loan.

The Lender dealt with Mr R's concerns as a complaint and issued its response letter on 15 January 2022, rejecting it on every ground. It confirmed that decision in its final response letter of 1 July 2022.

Mr R had, by that time, 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 R at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of that breach on his purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr R 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. After initially confirming Mr R's acceptance of the Investigator's assessment, the PR later requested that at least £3,000 in compensation be paid to Mr R in addition to the redress previously recommended. It said this was for the distress and inconvenience the Lender had caused him in not reaching a fair and reasonable outcome to his complaint (and to others the PR represented).

The case was passed to me to review afresh. Having reviewed the matter, I issued a provisional decision (PD) upholding the complaint. The PD included the following:

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

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

The legal and regulatory context that I think is relevant to this complaint is as follows:

The Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) (the 'CCA')

The timeshare at the centre of the complaint in question was/were paid for using restricted-use credit that was regulated by the Consumer Credit Act 1974. As a result, the purchase was/were covered by certain protections afforded to consumers by the CCA provided the necessary conditions were and are met. The most relevant sections as at the relevant time are below.

Section 56: Antecedent Negotiations
Section 75: Liability of Creditor for Breaches by a Supplier
Sections 140A: Unfair Relationships Between Creditors and Debtors
Section 140B: Powers of Court in Relation to Unfair Relationships
Section 140C: Interpretation of Sections 140A and 140B

Case Law on Section 140A

Of particular relevance to the complaint in question are:

1. *The Supreme Court's judgment in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 ('Plevin') remains the leading case.*
2. *The judgment of the Court of Appeal in the case of Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast') sets out a helpful interpretation of the deemed agency and unfair relationship provisions of the CCA.*
3. *Patel v Patel [2009] EWHC 3264 (QB) ('Patel') – in which the High Court held 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 relationship or otherwise the date the relationship ended.*
4. *The Supreme Court's judgment in Smith v Royal Bank of Scotland Plc [2023] UKSC 34 ('Smith') – which approved the High Court's judgment in Patel.*
5. *Deutsche Bank (Suisse) SA v Khan and others [2013] EWHC 482 (Comm) – in Hamblen J summarised – at paragraph 346 – some of the general principles that apply to the application of the unfair relationship test.*
6. *Carney v NM Rothschild & Sons Ltd [2018] EWHC 958 ('Carney').*
7. *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm) ('Kerrigan').*
8. *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').*

My Understanding of the Law on the Unfair Relationship Provisions

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."

So, the negotiations conducted by the Supplier during the sale of the timeshare(s) in question was/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.140A(1)(c) CCA.

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

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

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

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

In the case of Scotland & Reast, the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that "negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law" before going on to say the following in paragraph 74:

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

they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[1]

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

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

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

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

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

<u>The Law on Misrepresentation</u>

The law relating to misrepresentation is a combination of the common law, equity and statute – though, as I understand it, the Misrepresentation Act 1967 didn't alter the rules as to what constitutes an effective misrepresentation. It isn't practical to cover the law on misrepresentation in full in this decision – nor is it necessary. But, summarising the relevant pages in Chitty on Contracts (33rd Edition), a material and actionable misrepresentation is an untrue statement of existing fact or law made by one party (or his agent for the purposes of passing on the representation, acting within the scope of his authority) to another party that induced that party to enter into a contract.

The misrepresentation doesn't need to be the only matter that induced the representee to enter into the contract. But the representee must have been materially influenced by the misrepresentation and (unless the misrepresentation was fraudulent or was known to be likely to influence the person to whom it was made) the misrepresentation must be such that it would affect the judgement of a reasonable person when deciding whether to enter into the contract and on what terms.

However, a mere statement of opinion, rather than fact or law, which proves to be unfounded, isn't a misrepresentation unless the opinion amounts to a statement of fact and it can be proved that the person who gave it, did not hold it, or could not reasonably have held it. It also needs to be shown that the other party understood and relied on the implied factual misrepresentation.

Silence, subject to some exceptions, doesn't usually amount to a misrepresentation on its own as there is generally no duty to disclose facts which, if known, would affect a party's decision to enter a contract. And the courts aren't too ready to find an implied representation given the challenges acknowledged throughout case law.

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

The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations')

The relevant rules and regulations that the Supplier in this complaint had to follow were set out in the Timeshare Regulations. I'm not deciding – nor is it my role to decide – whether the Supplier (which isn't a respondent to this complaint) is liable for any breaches of these Regulations. But they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair. After all, they signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

The Regulations have been amended in places since the Time of Sale. So, I refer below to the most relevant regulations as they were at the time(s) in question:

- *Regulation 12: Key Information*
- *Regulation 13: Completing the Standard Information Form*
- *Regulation 14: Marketing and Sales*
- *Regulation 15: Form of Contract*
- *Regulation 16: Obligations of Trader*

The Timeshare Regulations were introduced to implement EC legislation, Directive 122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts (the '2008 Timeshare Directive'), with the purpose of achieving 'a high level of consumer protection' (Article 1 of the 2008 Timeshare Directive). The EC had deemed the 2008 Timeshare Directive necessary because the nature of timeshare products and the commercial practices that had grown up around their sale made it appropriate to pass specific and detailed legislation, going further than the existing and more general unfair trading practices legislation.[2]

The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations')

The CPUT Regulations put in place a regulatory framework to prevent business practices that were and are unfair to consumers. They have been amended in places since they were first introduced. And it's only since 1 October 2014 that they imposed civil liability for certain breaches – though not misleading omissions. But, again, I'm not deciding – nor is it my role to decide – whether the Supplier is liable for any breaches of these regulations. Instead, they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair as they also signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

Below are the most relevant regulations as they were at the relevant time:

- *Regulation 3: Prohibition of Unfair Commercial Practices*
- *Regulation 5: Misleading Actions*
- *Regulation 6: Misleading Omissions*
- *Regulation 7: Aggressive Commercial Practices*
- *Schedule 1: Paragraphs 7 and 24*

The Consumer Rights Act 2015 (the 'CRA')

[2] See Recital 9 in the Preamble to the 2008 Timeshare Directive.

The CRA, amongst other things, protects consumers against unfair terms in contracts. It applies to contracts entered into on or after 1 October 2015 – replacing the Unfair Terms in Consumer Contracts Regulations 1999.

Part 2 of the CRA is the most relevant section as at the relevant time.

County Court Cases on the Sale of Timeshares

1. *Hitachi v Topping (20 June 2018, Country Court at Nottingham) – claim withdrawn following cross-examination of the claimant.*
2. *Brown v Shawbrook Bank Limited (18 June 2020, County Court at Wrexham)*
3. *Wilson v Clydesdale Financial Services Limited (19 July 2021, County Court at Portsmouth)*
4. *Gallagher v Diamond Resorts (Europe) Limited (9 February 2021, County Court at Preston)*
5. *Prankard v Shawbrook Bank Limited (8 October 2021, County Court at Cardiff)*

Relevant Publications

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

What I've provisionally decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having 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 R as an investment, which, in the circumstances of this complaint, rendered the credit relationship between him 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 R complaint, it isn't necessary to make formal findings on all of them. This includes the allegation that the Supplier misrepresented the Fractional Club membership and the Lender ought to have accepted and paid the claim under Section 75 of the CCA.

That's because, even if that aspect of the complaint ought to succeed, the redress I'm currently proposing puts Mr R in the same or a better position than he would be if the redress was limited to misrepresentation.

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

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

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

I have then considered the impact of these on the fairness of the credit relationship between Mr R 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 R 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 R says that the Supplier did exactly that at the Time of Sale – saying the following during the course of this complaint:

'[The Supplier's representative] said that if we used the points wisely, we could go on holiday for 2-weeks at a time. At the end of the period, he said that the property would be sold, and we'd get any profit made – we were told that the property would undoubtedly go up in value.'

What Mr R says was reflected in the Letter of Complaint.

Mr R alleges, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because there were two aspects to his Fractional Club membership: holiday rights and a profit on the sale of the Allocated Property.

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

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr R 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 him as an investment, i.e. told him or led him to believe that Fractional Club membership offered him 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 R, the financial value of his 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 R as an investment.

For example, I gather the 'Information Statement' Mr R and Mrs W signed said:

'The purchase of fractional rights is for the primary purpose of holidays and is neither specifically for the direct purpose of a trade in nor as an investment in real estates.'

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork, especially in the context of a sale that took place in person. And there are a number of strands to Mr R'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 him 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 R or led him to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered him the prospect of a financial gain (i.e., a profit); and, in turn*
(2) *whether the Supplier's actions constitute a breach of Regulation 14(3).*

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

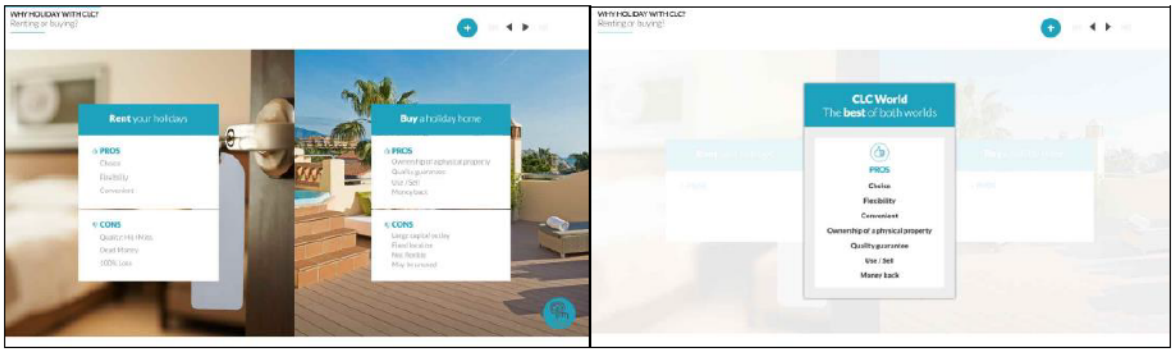
How the Supplier marketed and sold the Fractional Club membership

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

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

1. *the training the Supplier's sales representatives would have got before selling Mr R and Mrs W Fractional Club membership; and*
2. *how the sales representatives would have framed the sale of Fractional Club membership to them.*

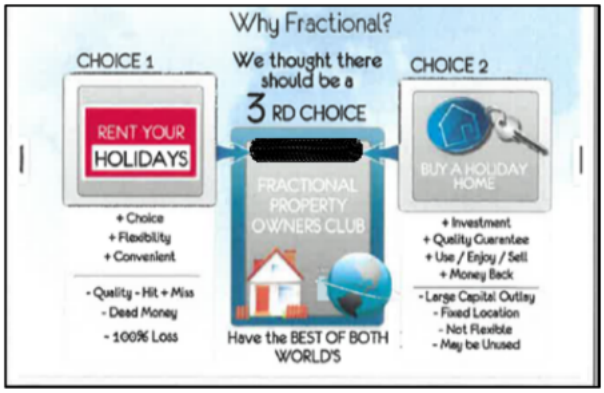
Having looked through the Manual, my attention is drawn first to page 19 (of 74) – which includes two slides called "Why holiday with [the Supplier]? Renting or buying?"



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

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

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



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

(1) "Rent Your Holidays"
(2) "Buy a Holiday Home"
(3) The "Best of Both Worlds"

I acknowledge that the slides incorporated into the 2017 Fractional Training Manual don't include express reference to the 'investment' benefit of Fractional Club membership. But they allude to much the same concept, namely that Fractional Club membership combined

the best aspects of taking 'normal' holidays and purchasing a holiday home. Further, for the reasons I will come onto, although the word 'investment' did not appear in the 2017 Fractional Training Manual, I think the idea that Fractional Club membership offered the same benefits as a purchasing an investment property did form part of the sales process. One of those advantages referred to in the slides on page 19 of the 2017 Fractional Training Manual is the "ownership of a physical property". And as an owner's equity in their property is built over time as the value of the asset increases relative to the size of any mortgage secured against it, this particular advantage of Fractional Club membership was portrayed in terms that played on the opportunity ownership gave prospective members of the Fractional Club to accumulate wealth in a similar way, especially when combined with the phrase "money back".

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

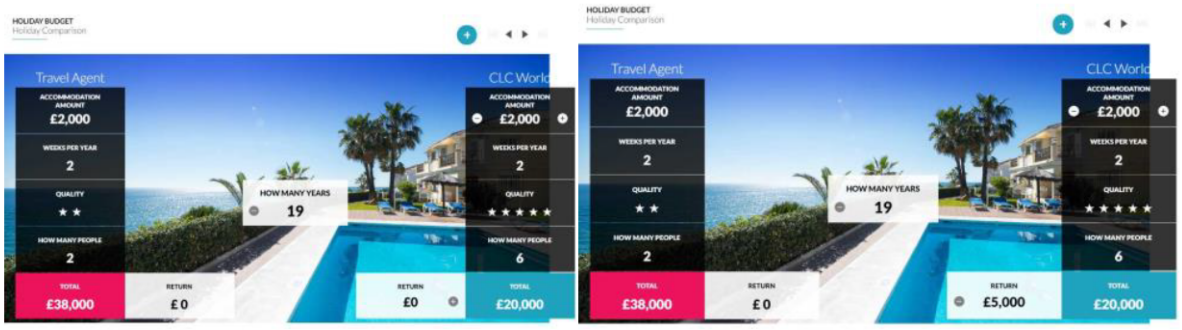
"A major benefit is that after 19 years of fantastic holidays, the property in which you own a fraction is sold and you will receive your share of the sale proceeds according to the number of fractions owned."

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

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

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

Page 53 included the following slides and accompanying notes:



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

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

We also agreed that you would get nothing back from the travel agent at the end of this

holiday period. Remember with your fraction at the end of the 19 year period, you will get some money back from the sale, so even if you only say £5,000, it would still be more than you would get renting your holidays from a travel agent wouldn't it."

I acknowledge that the slides above set out a "return" that is less than the total cost of the holidays and the "initial outlay". But that was just an example and, given the way in which it was positioned in the 2017 Fractional Training Manual, the language did leave open the possibility that the return could be equal to if not more than the initial outlay. Furthermore, the slides above represent Fractional Club membership as:

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

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

What's more, I think the Supplier's sales representatives were encouraged to make prospective Fractional Club members (like Mr R and Mrs W) 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 R and Mrs W 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)).'"[3] *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:

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[3] 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

"[…] I endorse the observation made by Mr Jaffey KC, Counsel for BPF, that, whatever the position in principle, ***it is apparently a major challenge in practice for timeshare companies to market fractional ownership timeshares consistently with Reg.14(3). […] Getting the governance principles and paperwork right may not be quite enough. The problem comes back to the difficulty in articulating the intrinsic benefit of fractional ownership over any other timeshare from an individual consumer perspective****. […]* ***If it is not a prospect of getting more back from the ultimate proceeds of sale than the fractional ownership cost in the first place, what exactly is the benefit?*** *[…] What the interim use or value to a consumer is of a prospective share in the proceeds of a postponed sale of a property owned by a timeshare company – one they have no right to stay in meanwhile – is persistently elusive.*

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

Given what I've already said about the Supplier's training material and the way in which I think it was likely to have framed the sale of Fractional membership to prospective members (including Mr R and Mrs W), 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 Membership were a good reason to purchase it.

So, overall, I think the Supplier's sales representative was likely to have led Mr R and Mrs W to believe that Fractional 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 that they were told that they were buying shares in property and that they would 'get any profit made – we were told that the property would undoubtedly go up in value'. On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mr R and Mrs W were led to believe by the Supplier at the relevant time. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

Was the credit relationship between the Lender and the Mr R 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 R 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.

It also it seems to me in light of Carney and Kerrigan that, if I am to conclude that a breach

of Regulation 14(3) led to a credit relationship between Mr R and the Lender that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led him to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

This where I believe Mr R's testimony is important. I recognise that the Lender has concerns about it which, it says, mean it is of limited evidential value. It says, for example, that it is unclear when the testimony dates back to, that it appears to have been influenced by the PR and that it contains errors and inconsistencies.

This service did not receive a copy of the testimony until January 2024, and I can understand why, on the face of it, the Lender might have reservations about that. But I note that it is broadly consistent with the Letter of Complaint in terms of the allegations made, the date of which is not in dispute. I think there is sufficient detail about the Time of Sale to persuade me that the testimony reflects Mr R's recollections – for example, where he mentions a break in the meeting where the Supplier's representative accompanied him to pick up his daughter from an activity in another location.

The Lender points to errors in some of Mr R's testimony. But these mainly relate to the sale of the trial membership rather than the sale that is the subject of this complaint. I wouldn't expect a consumer to be able to recall events that took place years before without any errors at all. These issues don't lead me to think the testimony in relation to the Time of Sale can't fairly be relied on.

On my reading of Mr R's testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when he decided to go ahead with his purchase. That doesn't mean he was not interested in holidays. His own testimony and booking history demonstrates that he was. And that is not surprising given the nature of the product at the centre of this complaint. But as Mr R says (plausibly in my view) that Fractional Club membership was marketed and sold to him at the Time of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I think his purchase was motivated by his 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 his existing trial membership and the more 'standard' type of timeshare available to him.

I've considered what the Lender says about the Supplier's sales notes from the Time of Sale. It argues that they indicate Mr R was 'happy to join' the Fractional Club and there was 'no pressure at all'. It says the notes explained how Mr R intended to use the product the following year and there was no reference to the product being sold as an investment or of this being a motivating factor for him.

I've not been provided with a copy of the sales notes but am prepared to accept the Lender's summary of them as accurate. However, I don't find the omission of any reference in them to investments to be conclusive. That's because I would not have expected the Supplier to record evidence to suggest it had sold the Fractional Club membership to Mr R in breach of Regulation 14(3) or that this induced him into going ahead with the sale.

Taking everything into account, I think the Supplier's breach of Regulation 14(3) was material to the decision Mr R ultimately made.

Mr R has not said or suggested, for example, that he would have pressed ahead with the purchase in question had the Supplier not led him to believe that Fractional Club membership was an appealing investment opportunity. And as he faced the prospect of borrowing and repaying a substantial sum of money while subjecting himself to long-term financial commitments, had he not been encouraged by the prospect of a financial gain from

membership of the Fractional Club, I'm not persuaded that he would have pressed ahead with his purchase regardless.

While I believe the Lender should compensate Mr R for his financial losses, I do not intend to make an award of compensation for distress and inconvenience – either for £3,000 as the PR recently argued for – or for any other amount. I can understand that Mr R may have found the complaints process difficult at times. But I have not seen anything persuasive to suggest his interactions with the Lender during the course of this complaint had an impact beyond the usual frustrations of a complaints process.

Although the PR did very briefly mention compensation for 'pain and suffering, distress and inconvenience' in the Letter of Complaint, it was not until learning that the Lender had disagreed with the Investigator's assessment that the PR made any further submissions on this point.

More importantly, I find the submissions the PR did make to be largely generic, with references to its clients and lenders in general, with little or no persuasive evidence to suggest Mr R in fact suffered distress and inconvenience to such an extent that significant (or any) compensation was warranted in addition to the redress the Investigator had already recommended the Lender pay for his financial losses. I note that I am currently directing the payment of interest to compensate Mr R for the time he has been out of pocket and, in my view, that adequately compensates him for the time he has waited for the complaint to be resolved.

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr R 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 set out what I thought fair compensation looked like in the context of Mr R's complaint.

I asked the parties to respond with any further comments or information they wished me to consider before I finalised my decision.

The PR confirmed that Mr R accepted my provisional findings.

The Lender said it didn't intend to challenge my PD given the specific facts of this case. It did share its observations on some aspects of the PD that it did not agree with, but it did not ask me to revisit my provisional findings.

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.

I note the points the Lender raises in response to, and about, my decision to provisionally uphold this complaint. But, given that the Lender didn't ask me to reconsider my decision and has agreed to make an offer to Mr R, I won't comment further on the aspects it highlighted.

As neither party has sought to challenge my PD, I see no need to change the conclusions I reached in it or the outcome.

Putting things right

Having found that Mr R 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 him back in the position he would have been in had he not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr R and Mrs W agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr R was a trial member 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 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 R'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 I think needs to be done to compensate Mr R – whether or not a court would award such compensation:

(1) The Lender should refund Mr R'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 R paid as a result of Fractional Club membership.
ii. The difference between the trade-in value given to Mr R's trial membership and the capital sum refinanced from the loan taken to pay for the trial membership into the Credit Agreement.

(3) The Lender can deduct:

i. The value of any promotional giveaways that Mr R used or took advantage of; and
ii. The market value of the holidays* Mr R took using his 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 R's credit file in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr R's Fractional Club membership is still in place at the time of this decision, as long as he agrees to hold the benefit of his interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify him against all ongoing liabilities as a result of his 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 R took using his 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 his usage.

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

My final decision

For these reasons, my final decision is that I uphold the complaint. I require Shawbrook Bank Limited to put things right for Mr R as explained above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 24 September 2025.

Nimish Patel
Ombudsman