

The complaint

Mr and Mrs C's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) being party to unfair credit relationships with them under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying claims under Section 75 of the CCA.

What happened

Mr and Mrs C were existing members of a timeshare arrangement having purchased a membership from a timeshare business (the 'Supplier') on 18 June 2013. This purchase of 1,080 fractional points was financed by a loan from a different provider ('Business A'). The circumstances of this purchase and its associated finance agreement has been the subject of a complaint which has been considered by this Service separately, and is included here for background purposes only.

Mr and Mrs C 'upgraded' their membership of the timeshare (to the 'Fractional Club 1') from the Supplier on 1 September 2013 (the 'Time of Sale 1'). They entered into an agreement with the Supplier to buy 1,660 fractional points (the 'Purchase Agreement 1'), and after trading in their existing timeshare, they ended up paying £9,881 for their new membership of the Fractional Club 1, which included their first year's membership fees.

Like their previous membership, this new Fractional Club 1 membership was asset backed – which meant it gave Mr and Mrs C 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 1') after their membership term ends.

Mr and Mrs C paid for their Fractional Club 1 membership by taking finance of £9,881 from the Lender in their joint names. (the 'Credit Agreement 1').

On 9 September 2014 (the 'Time of Sale 2'), whilst on holiday as part of their timeshare membership, Mr and Mrs C again 'upgraded' their membership by trading in their fractional points¹ towards the purchase of 2,340 fractional points (the 'Fractional Club 2'). After the trade-in value was added they ended up paying £11,259. This membership was also asset backed, including a share in the net sale proceeds of a property named on their Purchase Agreement (the 'Allocated Property 2') after their membership term ends.

Mr and Mrs C paid for their Fractional Club 2 membership by taking finance of £21,446 from the Lender in their joint names (the 'Credit Agreement 2') which consolidated the outstanding balance of Credit Agreement 1.

Mr and Mrs C – using a professional representative (the 'PR') – wrote to the Lender on 9 November 2016 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at both the Time of Sale 1 and Time of Sale 2 giving them claims against the Lender under Section 75 of the CCA, which the Lender failed to

¹ By trading in their points Mr and Mrs C no longer had any rights to a share in the future sales proceeds of Allocated Property 1.

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.

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

Mr and Mrs C say that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale 1 and Time of Sale 2 – namely that the Supplier:

- Told them that Fractional Club membership had a guaranteed end date when that was not true.
- Told them that the only way to exit from their existing membership was to upgrade their membership, when that was not true.

Mr and Mrs C say that they have claims against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, they have like claims against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs C.

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

Mr and Mrs C say that the Supplier breached the Purchase Agreement because there is no guarantee that they will receive their share of the net sale proceeds of the Allocated Property. And as a result, Mr and Mrs C 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 them.

(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 and Mrs C say that the credit relationships between them and the Lender were unfair to them under Section 140A of the CCA. In summary, they include the following:

- They were pressured into purchasing the Fractional Club 1 and 2 memberships by the Supplier.
- The decisions to lend were irresponsible because the Lender didn't carry out the right creditworthiness assessment.
- The Supplier failed to disclose that it was paid commission by the Lender.

The Lender did not respond to the Letter of Complaint, so on 13 March 2017 the PR referred Mr and Mrs C's complaint to our Service, and included with the submission a statement dated 22 August 2016 setting out Mr and Mrs C's recollections of the sales processes in question.

In relation to the Time of Sale 1, Mr and Mrs C's statement read:

"In September 2013 we went out to Tenerife on a bonus week which we were told was completely free. When we were there we were once again collected from the apartment by a [Supplier] representative and taken to view a couple of resorts. We were then taken back to a sales suite in Tenerife and once again subjected to an aggressive hard sell. We were told that by transferring our points from the allocated property [their original timeshare] to a

property in Tenerife we would have a better investment and a better return. We expressed concern about the cost but were told that it would work in our favour as they would transfer the cost to another property and that it would work out cheaper. At the end of another long day we were pressured into signing a new agreement for 1660 points for allocated property 31 BF in Sunningdale Village Tenerife."

And in relation to the Time of Sale 2, they went on to say:

"Using the points we had already booked a holiday at Paradise resort in Tenerife for the following September 2014 and were taking our children and grandchildren with us for a family holiday. Once again on arrival at the resort we were informed that we had to attend a member meeting. We refused as we had our family with us and did not want to waste a day of the holiday. We were hassled every single day of the holiday to attend; we finally gave in and were told it would literally be half an hour. We were picked up from Paradise resort and taken to their sales suite. We made sure to tell the sales representative that we did not have much time as we had left our family by the pool and that we were meeting friends at another resort at 7pm that night. This was about 1pm. She said not to worry it would not take long, they just wanted to make sure everything was alright. Once in the sales office we were given drinks and it seemed to be a casual talk. However this quickly turned. They knew that we had two loans and said we were stupid that we had not put them into one loan whilst in England. We said with being self-employed this had not been possible and we were struggling. The sales representative told us they would be able to sort it out and finance a new loan that amalgamated both loans. We refused and said we did not have time anyway. At that point it became very uncomfortable and they kept on and on at us. Every time we got up and said we really did not have time, another sales rep would come over. By this time it was getting on for 6pm and we were getting worried about our family. We had to wait for the sales rep to take us back to the resort as we had not taken any money with us. In the end we were put under so much pressure we agreed. They were running up and down the corridor by this time with different forms. We were given a form to sign which they said would allow them to amalgamate the two loans. We signed this and were told that the sales representative would call to the apartment the following day with the rest of the paper work for us to look at and sign. We told them we were actually going home the next afternoon so they arranged to come at 9am the next morning. The sales representative came the following morning whilst we were getting ready to vacate the apartment. She gave us forms to sign, she said they had not managed to amalgamate the [Business B] Loan but not to worry. Shawbrook had given us a new loan and we would be better off. We agreed as we really did not have time to look into it and signed the agreement at our apartment with the sales representative. We did not realise at this point that it was for a larger loan with Shawbrook Finance. The points that we had were now transferred to another property J212 at Paradise, we now had 2340 points. There had been no mention of this to us the previous afternoon."

And the statement was concluded with:

"It was a very aggressive hard sell right from the beginning in which we were pressured into signing agreements for loans whilst we were on holiday. We feel that we were completely misinformed about the product. Had we known it was a Timeshare and not an investment we would never have bought into it."

Upon notification of the referral of the complaint to this Service, the Lender said it had no record of receiving the complaint, and that it would now deal with it. The Lender then issued its final response letter on 26 April 2017, rejecting the complaint on every ground.

The PR then confirmed to our Service that Mr and Mrs C did not accept this outcome and wished us to consider their complaint, so it was assessed by an Investigator who only

considered the sale of Fractional Club 2. And having done so, upheld the complaint as she thought the Supplier had probably sold and marketed the Fractional Club 2 as an investment, in contravention of Regulation 14(3) of The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations'). And given the impact of that breach on their purchasing decision, the Investigator concluded that the resultant credit relationship (from Credit Agreement 2) between the Lender and Mr and Mrs C was rendered unfair to them for the purposes of section 140A of the CCA. The Investigator then set out how she thought fair compensation should be calculated and paid to Mr and Mrs C by the Lender.

Mr and Mrs C accepted this view, but the Lender did not, and it asked for an Ombudsman's decision – which is why it was passed to me.

Having considered everything that had been submitted, I thought that Mr and Mrs C's complaint ought to be upheld.

I sent all parties my initial thoughts in the form of a Provisional Decision (the 'PD'). In the PD I set out how I thought the two Fractional Club sales were different, in that I thought Fractional Club 1 was the Supplier's first version of the Fractional Club that it called FPOC1, and Fractional Club 2 was the Supplier's second version, FPOC2. I went on to explain that I thought the Supplier had breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling both Fractional Club 1 and Fractional Club 2 memberships to Mr and Mrs C as an investment, which, in the circumstances of this complaint, rendered the credit relationships between them and the Lender unfair to them for the purposes of Section 140A of the CCA. I then set out how I considered the Lender ought to calculate and pay fair compensation to Mr and Mrs C.

Mr and Mrs C accepted what I had said in the PD but the Lender did not, sending a comprehensive response disagreeing with my provisional findings. It said, in summary:

- The PD was premised on a material error of law in its approach to the prohibition under Regulation 14(3) of the Timeshare Regulations and erred in its application of that prohibition to the underlying documentation in support of the Fractional Club sales.
- The error(s) above undermined the approach to Mr and Mrs C's witness testimony; and
- The PD was premised on a material error of law in its approach to the legal test to determine the existence of an unfair relationship.
- The Fractional Club 1 sale was FPOC2, not FPOC1

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 that 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 Reg 14(3) of the Timeshare Regulations.
- The wording of the PD is inconsistent with the definition of an "*investment*" as set out

in (*Shawbrook & BPF v FOS*)². 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 Reg 14(3).

- It is not appropriate to make inferences about the conduct of the sale based on generic assumptions about FPOC2, rather than assess the evidence on this specific complaint.
- Neither the testimony nor the contemporaneous materials referred to by the Ombudsman reference the word 'investment', so it is irrational in law to say the witness evidence described it as such.
- The Supplier only gave the consumers information about the sale of the Allocated Property, merely describing its feature.
- Selling an investment requires the prospect of a financial gain/profit, and the corresponding motive on the part of the consumer. Referring to the prospect of a residual return does not satisfy this test.

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

- Fractional Club 1 was FPOC2 not FPOC1, so the sales material referred to by the Ombudsman in the PD were irrelevant.
- The documentation in relation to the FPOC2 sale is unobjectionable and does not breach Reg 14(3).
- Mr and Mrs C did not receive or view the sales presentation documents referred to by the Ombudsman.
- The signed disclaimers referenced show there was at no stage any representation as to the future price or value of the fractional share, and the 'advice disclaimer' referenced would lead the consumer to understand that the product was not being sold to them as an investment.
- The training manual referenced made no mention of the presence of the Allocated Property being an Investment, nor that the purpose or benefit of the product was the opportunity to make a profit – on the contrary, the material indicated that there would be a "return" of money after 19 years.
- The 'prospect of a financial return' does not make something an 'investment' as the latter requires the intention of acquiring more than the initial outlay, and the training material emphasised customers' expectation of receiving only a small part of their initial outlay.
- Referring to the Allocated Property as 'ownership of bricks and mortar' is unobjectionable.
- That the management fees were used by the Supplier to maintain the condition of the Allocated Property, and the 19-year term was to "see out peaks and troughs in the market", are unsurprising as the proceeds will be returned to the customers, so it is natural to ensure the return is as high as possible.
- There was no comparison between the expected level of financial return against the

² *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)

initial outlay in purchasing the product, the primary focus of which was to provide holidays.

- There was no promise made as to the amount of the financial return, nor any suggestion that the return would increase – it merely suggests that the customer would receive “some” of their money back.
- Any fair analysis of the training and contractual materials would conclude that the customer was told that their investment was in holidays, and that “some money” would be returned, which may be a “small part of your initial outlay”.
- *Prankard v Shawbrook Bank Limited* considered documents and evidence regarding the training programme operated by the Supplier at the time, and concluded that the product was not sold as an investment.
- The question the Ombudsman should have considered is; is there sufficiently clear, compelling evidence that the timeshare product was marketed and sold as an investment (i.e. for intended financial profit or gain as against the initial outlay). The reasonable answer, is that the sales documentation provides no reason to consider there was any such marketing or sale.

It then assessed the witness statement from Mr and Mrs C:

- The Letter of Complaint contained no allegation about the Fractional Club products being sold as investments – they were seeking to exit their timeshare for other reasons (maintenance fees causing financial stress).
- The testimony in relation to Time of Sale 1 does not make reference to a hope or expectation of financial gain/profit – only a “better return”.
- The testimony relating to Time of Sale 2 makes no reference to membership being sold as an investment nor that Mr and Mrs C were motivated to purchase to make a financial gain or profit. There is no evidence presented by Mr and Mrs C to support a finding the Fractional Club 2 was sold as an investment. So it is not credible that Mr and Mrs C were assured they would recover back their initial outlay or given hope or expectation that they would make a profit, nor is it credible that the purchase was as an investment objective as opposed to future holiday needs.
- Reliance on C’s testimony is unsafe, and the generic allegations made here are a hallmark of many of the complaints submitted by claims management companies.

And finally, the Lender made submissions regarding the legal test that had been 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 had erred here and applied a different test – reversing the burden of proof. It is necessary to assess whether there is sufficient evidence of a material impact on the decision to enter the agreement, not to start from the position, as the Ombudsman has done, that the prospect of a financial gain existed, but that this was not insignificant enough for it not to render the relationship unfair.
- The number of holidays taken by Mr and Mrs C after the Fractional Club sales demonstrates their motivation. Had they not made their upgrade purchases they would not have been able to enjoy these holidays due to a lack of points. The actual method of sale of the memberships did not have a material impact on their decisions to purchase, therefore the relationship was fair.

The Lender concluded that there is no clear, compelling evidence that the Fractional Club was sold to Mr and Mrs C with the intention of financial gain, or alternatively, not in a manner that was of importance, as against their purpose of upgrading their points for holiday entitlement.

As the deadline for further responses as now passed, the complaint has come back to me.

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 no different to that shared in several hundred ombudsman decisions on very similar complaints, and the same as was set out in the provisional decision. And with that being the case, it is not necessary to set it out here.

What I've decided – and why

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

And having done that, and having read and considered all of the reasons the Lender gave for why it disagreed with my PD, I remain satisfied that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling both Fractional Club 1 and Fractional Club 2 memberships to Mr and Mrs C as an investment, which, in the circumstances of this complaint, rendered both of the credit relationships between them and the Lender unfair to them for the purposes of Section 140A of the CCA.

However, as both parties are aware, my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I recognise that there are a number of aspects to this complaint, it is not necessary to make formal findings on all of them because, even if one or more of those aspects ought to succeed, the redress I am currently proposing puts Mr and Mrs C in the same or a better position than they would otherwise be in.

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?

Having considered the entirety of the credit relationship between Mr and Mrs C and the Lender along with all of the circumstances of the complaint, I think the credit relationships between them were 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(s) of Sale – which includes training material that I think is likely to be relevant to the sales;
2. The provision of information by the Supplier at the Time(s) 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(s) of Sale; and
4. The inherent probabilities of the each sale given its circumstances.

I have then considered the impact of these on the fairness of each credit relationship between Mr and Mrs C and the Lender. And having done so, and having considered everything that has been submitted in response to my PD, I think the credit relationships between them were likely to have been rendered unfair for the purposes of Section 140A. I will explain why.

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

The Lender does not dispute, and I am satisfied, that both Fractional Club 1 and 2 memberships met the definition of a "timeshare contract" and each 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(s) 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 although not expressed in these precise terms in the Letter of Complaint, Mr and Mrs C say that the Supplier did exactly that; In their statement they said:

"We were told that by transferring our points from the allocated property [their original timeshare] to a property in Tenerife we would have a better investment and a better return."

And at the conclusion of their statement, they said:

"...We feel that we were completely misinformed about the product. Had we known it was a Timeshare and not an investment we would never have bought into it."

Mr and Mrs C allege, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale(s) 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 led to believe by the Supplier that they would get their money back or more during the sale of Fractional Club membership.

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

Mr and Mrs C's share in the Allocated Property connected to both memberships clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But, like I said in my PD, and as the Lender has stressed in response, the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a

timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

In other words, and as the Lender correctly pointed out in its response to the PD, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.

To conclude, therefore, that either or both of the Fractional Club memberships were marketed or sold to Mr and Mrs C 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 the 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.

As the Lender has shown, the products that were sold were both the same versions of what the Supplier called the Fractional Property Owners Club ('FPOC2'). And as I acknowledged in my PD, there is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs C, 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 for both sales that state that Fractional Club membership was not sold to Mr and Mrs C as an investment.

In response to my PD, the Lender says these disclaimers show there was at no stage any representation as to the future price or value of the fractional share, and the 'advice disclaimer' that is referenced above would lead the consumer to understand that the product was *not* being sold to them as an investment. I agree that the disclaimer's aim seems to be to ensure purchasers didn't rely on what they were told as investment advice, or a warranty as to the future value of the Allocated Property. So, I agree with the Lender, in that the disclaimer, on its own, cannot be construed as a representation that the Fractional Club is an investment. But I still regard its contents as more relevant to the sale of an investment than a holiday product, because it says those making the timeshare sale obtained information "*from their own experience as investors*" and recommends purchasers seek advice from "*investment advisors*" about their "*investment needs*". But in any event, the disclaimer doesn't seem to have been focussed on by Mr and Mrs C at the Time(s) of Sale, so doesn't advance either side's case anyway.

However, as I said in my PD, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And for reasons I'll now come on to, given the facts and circumstances of this complaint, I think the Supplier is likely to have breached Regulation 14(3) of the Timeshare Regulations.

How the Supplier marketed and sold the Fractional Club memberships

As I've said, I can now see that both Fractional Club 1 and Fractional Club 2 were FPOC2, and during the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives – including:

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

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

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

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

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



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

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

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

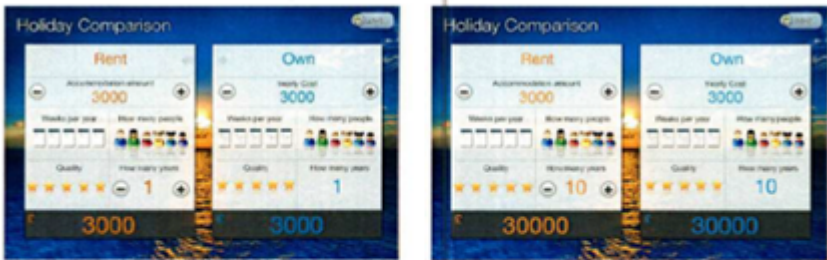
CLOSE:

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

prospective members of the Fractional Club to accumulate wealth over time.

I acknowledge the point made by the Lender that the slides don't include express reference to the "investment" benefit of ownership. But the description alludes to much the same concept. It was simply rephrased in the language of "building equity". And with that being the case, it seems to me that the approach to marketing Fractional Club membership was to strongly imply that 'owning' fractional points was a way of building wealth over time, similar to home ownership.

Page 33 of the Fractional Club Training Manual then moved the Supplier's sales representatives onto a cost comparison between "renting" holidays and "owning" them. Sales representatives were told to ask prospective members to tell them what they'd own if they just paid for holidays every year in contrast to spending the same amount of money to "own" their holidays – thus laying the groundwork necessary to demonstrating the advantages of Fractional Club membership:



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

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

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

CLOSE:

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

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

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

SUMMARISE LAST SLIDE:

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

[...]

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

[...]

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

(My emphasis added)

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

“T/O will explain slides emphasising that they only pay a fraction of maintaining the entire property. It also ensures property is kept in peak condition to maximise the return in 19 years[.] time.

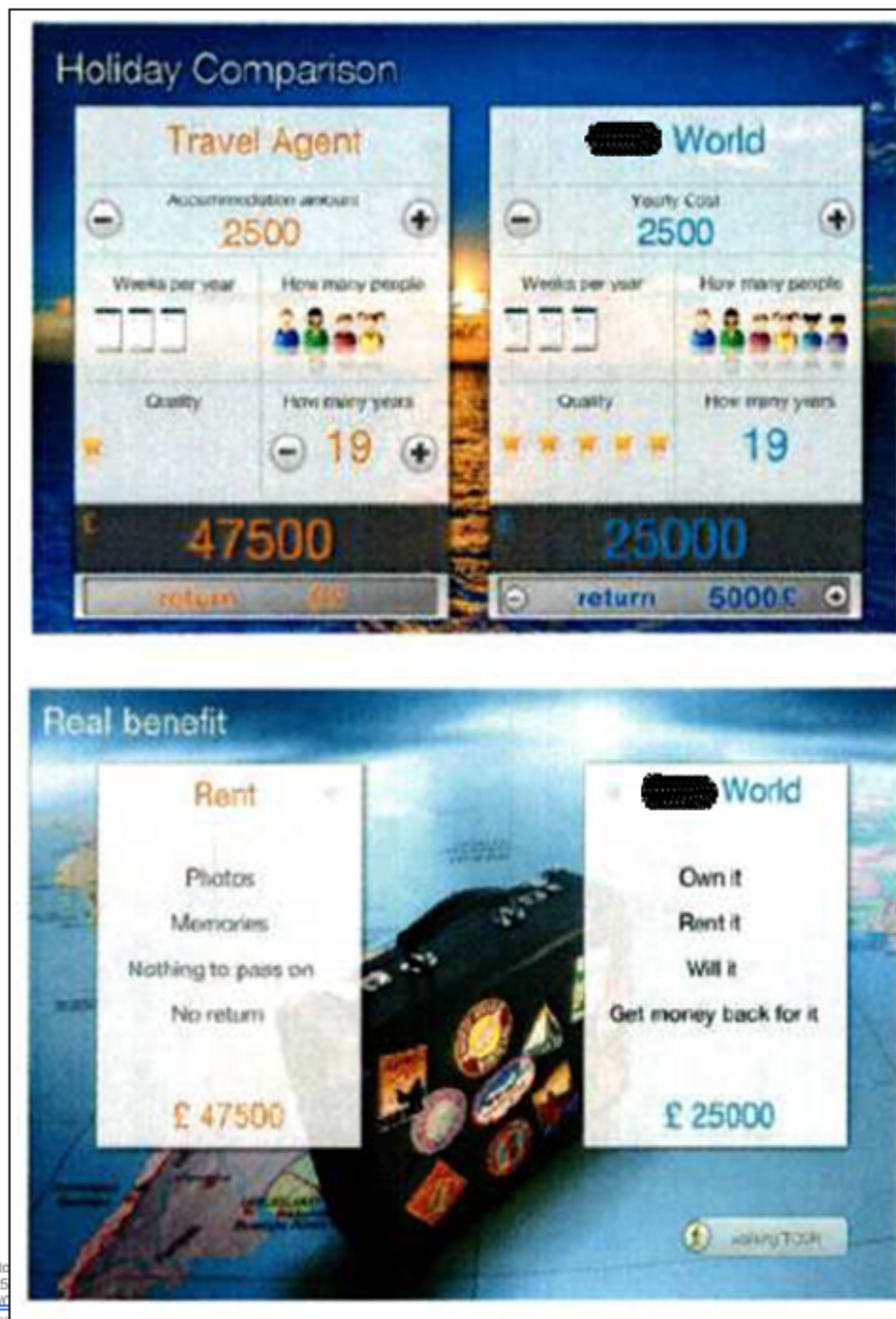
[...]

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

(My emphasis added)

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

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



[...]

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

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

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

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

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

I acknowledge that, as I did in the PD. However, if I were to only concern myself with express efforts to quantify to Mr and Mrs C 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.

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

Given what I’ve already said, both in the provisional decision and again here, about the Supplier’s training material and the way in which I think it was likely to have framed the sale

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>

of Fractional membership to prospective members (including Mr and Mrs C), 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 – which, broadly speaking, is consistent with Mr and Mrs C’s recollections of the sale.

So overall, on the balance of probabilities, I think the Supplier’s sales representatives were likely to have led Mr and Mrs C to believe that Fractional Club membership was an investment that may lead to a financial gain (i.e., a profit) in the future at both of the Time(s) of Sale. And with that being the case, I do not find them either implausible or hard to believe when they say that they were told that they were buying shares in property that, being an investment, may well lead to a financial gain. On the contrary, given everything I have seen and read, I think that is likely to be what Mr and Mrs C 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 at both the Time of Sale 1 and Time of Sale 2.

Were the credit relationships between the Lender and the Consumer rendered unfair?

Having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at both Time of Sale 1 and Time of Sale 2, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr and Mrs C and the Lender under both Credit Agreement 1 and 2 and related Purchase Agreement 1 and 2. This is because the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

Indeed, it seems to me, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs C and the Lender that was unfair to them and warranted relief as a result, whether the Supplier’s breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On my initial reading of Mr and Mrs C’s testimony, I thought the prospect of a financial gain from the Fractional Club memberships was an important and motivating factor when they decided to go ahead with their purchases. And I remain of that opinion now. That doesn’t mean they were not interested in holidays - their own testimony demonstrates that they quite clearly were, which is not surprising given the nature of the product at the centre of this complaint.

But as I said in my PD, Mr and Mrs C say (plausibly in my view) that Fractional Club membership was marketed and sold to them at both of the Time(s) of Sale as something that offered them more than just holiday rights, on the balance of probabilities, and whilst taking everything into account, I think their purchases were motivated by their share in the Allocated Property(s) and the possibility of a profit, as that share was one of the defining features of membership that marked it apart from the more ‘standard’ type of timeshare available to them.

Mr and Mrs C have not said or suggested, for example, that they would have pressed ahead with the purchases in question had the Supplier not led them to believe that Fractional Club membership was an appealing investment opportunity. Indeed, they have expressly said they wouldn’t have:

“...We feel that we were completely misinformed about the product. Had we known it was a Timeshare and not an investment we would never have bought into it.”

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 with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

Conclusion

As I've said, given that it was likely that the sale of Fractional Club 1 and 2 were both pitched as an investment in breach of Regulation 14(3), and I think it likely that the potential for a financial return was an important driver for Mr and Mrs C in their purchase of both the Fractional Club 1 and 2 memberships, it follows that the associated credit relationship under the Credit Agreement 1 and 2 with the Lender was rendered unfair to Mr and Mrs C as a result. And with that being the case, and having taken everything into account, I think it is fair and reasonable that I uphold this complaint.

Putting things right

In the PD I set out what I considered to be a fair and reasonable way for the Lender to calculate and pay compensation to Mr and Mrs C. The Lender made no submissions relating to my proposed methodology, so I see no reason to change what I set out.

Having found that Mr and Mrs C would not have agreed to purchase either Fractional Club 1 or Fractional Club 2 memberships 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 either of the Fractional Club memberships (i.e., not entered into the Purchase Agreement 1 or 2), and therefore not entered into the Credit Agreement 1 or 2, provided Mr and Mrs C agree to assign to the Lender the Fractional Points (that relate to these purchases) or hold them on trust for the Lender if that can be achieved.

Here's what I am directing the Lender to do to compensate Mr and Mrs C with that being the case – whether or not a court would award such compensation:

- (1) The Lender should refund the repayments Mr and Mrs C made to it under Credit Agreement 1, and the subsequent repayments they made under Credit Agreement 2.
- (2) The balance (if there is any) of Credit Agreement 2 should be cancelled.
- (3) In addition to (1), the Lender should also refund 35%⁴ of the annual management charges Mr and Mrs C paid as a result of their Fractional Club 1 and 2 memberships (if any).
- (4) The Lender can deduct
 - i. The value of any promotional giveaways that Mr and Mrs C used or took advantage of; and
 - ii. The market value of the holidays* Mr and Mrs C took using their Fractional Club 1 and 2 fractional points (if any).

⁴ As a result of a separate complaint regarding their very first Fractional Club membership (dated 18 June 2013) being upheld by this Service, Business B was directed to refund 65% of the management charges paid by Mr and Mrs C from 1 September 2013 onwards. So, to ensure Mr and Mrs C are not over-compensated, the amount that I am requiring the Lender to refund in relation to their on-going management charges reflects that previous award.

(1-4 above result in the 'Net Repayments')

- (5) Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.
- (6) The Lender should remove any adverse information recorded on Mr and Mrs C's credit files in connection with the Credit Agreement 1 and Credit Agreement 2.
- (7) If Mr and Mrs C's Fractional Club 2 membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.

*I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Mr and Mrs C 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(s) 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 against Shawbrook Bank Limited and direct it to calculate and pay fair compensation to Mr and Mrs C as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs C and Mr C to accept or reject my decision before 1 October 2025.

Chris Riggs
Ombudsman