

The complaint

Ms E's complaint is, in essence, that Clydesdale Financial Services Limited trading as Barclays Partner Finance (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with her 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.

Although the timeshare in question was bought in the joint names of Ms E and Mr S, the credit agreement was in Ms E's sole name, so she is the only eligible complainant here. I will, however, refer to both Ms E and Mr S where it is appropriate to do so.

What happened

Ms E and Mr S were members of a timeshare from a timeshare provider (the 'Supplier') having bought a number of products from it over time.

Their first full membership was in the Vacation Club (the 'VC'). Between 2009 and 2011 they purchased a total of 4,001 VC points.

As VC members, every year they could use their points in exchange for holidays at the Supplier's holiday resorts. Different accommodation had different points values, depending on factors such as location, size, and time of year. So, for example, a larger apartment in peak season would cost more to a member in their points than a smaller apartment outside of school holiday periods.

On 16 August 2012, Ms E and Mr S traded in their VC points towards the purchase of a different type of timeshare – the Fractional Property Owners Club ('FPOC'). They bought 4,140 fractional points for £64,810, but after the trade-in value the Supplier gave to their VC points, they ended up paying £9,386 for this FPOC membership.

FPOC membership differed from their existing VC membership. The two significant differences were that it had a shorter membership term (16 years compared to an end date of 2034 for the VC membership) and it was also asset backed – which meant it gave Ms E and Mr S more than just holiday rights. It also included a share in the net sale proceeds of a property named on their purchase agreement after their membership term ends.

Ms E paid for this FPOC membership by taking finance from a different lender. These purchases of VC points and the FPOC membership are not the subject of this complaint and are included here for background purposes only.

Ms E and Mr S traded in their fractional points¹ towards the purchase of a new FPOC membership (hereon in referred to as the 'Fractional Club') from the Supplier on 12 August 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 4,190 fractional points at a cost of £64,810 but after the trade-in value given to their existing 4,140 fractional points, they ended up paying £6,850 (the 'Purchase Agreement') for the new

¹ In trading in their FPOC membership Ms E and Mr S gave up their rights to their share of the sale proceeds of the FPOC's named property.

Fractional Club membership.

Fractional Club was, like their previous FPOC membership, asset backed – so it included a share in the net sale proceeds of a property named on their Purchase Agreement (the ‘Allocated Property’) after their membership term ends.

Ms E paid for their Fractional Club membership by taking finance of £6,850 from the Lender in her sole name (the ‘Credit Agreement’).

Part of their Fractional Club membership was traded in by Ms E and Mr S towards a further purchase in 2017, but again, that further purchase is not the subject of this complaint and is included here for background purposes only.

Ms E – using a professional representative (the ‘PR’) – wrote to the Lender on 4 February 2020 (the ‘Letter of Complaint’) to raise a number of different concerns about the Time of Sale and the associated credit relationship with the Lender. As those concerns haven’t changed since they were first raised, and as both sides are familiar with them, it isn’t necessary to repeat them in detail here beyond the summary above.

The Lender did not send Ms E a substantive response to her complaint within the eight weeks required by the Regulator, so the PR referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

Ms E disagreed with the Investigator’s assessment and asked for an Ombudsman’s decision – which is why it was passed to me.

As part of the PR’s submissions in this case, it sent this Service a statement from Ms E and Mr S dated 25 September 2019. This set out their recollections of their entire relationship with the Supplier and the purchases they had made. The following is an extract of this statement insofar as it relates to their fractional points purchases:

“In 2012 we were in Spain and were invited to an update meeting to discuss a new product called fractional points. This turned into another long-high-pressured sales presentation where we were offered the opportunity to obtain a good deal on points if we purchase that day.

The representatives advised that fractional points were an investment in property that would be sold in the future. We would then have our fraction of the investment plus any profit from the sale of the market value. We would also have a guarantee [sic] exit from our timeshare contract.”

On the basis of the above we purchased 4140 fractional points on the 16th of August 2012 with a [redacted] consolidated loan £9386.

We were in Spain in 2014 and on this occasion the representatives advised that we should be exchanging more of our European points for fractional points. We were again advised that we should be investing in fractional phase 2 of the fractional investment as you did not have to pay fees per points and would be saving money. This is not the case. The fees have increased year on year and do not reflect the investment that we have made or the product that we were promised.

The representatives advised that we would again be investing in property and we would have a return on this investment when the property was sold in approximately 15 years. We were now reflecting on the future and were keen to have an exit date in the future from our timeshare contract. The representatives advised that we were guaranteed and [sic] exit date on the sale of our fractional properties.

On the advice of the representatives and believing we would have a guaranteed exit date from our contract, we purchased 4190 fractional points on the 12 August 2014 for the cost of £6850. This was funded through Barclays Partner Finance. [...]"

We were in Spain in 2017 on holiday when we were invited to a meeting with the representatives. The representatives advised that they now had suites available for fractional investment. The suites were a more lucrative investment and would give us an excellent return on our monies. Additionally, they were very sought after and would sell easily.

We could use these luxurious suites for our holidays every second year until the sale date.

We were offered a good price if we purchased on the day. Believing that we would make a good return on the sale we decided to make a final investment on 2330 fractional points on 14/08/17 for the cost of £10,449 [...]"

I couldn't see that the Lender had been given the opportunity to consider the statement, so I sent it a copy, and asked it to review its position on the merits of Ms E's complaint in light of what it contained. I also asked it to provide some more information about Ms E and Mr S's timeshare purchases.

It provided the requested information, and as regards the merits of Ms E's complaint, it maintained that it didn't think it ought to be upheld. It thought this because, in summary:

- There is no evidence to suggest that Ms E and Mr S were overly pressured into entering the purchase agreement or the finance agreement. Ms E has, over time, been invited to 16 presentations, and has declined to attend 3 times, attended 13 and purchased on 8 of these.
- Ms E has provided no details as to what sales material she saw or what returns she was told she could expect.
- What Ms E has said in her statement is a factual representation of how the Fractional Club membership worked.
- Ms E confirmed they were reflecting on their future and were keen to have an exit date from the timeshare. This clearly shows her motivation to make the purchase.
- A contact note completed by the Supplier following the Time of Sale states:
 - *"Just a quick update on the new deal just done in the name of [Ms E and Mr S] A lovely couple use there [sic] points with us very well they have a booking for the Apollonium in Turkey for next year but are on the waiting list for a 3 bedroom as they have been given a 2 bed for now, Love there [sic] holidays with us."*
- Where Ms E says she would not have to pay fees per points and would be saving money, this relates to the fact that there would be no booking fee, and not in relation to the annual membership fees.
- The membership was not sold as an investment. Ms E signed to confirm they had read, understood and agreed to the sale, with documents received explaining that the Fractional Club was not a financial investment, and that its primary purpose was for holidays.
- In buying the Fractional Club, Ms E would not have viewed the same presentation as they had done previously for the FPOC. The Fractional Club sales material and presentation slides do not promote it as a financial investment. The presentation material made it clear to potential purchasers that the 'savings' and 'return' were in

the context of savings and return on holidays and not promoting the timeshare as a financial investment.

- The signed documentation included:
 - “We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that [the Supplier] makes no representation as to the future price or value of the Fraction.”
- Ms E was provided with a Fractional Property Owners Club – Information Statement which in Part 1 (third paragraph from the bottom of page 2) states:
 - “...Fractional Rights have been designed to be used and enjoyed and not bought with the expectation or necessity of future financial gain...”
- and later on, page 3 of 10 (2nd paragraph):
 - “...On sale, the Trustee and the Manager are entitled to the percentage fees set out in Rule 9 in the Rules. The Vendor, Manager and the Trustee are unable to give any guarantees on the ultimate sales price as this depends on many factors including the state of the property market and supply and demand at the time of sale...”
- Finally, Page 8 of the Information statement states:
 - “5. Primary Purpose... The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for direct purposes of a trade in nor as an investment in real estate. CLC makes no representation as to the future price or value of the Allocated Property or any Fractional rights...”

The Lender concluded that, having considered the claims raised verses the evidence available, it was satisfied its position is fair and reasonable, and as such it did not agree with the allegations raised by Ms E.

The provisional decision

Having considered everything that had been submitted, I thought that the complaint ought to be upheld. So, I set out my initial thoughts in a provisional decision (the ‘PD’) and invited both sides to submit any new evidence or arguments that they wished me to consider before I made my final decision.

In my PD I said:

“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 with that being the case, it is not necessary to set it out here. But if either side would like me to confirm what I think that context is, they can let me know in response to this provisional decision.

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.

And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations') by marketing and/or selling Fractional Club membership to Ms E and Mr S as an investment, which, in the circumstances of this complaint, rendered the credit relationship between Ms E and the Lender unfair to her 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 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 Ms E in the same or a better position than she would otherwise be in.

The witness testimony

As set out, a statement from Ms E and Mr S was sent to this Service as part of the PR's submissions. It is not signed, and is dated 25 September 2019. I have thought about how much weight I can place on the contents of the statement when considering the merits of Ms E's complaint.

As I've said, the statement is dated 25 September 2019, but it was not sent to this Service until October 2023. But I can see on the statement that a booking was made with Ms E and Mr S by the PR on 24 September 2019, so it appears likely that a telephone call was set up to take details for the statement on that date. And this was some five months prior to the Letter of Complaint, and the statement was probably prepared as part of the PR's case preparation. Indeed, the Letter of Complaint is generally consistent with the contents of the statement, which leads me to think the statement was used to inform the Letter of Complaint. So, on balance, I am satisfied that the statement was prepared then.

But the statement does appear to have been prepared and written by the PR, and as I've said, was probably taken during a telephone conversation. So, I am mindful of the risk that Ms E and Mr S may have been guided through the process, and the associated risk that what has been written may not be their own specific recollections.

But I think that risk is low, as I can see it contains personal information about their purchasing history that only Ms E and Mr S would have known, so I have no doubt that Ms E and Mr S had a significant input into its contents. It is also not unusual for statements to be prepared on complainants' behalf by professional representatives. Taking everything into account I am satisfied that it is a record of Ms E and Mr S's recollections of their relationship with the Supplier.

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

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

evidence Ms E and Mr S have provided. Paragraph 40 reads as follows:

“At the start of the hearing, I raised with Counsel the issue of how the Court should assess his oral evidence in light of his communication difficulties. Overnight, Counsel agreed a helpful note setting out relevant case law, in particular the commercial case of Gestmin SPGS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) (Leggatt J as he then was at paragraphs 16-22) placed in context by the Court of Appeal in Kogan v Martin [2019] EWCA Civ 1645 (per Floyd LJ at paragraphs 88-89). In the context of language difficulties, Counsel pointed me to the observations of Stuart-Smith J in Arroyo v Equion Energia Ltd (formerly BP Exploration Co (Colombia) Ltd) [2016] EWHC 1699 (TCC) (paragraphs 250-251). Counsel were agreed that I should approach Mr Smith’s evidence with the following in mind:

- a. “In assessing oral evidence based on recollection of events which occurred many years ago, the Court must be alive to the unreliability of human memory. Research has shown that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses’ recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts (Gestin and Kogan).*
- b. A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party’s sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence (Kogan).*
- c. The task of the Court is always to go on looking for a kernel of truth even if a witness is in some respects unreliable (Arroyo).*
- d. Exaggeration or even fabrication of parts of a witness’ testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony (Arroyo).*
- e. The mere fact that there are inconsistencies or unreliability in parts of a witness’ evidence is normal in the Court’s experience, which must be taken into account when assessing the evidence as a whole and whether some parts can be accepted as reliable (Arroyo).*
- f. Wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, may be neither reliable nor even truthful, the difficulty of discerning where the truth actually lies, what findings he can properly make, is often one of almost excruciating difficulty yet it is a task which judges are paid to perform to the best of her ability (Arroyo, citing Re A (a child) [2011] EWCA Civ 12 at para 20).”*

I have thought about how much weight I can place on this statement when considering the merits of Ms E and Mr S’s complaint. And having done so, I feel able to place weight on its contents. I do so whilst being cognisant of the fact that memories can fade over time, and that inconsistencies in evidence are a normal part of someone trying to remember what happened in the past. So, I’m not surprised that there may be some inconsistencies between what they say has happened over the course of their purchases, and what other evidence

shows. The question to consider, therefore, is whether there is a core of acceptable evidence from Ms E and Mr S, such that the inconsistencies have little to no bearing on whether their testimony can be relied on, or whether such inconsistencies are fundamental enough to undermine, if not contradict, what the Supplier was likely to have said and/or done during the sale of the Fractional Club, or their other purchases.

I don't, for example, find it in any way material that Ms E and Mr S appear to have confused what the Supplier told them about the fees they would or would not have to pay as part of their Fractional Club membership. This is a detail that is not, in my view, material to whether the membership was sold as an investment or not or whether the testimony can be relied on. I don't think this fundamentally undermines the crux of the statement, which sets out that Fractional Club was bought because of its investment potential.

So, overall, I am satisfied that I can place weight on Ms E and Mr S's testimony when considering what most likely happened at the Time of Sale.

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

Having considered the entirety of the credit relationship between Ms E 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;
2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;
3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; and
4. The inherent probabilities of the sale given its circumstances.

I have then considered the impact of these on the fairness of the credit relationship between Ms E and the Lender.

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

The Lender does not dispute, and I am satisfied, that Ms E and Mr S's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling Fractional Club membership as an investment. This is what the provision said at the Time of Sale:

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

But Ms E says that the Supplier did exactly that at the Time of Sale – saying, in summary, that they were told by the Supplier that Fractional Club membership was the type of investment that would increase in value.

The term "investment" is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and 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.

Ms E and Mr S's share in the Allocated Property clearly 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 it is important to note at this stage that 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 Ms E and Mr S as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Ms E and Mr S, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Ms E and Mr S as an investment.

However, 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 membership

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

- 1. A document called the 2013/2014 Sales Induction Training (the '2013/2014 Induction Training');*
- 2. Screenshots of 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 Ms E and Mr S.

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

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

• Re-visit the idea of renting a house and talk them through the example of renting a home for £500 highlighting the fact of no return

• Refer to their decision to purchase a property as it made more financial sense to own than rent because, not only are they are building equity in their property, they can also continue to enjoy living in their home once it is paid for

• Ask: “if it cost a little more to own rather than rent would they be happy to pay the extra to own?” (increase amount of owning and continue to do this for a couple of times until they don't agree.

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

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

CLOSE:

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

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

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

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

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

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

CLOSE:

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

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

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

SUMMARISE LAST SLIDE:

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

[...]

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

more details for you.

[...]

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

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

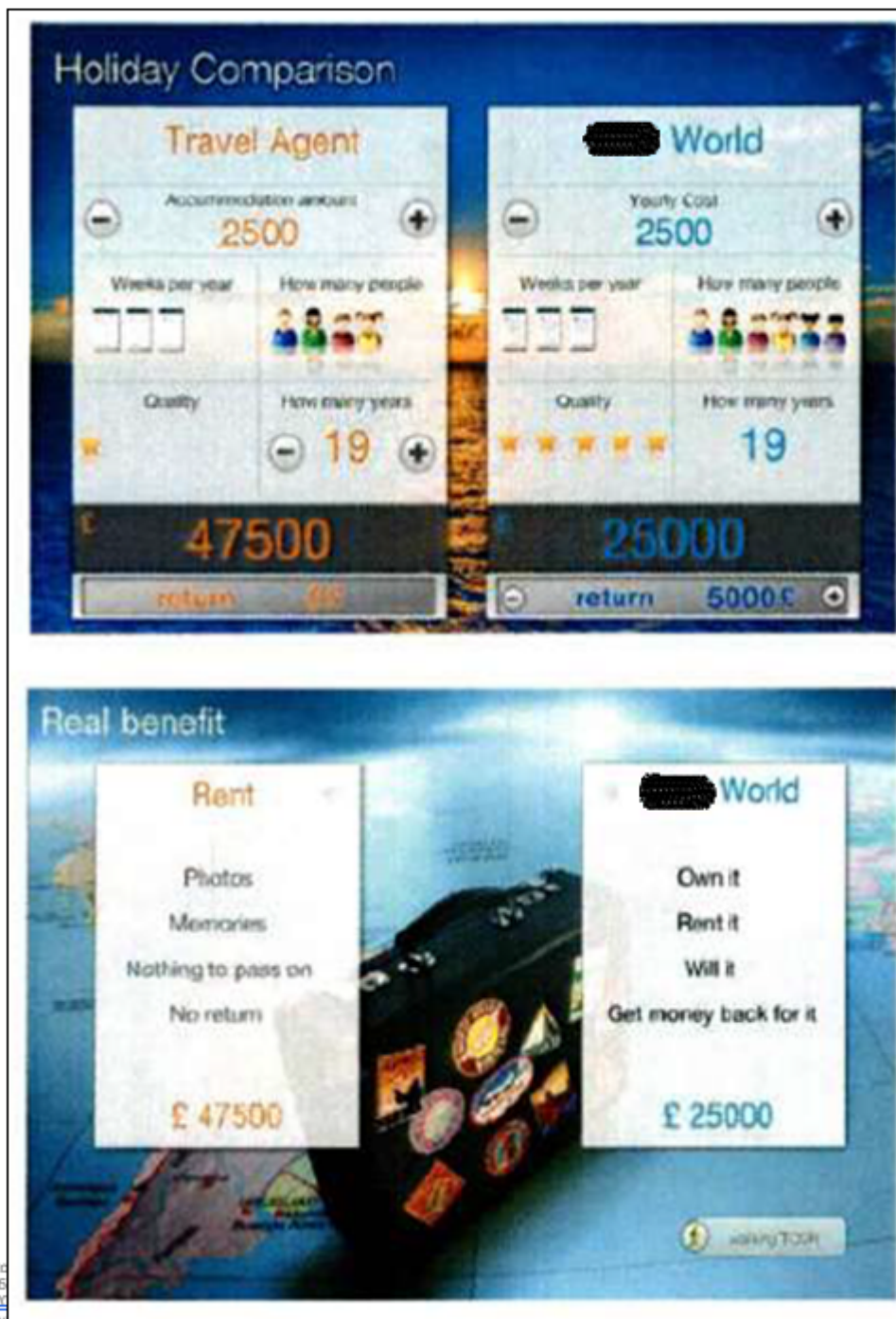
“T/O will explain slides emphasising that they only pay a fraction of maintaining the entire property. It also ensures property is kept in peak condition to maximise the return in 19 years['] time.

[...]

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

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

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



[...]

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

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

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

And to consumers (like Ms E and Mr S) 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.

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. And the Lender has made this point to me in its latest response. However, if I were to only concern myself with express efforts to quantify to Ms E and Mr S the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

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

So, if a supplier implied to consumers that future financial returns (in the sense of possible profits) from a timeshare were a good reason to purchase it, I think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment.

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 Ms E and Mr S), I think it is more likely than not that the Supplier did, at the very least, imply that future financial returns (in the sense of possible profits) from a Fractional Club membership were a good reason to purchase it – which, broadly speaking, is consistent with Ms E and Mr S’s recollections of the sale.

But in addition to what they were likely told at the Time of Sale, it is important to note that this was the second ‘fractional’ membership they had purchased – they went through a sales presentation for their FPOC membership two years earlier. As the Lender has correctly said, the presentation they would have been shown for the FPOC, which was the Supplier’s first version of the fractional membership, would have been different to that which they were shown for the Fractional Club. And although I am not considering a complaint about the FPOC membership and how it was sold, when looking at the circumstances as a whole I think it is fair to consider what Ms E and Mr S were likely told about fractional memberships

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

in 2012, as it is likely that this would have set the tone for that, and their subsequent fractional purchases. Although there were subtle differences in the product and how they were sold, they were after all, all fractional memberships which were asset-backed with an Allocated Property designed to provide members with the net proceeds of its sale value.

And, as I go on to explain below, when their FPOC membership was marketed to Ms E and Mr S in 2012, it was likely to have given them the impression that the membership was an investment.

Alongside the information this Service has been given about the training and sales presentations that were associated with the selling of the type of Fractional Club I am considering here, we have also been provided training material used to prepare its sales representatives – including a document called “2011 Spain PTM FPOC 1 Practice Slides Manual” (the ‘2011 Fractional Training Manual’).

As I understand it, the 2011 Fractional Training Manual was used throughout the sale of the Supplier’s first version of the FPOC. It isn’t entirely clear whether Ms E and Mr S would have been shown the slides included in the Manual as part of their sales presentation in 2012, but it seems to me to be reasonably indicative of:

- (1) the training the Supplier’s sales representatives would have got before selling Ms E and Mr S’s FPOC membership; and
- (2) how the sales representatives would have framed the sale of FPOC membership to Ms E and Mr S.

Having looked through the manual, my attention is drawn to page 6 (of 41) – which includes the following slide on it:



This slide titled “Why Fractional?” indicates that sales representatives would have taken Ms E and Mr S 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”

It was the first slide in the 2011 Fractional Training Manual to set out any information about FPOC membership and I think it suggests that sales representatives were likely to have made the point to Ms E and Mr S that membership combined the best of (1) and (2) – which included choice, flexibility, convenience and, significantly, an investment they could use, enjoy and sell before getting money back.

Having looked through the 2011 Fractional Training Manual, it seems to me that there were 10 slides on how Fractional Club membership worked before the slides moved onto sections titled "Peace of Mind", "Resort Management" and "Which Fractional". And as 5 of the 10 slides look like they focused on holidays, there seems to me to have been a fairly even split during the Supplier's sales presentations between marketing membership of the Fractional Club as a way of buying an interest in property and as a way of taking holidays.

However, even if more time was spent on marketing membership of Fractional Club membership as a way of taking holidays rather than buying an interest in property, as the slides above suggest, in my view, that the Supplier's sales representatives would have probably led prospective members to believe that a share in an allocated property was an investment (after all, that's what the slide titled "Why Fractional" expressly described it as), I think the Supplier's sales representative was likely to have led Ms E and Mr S to believe that FPOC membership was an investment that may lead to a financial gain (i.e., a profit) in the future.

So, as I've said, Ms E and Mr S were presented with the opportunity to purchase the FPOC membership in 2012 in a way that was most likely to have suggested, either explicitly or implicitly, that it could lead to a financial gain (i.e. a profit) on the sale of the allocated property, with their testimony supporting that this was the case. And I can't see that anything they were told in the 2014 presentation would have dissuaded them from that idea.

When thinking about what was likely to have happened at the Time of Sale in 2014 it is important to consider what Ms E and Mr S gained when they traded in their FPOC for the Fractional Club membership. They had 4,140 fractional points, and only got an additional 50 from the purchase, with a new Allocated Property, and paid £6,850 for this. So, the Allocated Property was plainly a major part of the product's features and, in this instance, is a justification for the price of Ms E and Mr S's Fractional Club membership.

The investment element of membership was plainly a major part of its rationale and justification for its cost. And as it was designed to offer its members a way of making a financial return from the money they invested – whether or not, like every investment, the return was more, less or the same as the sum invested - it would not have made much sense if the Supplier included the features in the product without relying on them to promote sales, especially when the reality was that the principal benefits of the move to Fractional Club were its investment element i.e., the share in the net sale proceeds of the Allocated Property, and the shorter membership term.

Further, I find it fanciful that the Supplier would not have highlighted the possible returns available to Ms E and Mr S when selling Fractional Club membership to them given that they already had an FPOC membership. And as Ms E and Mr S were laying out a considerable sum to make the purchase, I think it's clear that they expected to get a significant sum back – after all they got very little extra holiday entitlement - so it seems common sense that the change in Allocated Property, and the potential return was an important factor in the sale.

The Lender has said that the Supplier included the specific disclaimers to show that it didn't present Fractional Club membership as an investment. But these disclaimers were contained in documents which were given to Ms E and Mr S to sign after they had been through the sales presentation, and after they had agreed to make the purchase on the basis of the presentation and what they had been told by the Supplier. But it's ultimately difficult to explain why it was necessary to include such disclaimers if there wasn't a very real risk of the Supplier marketing and selling membership as an investment, given the difficulty of articulating the benefit of fractional ownership in a way that distinguishes it from other timeshares from the viewpoint of prospective members. And this is especially true when customers, such as Ms E and Mr S who were existing fractional points members, made the

purchase and only got a very small increase in their holiday rights. So, I think it's reasonable to assume there was likely some discussion at the Time of Sale as to why they should purchase this new membership in particular. In other words, some discussion of why Ms E and Mr S ought to purchase the Fractional Club in the way that they did.

So, when bearing this in mind, and given what I've said about the way I think the Fractional Club was sold and/or marketed to them in 2014, I think it is likely that, on the balance of probabilities, the Supplier's sales representative led Ms E and Mr S to believe that the Fractional Club membership, which was an upgrade of their FPOC, was also an investment that may lead to a financial gain (i.e., a profit) in the future.

And with that being the case, I do not find Ms E and Mr S either implausible or hard to believe when they suggest 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 so far, I think that is likely to be what Ms E and Mr S 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 the Time of Sale.

Was the credit relationship between the Lender and the Consumer rendered unfair?

Having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Ms E and the Lender under the Credit Agreement and related Purchase Agreement, as 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 that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Ms E and the Lender that was unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and Ms E into the Credit Agreement is an important consideration.

On my reading of Ms E and Mr S's testimony, the prospect of a financial gain from their fractional memberships was an important and motivating factor when they decided to go ahead with each purchase. It seems to me that it is likely, from a combination of what they would likely have been told, what they have said happened, and what they actually did, that all of their fractional membership purchases were following the same pattern and overall aim, and were all linked to the potential profit at the end of each of the membership terms. After all, when you consider what happened at the Time of Sale, they traded in 4,140 fractional points to get only 50 more and paid £6,850 for this. And in doing so they didn't get any more holiday weeks, just a different Allocated Property. So, I think it likely that the potential increase in profit from the new Allocated Property was what they were referring to in their statement when they said:

"The representatives advised that we would again be investing in property and we would have a return on this investment when the property was sold in approximately 15 years."

That doesn't mean they were not interested in holidays. Their own testimony and holiday reservation history demonstrates that they quite clearly were, which is unsurprising given the nature of the product at the centre of this complaint. But as Ms E and Mr S say (plausibly in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit, as that change in Allocated Property was one of the defining

features of the membership that marked it apart from their existing fractional membership.

I do acknowledge that the change from FPOC to Fractional Club meant that Ms E and Mr S would no longer have to pay a booking fee each time they booked a holiday with their points. But while I accept that would have saved them some money, I cannot see that the savings would have been equivalent to the £6,850 they ended up paying for the new membership. And as regards the reduced membership term, it does seem that the defined membership term of the fractional memberships was attractive to Ms E and Mr S when compared to the longer term of the VC, but I don't think this was an important consideration for them when they made this particular purchase. This is because they were already in a fractional membership, so there wouldn't have been any significant change to the length of the term when they purchased the Fractional Club membership at the Time of Sale.

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

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

Did the unfairness caused by the purchase of the Fractional Club end when it was partially traded in for a further purchase?

As I've said, on 14 August 2017, Ms E and Mr S traded in one of their Fractional Club fractions (840 points), paying an additional £10,449 for the purchase of 2,330 fractional points in a bi-annual 'Signature Collection' membership, thereby 'upgrading' and replacing part of their original Purchase Agreement. This was paid for by a new credit agreement with a different lender.

As a result of their purchase of the Signature Collection, it is necessary to consider whether the unfairness caused to Ms E from the purchase of the Fractional Club at the Time of Sale continued, and if it did continue, whether there were ongoing consequences that I need to take into account.

I think there was some unfairness carried over into the new credit agreement as 840 fractional points were traded in for the new membership, and that would normally be taken into account when considering redress. But a complaint about the sale of the Signature Collection membership and the credit relationship between Ms E and the lender relating to that purchase has been made, and is also being considered by me. And I intend to uphold that complaint, and as part of my proposed redress in that case I am minded to direct the lender that funded the Signature Collection purchase to refund the loan payments and the annual management charges that Ms E and Mr S actually paid that relate to that Signature Collection membership. "

I then set out what I considered to be a fair and reasonable way for the Lender to calculate and pay fair compensation to Ms E.

The responses to the provisional decision

The PR, on Ms E's behalf, accepted the provisional decision, and said that Ms E did not want to have her FPOC membership reinstated.

The Lender also accepted what I had said in the provisional decision.

As the deadline has passed for any further submissions, the matter has come back to me for a final decision.

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.

As neither side has disagreed with what I said in the provisional decision, as set out above, and having reconsidered everything, I see no reason to depart from my provisional findings.

I remain satisfied that this complaint ought to be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by selling and/or marketing the Fractional Club membership to Ms E and Mr S as an investment. And this breach rendered the associated credit relationship between Ms E and the Lender unfair to her under Section 140A of the CCA.

Putting things right

Having found that Ms E and Mr S 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 Ms E was unfair under Section 140A of the CCA, I think it would be fair and reasonable to put her back in the position she would have been in had they not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Ms E and Mr S agree to assign to the Lender their existing 3,350 fractional points or hold them on trust for the Lender if that can be achieved.

Ms E and Mr S were existing FPOC members, and their membership was traded in against the purchase price of the Fractional Club membership. Under FPOC, they had 4,140 fractional points. And, like their Fractional Club membership, they had to pay annual management charges as part of their FPOC membership. So, had Ms E and Mr S not purchased the Fractional Club, they would have always been responsible for paying an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Ms E and Mr S from the Time of Sale as part of Fractional Club should amount only to the difference between those charges and the annual management charges they would have paid as part of their FPOC Membership.

Although I think there was likely to be some ongoing unfairness caused to Ms E in relation to the fractional points that were rolled into the Signature Collection membership, as this will be accounted for in the redress in the other complaint, it does not need to be considered here.

I am conscious that under their FPOC membership, they were required to pay a booking fee for any holiday taken using that membership's points. So, this also needs to be taken into

account.

So, here's what I am directing the Lender to do to compensate Ms E with that being the case – whether or not a court would award such compensation:

- (1) The Lender should refund Ms E's repayments to it under the Credit Agreement, including any sums paid to settle the debt.
- (2) In addition to (1), the Lender should also refund the difference between the annual management charges paid after the Time of Sale under the Fractional Club and what Ms E and Mr S's annual management charges would have been under FPOC had they not purchased Fractional Club.
- (3) The Lender can deduct:
 - i. The value of any promotional giveaways that Ms E and Mr S used or took advantage of; and
 - ii. The market value of the holidays* Ms E and/or Mr S took using the Fractional Club membership if the points value of the holiday(s) taken amounted to more than the total number of fractional points they would have been entitled to use at the time of the holiday(s) as ongoing FPOC members. However, this deduction should be proportionate and relate only to the additional fractional points that were required to take the holiday(s) in question.

For example, if Ms E and/or Mr S took a holiday worth 2,550 fractional points after the Time of Sale (using their Fractional Club points) and they would have been entitled to use a total of 2,500 fractional points under FPOC membership at the relevant time, any deduction for the market value of that holiday should relate only to the 50 additional fractional points that were required to take it. But if they would have been entitled to use 2,600 fractional points under FPOC, for instance, there shouldn't be a deduction for the market value of the relevant holiday.
 - iii. The booking fee that would have been applicable to any holiday Ms E and/or Mr S took using their Fractional Club points had that holiday been taken using their FPOC membership.

(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 Ms E's credit file in connection with the Credit Agreement reported within six years of this decision.
- (6) If Ms E and Mr S's Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.

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

**HM Revenue & Customs may require the Lender to take off tax from this interest. If that's

the case, the Lender must give the consumer a certificate showing how much tax it's taken off if they ask for one.

My final decision

I uphold this complaint and direct Clydesdale Financial Services Limited trading as Barclays Partner Finance to calculate and pay fair compensation to Ms E as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms E to accept or reject my decision before 12 December 2025.

Chris Riggs
Ombudsman