DRN-6003090

The complaint

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

What happened

Mr and Mrs B had been long-standing members of a timeshare provider (the 'Supplier') after making several purchases totalling 4,001 of the Supplier's Vacation Club ('VC') points over time. 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 26 September 2013 (the 'Time of Sale') whilst on holiday, Mr and Mrs B purchased membership of a different type of timeshare (the 'Fractional Club') from the Supplier. They entered into an agreement with the Supplier to buy 4,190 fractional points for £57,090. But after trading in their existing 4,001 VC points, they ended up paying £13,079 (the 'Purchase Agreement') for their Fractional Club membership.

Unlike the VC, Fractional Club membership was asset backed – which meant it gave Mr and Mrs B more than just holiday rights. It also included a share in the net sale proceeds of a property named on their Purchase Agreement (the 'Allocated Property') after their membership term ends.

Mr and Mrs B paid for their Fractional Club membership by taking finance of £13,079 from the Lender in their joint names (the 'Credit Agreement').

Mr and Mrs B – using a professional representative (the 'PR') – wrote to the Lender on 30 August 2018 (the 'Letter of Complaint') to raise a number of different concerns about their Fractional Club membership and the associated Credit Agreement. 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 dealt with Mr and Mrs B's concerns as a complaint and issued its final response letter on 13 November 2018, rejecting it on every ground.

Mr and Mrs B then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, upheld the complaint on its merits.

The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr and Mrs B at the Time of Sale in breach 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 credit relationship between the Lender and Mr and Mrs B was rendered unfair to them for the purposes of Section 140A of the CCA.

The Lender disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

The provisional decision

Having considered everything that had been submitted, I agreed with the Investigator in that I thought Mr and Mrs B's complaint ought to be upheld, but I had expanded somewhat on the reasons for doing so. 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.

In the PD I said:

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

And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr and Mrs B as an investment, which, in the circumstances of this complaint, rendered the credit relationship between them and the Lender unfair to them for the purposes of Section 140A of the CCA.

However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I recognise that there are a number of aspects to 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 B in the same or a better position than they would otherwise be in.

Mr and Mrs B's witness testimony

As part of the PR's submissions to this Service, on 11 October 2023 it sent us a witness statement from Mr and Mrs B. This set out their recollections of their relationship with the Supplier, from their purchases of VC points until their purchase of the Fractional Club at the Time of Sale. It also set out the problems they were experiencing with their VC membership. As far as is relevant to the Time of Sale, the statement said:

> *"In September 2013, we were on holiday in Turkey in Kusadasi. Again, the representatives came up to us and said they had to take us for a quick breakfast meeting. By this point, we knew fine well that it was not going to be a quick meeting but we ended up going anyway because you just feel totally pressured to do it. We ended up going along and they showed us this new property to buy. They kept trying to sell us this property and kept trying to get us to buy into it, but we just kept saying no. Then they told us that we could buy part of it and that they would then sell it, and we would get our money back at the end. They said that the property was valued at about £40,000 right now and that it would 100% increase in value because it was a property. They told us this was an investment and told us there would be no more liability at the end of it, and that it would be a guaranteed exit entirely."*

I have considered how much weight I can place on this statement when assessing the merits of Mr and Mrs B's complaint.

The statement, although dated 29 March 2018, was only sent to this Service as part of the PR's submissions on 11 October 2023. So, I have considered whether it was written later than the date indicated. But while acknowledging that it is possible, I don't think it is probable. I think it was likely to have been written during a telephone call with Mr and Mrs B on 29 March 2018 as part of the PR's case preparation. I think this because the statement contains date-stamp evidence of the arrangements to make the call, and that the 'CS' was taken on that date. And the Letter of Complaint (written on 30 August 2018) generally follows the contents of the statement, so I think it likely that the statement was used to inform it.

But, as I've said, the statement appears 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 Mr and Mrs B 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 and their frustrations with their memberships that only Mr and Mrs B would have known about, so I have no doubt that Mr and Mrs B 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 Mr and Mrs B's recollections of their relationship with the Supplier.

When considering how much weight I can place on Mr and Mrs B'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 Mr and Mrs B 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 she 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)."*

The question to consider, therefore, is whether there is a core of acceptable evidence from Mr and Mrs B. And having considered their testimony, whilst being mindful that they are recalling events which were between 2004 and up until 2013, which was five years before it was written, and that memories can fade over time, I am satisfied that I am able to place weight, and rely on, what Mr and Mrs B have said.

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 B 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 Mr and Mrs B 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 Mr and Mrs B's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or

selling Fractional Club membership as an investment. This is what the provision said at the Time of Sale:

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

But Mr and Mrs B say 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 only increase in value as it was in property.

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.

Mr and Mrs B'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 Mr and Mrs B 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.

And 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 B, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs B 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 an 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 B.*

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

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

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

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

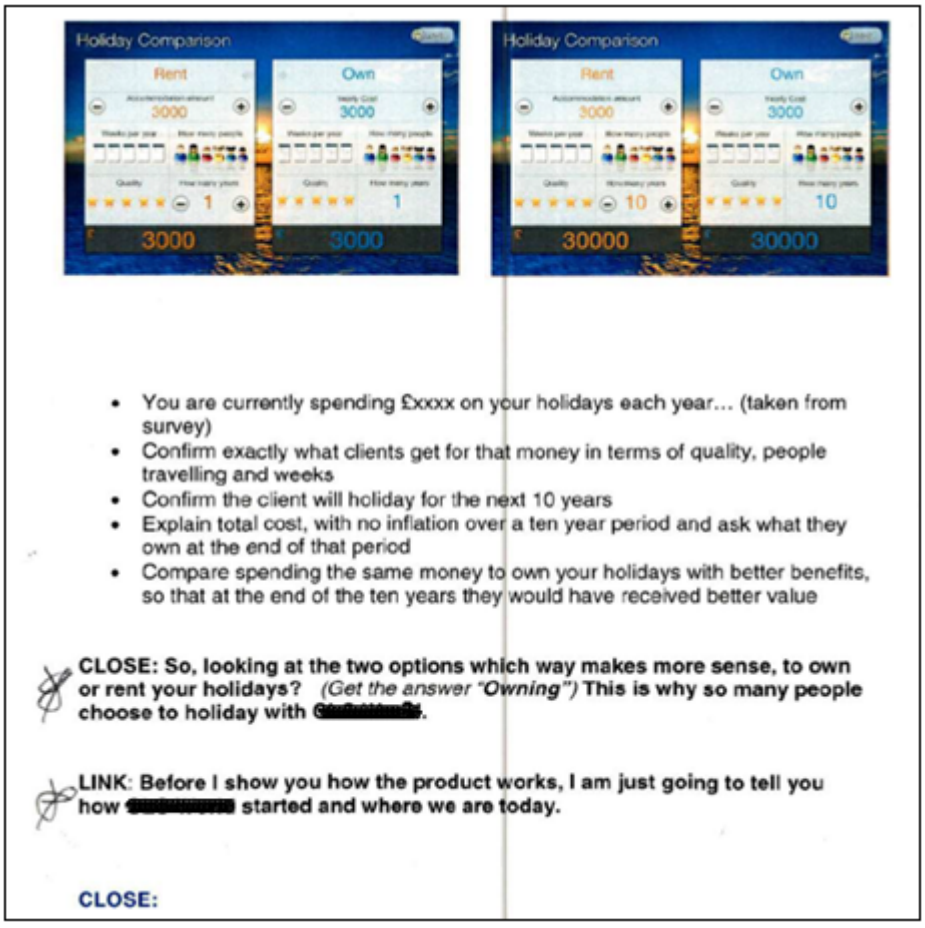
LINK: Now let me show you the relevance this has when it comes to your holidays because what you are currently doing is …

CLOSE:

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

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

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



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

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

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

CLOSE:

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

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

***mortar** […]*

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

SUMMARISE LAST SLIDE:

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

[…]

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

[…]

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

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

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

[…]

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

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

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

[…]

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

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

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

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

And to consumers (like Mr and Mrs B) 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 in the training slides. But Mr and Mrs B have set out in their statement that the Supplier did place a value on the purchase price of the Allocated Property:

> *"They said that the property was valued at about £40,000 right now and that it would 100% increase in value because it was a property."*

But in any case, if I were to only concern myself with express efforts to quantify to Mr and Mrs B 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)).'"[1] *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. Ans as I've said, Mr and Mrs B say the Supplier set out that they would make a profit from this purchase.

Given what I've already said about the Supplier's training material and the way in which I think it was likely to have framed the sale of Fractional membership to prospective members (including Mr and Mrs B), 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 B recollections of the sale.

So, overall, on the balance of probabilities, I think the Supplier's sales representative was

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[1] 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

likely to have led Mr and Mrs B to believe that Fractional membership was an investment that may lead to a financial gain (i.e., a profit) in the future. And with that being the case, I 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 so far, I think that is likely to be what Mr and Mrs B were led to believe by the Supplier at the relevant time. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

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

Having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr and Mrs B 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 Mr and Mrs B 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 reading of Mr and Mrs B's testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. But in addition to this, it is also important to consider what Mr and Mrs B gained when they traded in their VC points for the Fractional Club membership. They had 4,001 VC points and only got an additional 189 points from the purchase, so in terms of additional holiday rights, they got less than a 5% increase from this purchase and paid over £13,000 for this. But they did also gain a share in the Allocated Property, so this share was plainly a major part of the product's features and, in this instance, a justification for the price of Mr and Mrs B's Fractional Club membership.

So, 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 the 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 Mr and Mrs B when selling the Fractional Club membership to them given that they already had a VC membership. And as Mr and Mrs B 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 (less than 5%) - so it seems common sense that the change to a membership with a share in the Allocated Property, and the potential return, was an important factor in the sale.

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 Mr and Mrs B 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 share was one of the defining features of membership that marked it apart from their existing membership.

Mr and Mrs B 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 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

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs B under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint."

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

The responses to the provisional decision

Mr and Mrs B, via the PR, accepted the provisional decision with no further comment.

The Lender replied and said that it would not challenge the provisional findings, but had some observations on some points that it did not agree with.

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

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, in many ways, no different to that shared in several hundred published ombudsman decisions on very similar complaints – which can be found on the Financial Ombudsman Service's website. And with that being the case, it is not necessary to set out that context in detail 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 so, and having considered everything again in light of both sides' responses to the PD, I see no reason to depart from the outcome reached in the provisional decision. I remain satisfied that this complaint ought to be upheld, but I will address the

concerns raised by the Lender in its response to the PD.

The Lender thought that the PD was premised on a material error of law in its approach to the prohibition under Regulation 14(3) of the Timeshare Regulations. It said the PD had said that the mere existence of the *'prospect of a financial return'* constituted an *'investment',* and in doing so falls into error by conflating two meanings of the word 'return': (i) a 'return on investment', which is normally understood to mean the measure of profit (the return) on the original investment; and (ii) a customer being told that some money will be 'returned' upon sale, which carries no connotation of financial gain/profit. The Lender said that the former is what must not be marketed under the Timeshare Regulations; and the latter is an inherent feature of fractional products and does not breach Regulation 14(3).

But I don't think the Lender has understood the point that was being made here. In the PD I set out what Regulation 14(3) said:

> *"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."*

And then I set out the definition of the word 'investment' I was using:

> *"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."*

But the Fractional Club was asset-backed by an Allocated Property, and the share in this property clearly constituted an investment as it offered the member the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But there was no conflation of the word 'return' because I made it clear 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*. So, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.

The Lender also thought that the PD had dismissed the disclaimers contained in the contractual paperwork with no proper basis or explanation, despite observing that they emphasised that the product should not be seen as an investment. It said that the disclaimers had been found to evidence compliance with Regulation 14(3).

And I agree with the Lender to the extent that the disclaimers did set out that the membership should *not* be looked at as a financial investment, and Mr and Mrs B signed to say they had read and understood that. But these disclaimers were contained in documents which were given to Mr and Mrs B 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. And as I set out, that presentation suggested that the membership could lead to a financial gain (i.e. a profit) from the sale of the associated Allocated Property. So, I think it unlikely that, having made a decision to purchase on the basis of what they had seen and heard, the disclaimers would have done much to dissuade Mr and Mrs B from thinking that the membership was an investment. It is also 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.

The Lender said that the wrong test had been applied to determine whether the credit relationship between it and Mr and Mrs B was unfair. It then quoted the following:

> *"In the PD, the Ombudsman appears to have adopted a different test at PD pages 12 and 13 than that of cited in Carney, he states "I think their purchases were motivated by their share in the Allocated Property and the possibility of a profit. And with that being the case, I think the Supplier's breach of Regulation 14(3) were material to the decision they ultimately made""*

It said that this appears to reverse the burden of proof, in that I had appeared to start from the position that the prospect of a financial gain existed, but this was not insignificant enough for it not to render the relationship unfair. It said the starting point is to assess whether there is sufficient evidence of a material impact on the decision to enter the agreement. The Lender thought that in the absence of this evidence, the relationship ought not to be found unfair.

But the Lender appears to have both misquoted and misunderstood what I had said. The burden of proof has not been reversed here. I said:

> *"I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit, as that share was one of the defining features of membership that marked it apart from their existing membership.*
>
> *Mr and Mrs B 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 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"*

So, I am satisfied, as I set out in the PD, that Mr and Mrs B were motivated to make their purchase of the Fractional Club because of the share in the Allocated Property and the possibility of a profit. And because of that, the breach of Regulation 14(3) by the Supplier was material to the purchasing decision they ultimately made.

The Lender then concluded by saying that the reliance on the witness testimony was unsafe. It thought this because the testimony contained vague and brief allegations, as well as being inconsistent and generic. It said it would have expected there to have been information about what Mr and Mrs B were told about the likely return or mechanisms of how the agreement works, which has not been mentioned. The allegation's credibility, that the product was sold as an investment, is one of many that they feel have not been challenged.

But the PD considered, in some detail, both the provenance and contents of the statement, and I was satisfied that what had been recorded was Mr and Mrs B's recollections of their purchase. And I was satisfied that, being cognisant of the fact that memories can fade over time, that Mr and Mrs B's testimony could be relied on. Having reconsidered everything again, I remain satisfied that it is safe to place weight on Mr and Mrs B's testimony when considering what most likely happened at the Time of Sale. And I find that their testimony, when considered alongside all of the evidence and circumstances, persuades me that the

Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, and that that breach was material to Mr and Mrs B's purchasing decision.

Conclusion

So, although the Lender has said it would not challenge my provisional decision that this complaint ought to be upheld, I have considered everything that it has said in response. And having done so, I remain satisfied that this complaint ought to be upheld. I think the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs B under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A.

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 fair compensation to Mr and Mrs B. Neither side has made any comment on my proposed redress, so I see no reason to depart from my provisional thoughts on this issue.

For the avoidance of doubt, I shall set out my directions below.

Fair Compensation

Having found that Mr and Mrs B would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and Mr and Mrs B was unfair under Section 140A of the CCA, I think it would be fair and reasonable to put them back in the position they would have been in had they not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr and Mrs B agree to assign to the Lender their Fractional points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs B were existing VC members, and their membership was traded in against the purchase price of Fractional Club membership. Under their VC membership, they had 4,001 VC points. And, like Fractional Club membership, they had to pay annual management charges as VC members. So, had Mr and Mrs B not purchased the Fractional Club membership, 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 Mr and Mrs B from the Time of Sale as part of their Fractional Club membership should amount only to the difference between those charges and the annual management charges they would have paid as ongoing VC members.

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

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

(2) In addition to (1), the Lender should also refund the difference between Mr and Mrs B's Fractional Club annual management charges paid after the Time of Sale and what their VC annual management charges would have been had they not purchased Fractional Club membership.

(3) The Lender can deduct:

   i. The value of any promotional giveaways that Mr and Mrs B used or took

advantage of; and

ii. The market value of the holidays* Mr and Mrs B took using their fractional points *if* the points value of the holiday(s) taken amounted to more than the total number of VC points they would have been entitled to use at the time of the holiday(s) as ongoing VC 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 Mr and Mrs B took a holiday worth 2,550 fractional points and they would have been entitled to use a total of 2,500 VC points 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 VC points, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

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

(4) Simple interest** at 8% per annum should be added to each of the Net Repayments from the date each one was made until the date the Lender settles this complaint.

(5) The Lender should remove any adverse information recorded on Mr and Mrs B's credit files in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr and Mrs B's Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Fractional Club membership.

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

**HM Revenue & Customs may require the Lender to take off tax from this interest. If that's the case, the Lender must give Mr and/or Mrs B a certificate showing how much tax it's taken off if they ask for one.

My final decision

I uphold this complaint, and direct Shawbrook Bank Limited to calculate and pay fair compensation to Mr and Mrs B as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B and Mr B to accept or reject my decision before 5 January 2026.

Chris Riggs
Ombudsman