DRN-6158651

The complaint

Mr and Mrs H'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 H were existing members of a timeshare provider (the 'Supplier') having bought a number of points in the Supplier's Vacation Club (the 'VC') over time. But the complaint being considered here is regarding their purchase of a different type of timeshare (the 'Fractional Club') which they bought on 28 April 2013 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 2,766 fractional points, and after being given a trade in value for their VC points, they ended up paying £9,856 for their Fractional Club membership (the 'Purchase Agreement').

Unlike their VC membership, Fractional Club membership was asset backed – which meant it gave Mr and Mrs H 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 H paid for their Fractional Club membership by taking finance of £9,856 from the Lender in their joint names (the 'Credit Agreement').

Mr and Mrs H went on to 'upgrade' their fractional membership in April 2014 with a new purchase (the 'Fractional Club 2') providing 2,830 fractional points and a new allocated property. They traded in the Fractional Club towards this, thereby forfeiting their rights to the proceeds of the original Allocated Property. This new purchase was funded by a loan from the Lender, but this purchase and the associated loan is not the subject of this complaint and is included here for background purposes only.

Mr and Mrs H – using a professional representative (the 'PR') – wrote to the Lender on 8 December 2020 (the 'Letter of Complaint') to raise a number of different concerns about their Fractional Club 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 H's concerns as a complaint and issued its final response letter on 30 March 2021, rejecting it on every ground.

Mr and Mrs H then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, didn't think it ought to be upheld.

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

The provisional decision

Having considered everything that had been submitted, I thought the complaint ought to be upheld. So I set out my initial thoughts in a provisional decision (the 'PD') and invited all parties to submit any new evidence or arguments that they wished me to consider before I made my final decision. 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[1] by marketing and/or selling Fractional Club membership to Mr and Mrs H 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 H in the same or a better position than they would otherwise be in.

The witness testimony

As part of its submissions to this Service, on 13 October 2023 the PR submitted a written statement from Mr H, dated 30 September 2019. This set out his and Mrs H's recollections of their relationship with the Supplier, from their initial purchase of VC points until their fractional points purchases, including that at the Time of Sale.

As far as is relevant to the complaint I am considering here, Mr H said:

> *"In 2013, while on holiday, we attended the required meeting. This meeting last [sic] several hours and we were told that there was an opportunity to purchase fractional points. We were told that with fractional points, these could be sold in 15 years and that we could make a profit from our purchase. We were told that fractional points were an investment. This has turned out to be a lie as we are now aware that we wont be able to make a profit from our purchase after hearing similar stories. Maintenance fees were never explained to us other than they would go up with inflation and we have found this not to be the case as they have significantly risen. We were told that fractional points would make our holidays better in regard to the availability and quality and we have never seen this change with our purchases. We decided to make the purchase as we were put under pressure. We were offered finance through Shawbrook though we cant [sic] remember an affordability check being carried out and we were given no time to consider the documents. There was no mention of commission either.*
>
> *As such, on 28th April 2013, we purchased 2766 fractional points at a cost of £9856.00 which was paid by finance through Shawbrook."*

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

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

As I've said, the statement, dated 30 September 2019, wasn't sent to this Service until 13 October 2023, so I have considered whether it is likely that it was taken later than the date indicated. But having considered this, I can see the statement includes data timestamps to show that a telephone call was scheduled and made to Mr and Mrs H by the PR to take the statement on 30 September 2019. So, given this evidence, and from what I know about how this particular PR took testimony from consumers, I think the statement was most likely taken on 30 September 2019 during a telephone conversation, and was written as part of the PR's case preparations. Indeed, the Letter of Complaint is generally consistent with the contents of the statement, which leads me to think that the statement was used to inform the Letter of Complaint.

But because the statement was prepared by the PR, I am mindful of the risk that Mr H may have been guided through the process, and the associated risk that what has been written may not be his and Mrs H's specific recollections. But it does contain personal information about their purchasing history that only Mr and/or Mrs H would have known, so I have no doubt that Mr H had a significant input into the statement's contents. It is also not unusual for statements to be prepared on complainants' behalf by professional representatives.

Also, when considering how much weight I can place on Mr H'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 H has 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)."*

Having considered how much weight I can place on the contents of Mr H's statement, I feel I am able to rely on what he has said. I do so whilst being cognisant of the fact that memories can fade over time, and that inconsistencies and errors 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 he says has happened over the course of their purchases, and what other evidence shows. For example, Mr H has said that the membership term was 15 years, whereas the contractual documentation shows this is actually 19 years.

The question to consider, therefore, is whether there is a core of acceptable evidence from Mr H, such that the inconsistencies have little to no bearing on whether his 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.

And although I acknowledge that the length of the membership term, when linked to a potential investment return is an important detail, I don't find Mr H's error here material to how the membership was sold to them, and whether the membership itself was sold as an investment or not.

So overall, having considered his testimony, whilst being mindful that he is recalling events which occurred six years prior to the statement being written and that memories can fade over time, I am satisfied that I am able to place weight on and rely on what Mr H has said when considering the merits of his and Mrs H's complaint.

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 H 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 H 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 H'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 H 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 could make them a profit.

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 H'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 H as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs H, 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 H as an investment, and Mr and Mrs H have signed these.

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.

<u>How the Supplier marketed and sold the Fractional Club membership</u>

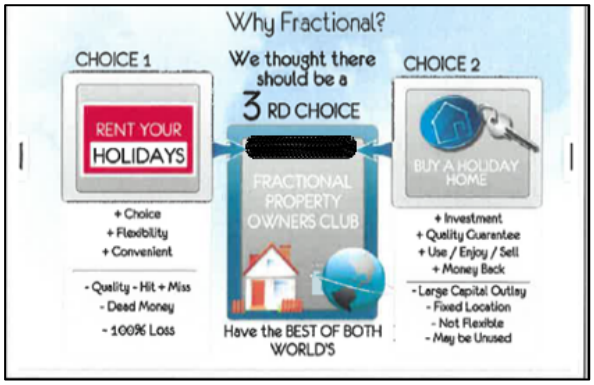
During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier has provided training material used to prepare its sales representatives – including a document called "2011 Spain PTM FPOC 1 Practice Slides Manual" (the '2011 Fractional Training Manual').

As I understand it, the 2011 Fractional Training Manual was used throughout the sale of the Supplier's first version of a product called the Fractional Property Owners Club – which I've referred to and will continue to refer to as the Fractional Club. It isn't entirely clear whether Mr and Mrs H would have been shown the slides included in the Manual. But it seems to me to be reasonably indicative of:

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

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

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 Mr and Mrs H through three holidaying options along with their positives and negatives:

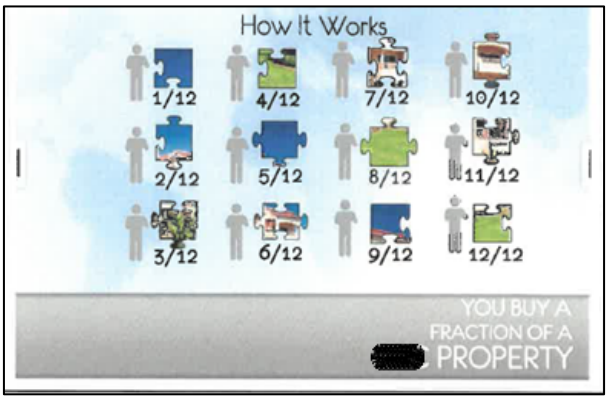
(1) *"Rent Your Holidays"*

(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 Fractional Club membership and I think it suggests that sales representatives were likely to have made the point to Mr and Mrs H 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.

The manual then moved on to two slides (on pages 7 and 8) concerned with how Fractional Club membership worked:



I'm aware that the Supplier says that 90-95% of its time during its sales presentations was focused on holidays rather than the sale of an allocated property. 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 the Fractional Club 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 can't see why the Supplier wouldn't have been in breach of Regulation 14(3) in those circumstances.

I acknowledge that there may not have been a comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mr and Mrs H 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.

Mr and Mrs H say, in their own words, that the Supplier positioned membership of the Fractional Club as an investment to them. And as I've said before, the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members – including Mr and Mrs H. And as the slides clearly indicate that the Supplier's sales representative was likely to have led them to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e., a profit) in the future, I don't find them either implausible or hard to believe when they say:

> *“We were told that with fractional points, these could be sold in 15 years and that we could make a profit from our purchase. We were told that fractional points were an investment.”*

On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mr and Mrs H were led by the Supplier to believe 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 H 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 me that if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs H 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 H'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. After all, the potential to make a profit was the first thing mentioned in the statement when describing how the Fractional Club was sold to them at the Time of Sale. And the asset-backed nature of the membership was the most significant difference between it and the VC that they already held. That doesn't mean they were not interested in holidays, which is not surprising given the nature of the product at the centre of this complaint. But if the Fractional Club had been bought for the holidays it could provide, I can't see why Mr and Mrs H would not have just increased their VC holding by a similar amount. But they didn't –

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

they traded in all of their VC points towards the Fractional Club membership, and paid nearly £10,000 to do so. And as Mr and Mrs H 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 H 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, and this rendered their associated credit relationship with the Lender unfair.

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 H 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 Fractional Club end when it was traded in for a further purchase?

As I've said, on 1 April 2014, Mr and Mrs H traded in their Fractional Club membership, paying an additional £4,881 and adding a further 64 fractional points to their existing 2,766 by entering into a different purchase agreement for Fractional Club 2, thereby 'upgrading' and replacing their original Purchase Agreement. They paid for this upgrade with a new standalone loan from the Lender. The credit relationships Mr and Mrs H had with the Lender relating to these two purchases continued until the balances were cleared in December 2014 with a consolidation loan.

As a result of their purchase of Fractional Club 2, it is necessary to consider whether the unfairness caused to Mr and Mrs H from the purchase of the original Fractional Club at the Time of Sale continued, and if it did continue, what were the ongoing consequences.

As I've said, I am not considering a complaint about the purchase of Fractional Club 2 and its associated finance agreement, so I do not think it would be fair or reasonable to hold the Lender responsible for any aspect of the purchase of Fractional Club 2. So I do not think the Lender should have to answer for the financial consequences specifically associated with the 64 additional fractional points Mr and Mrs H purchased in April 2014.

Formally, the agreement Mr and Mrs H entered into in April 2014 was a new contract that superseded the old one. But I think the purpose of this upgrade was to continue and supplement their existing Fractional Club membership.

With all of that being the case, I therefore think that the upgrade was really just a top-up of Mr and Mrs H's fractional points by rolling over those that they had and providing them, as members of the Fractional Club 2, with enough points to enable them to take additional

holidays, albeit while also holding an interest in the net sales proceeds of a different allocated property.

And as the function of the Supplier's trade-in allowance was to roll over Mr and Mrs H's existing fractional points into their upgrade, I'm not persuaded that the purchase of Fractional Club 2 ended the unfairness to Mr and Mrs H in their credit relationship with the Lender. I think their original purchase of Fractional Club, and the associated Credit Agreement with the Lender had ongoing financial consequences for them, which continued the unfair relationship with the Lender. And for that reason, it is my view that the Lender is still answerable for them."

At the conclusion of 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 H.

The responses to the provisional decision

Mr and Mrs H accepted what I had said in the PD with nothing further to add. The Lender did not accept the outcome, and sent a comprehensive response explaining why if did not do so, and why it thought the complaint ought not to be upheld.

In summary it said:

The contemporaneous evidence does not support the conclusion that the prospect of financial gain was an important and motivating factor for Mr and Mrs H;

- The PD has placed strong reliance on the witness testimony dated over six years after the Fractional Club sale, despite it containing vague and brief allegations, as well as being rather generic. The allegation that it was sold as an "investment" lacks detail. The veracity of the testimony has not been adequately considered in light of inconsistencies, omissions, and the contemporaneous evidence.
- Mr and Mrs H attended a sales presentation for a fractional ownership timeshare in March 2012 and agreed to enter into a purchase agreement for a fractional product, a fact omitted from their testimony. However, they subsequently chose to exercise the right to cancel this purchase in the recission period. The Supplier's contemporaneous notes from the time of this sale records that Mr and Mrs H expressed that they *"feel they are too old for the percentage share to be of interest".* It is clearly evident that the prospect of a financial return was not an important and motivating factor for them in 2012.
- While the contemporaneous notes from the fractional club sale do not expressly confirm Mr and Mrs H's primary motivations for the purchase in April 2013, it is not unreasonable to infer that their lack of interest in a financial return would not have materially changed approximately a year later.
- Mr and Mrs H's subsequent behaviour further supports the conclusion that they purchased the Fractional Club membership in April 2013 primarily for holiday use, because:
    - Following the April 2013 purchase, Mr and Mrs H used all available points and purchased additional points in April 2014, which were also fully used for holidays; and
    - in 2017, they requested to surrender their membership citing increasing difficulty due to their age.
- It is difficult to reconcile this pattern of behaviour with the suggestion that the prospect of financial gain on the sale of the Allocated Property was an important or motivating factor

in the purchase of the Fractional Club membership in April 2013 - the contemporaneous evidence does not support that conclusion.

It thought the PD is premised on a material error of law in its approach to the prohibition under Regulation 14(3) of the Timeshare Regulations because:

- A return from the sale of the Allocated Property is an inherent part of a fractional ownership timeshare, and it is inevitable that a customer will be told about this return as it is a feature of the product.
- There is nothing inherent in the Fractional Club which contravenes Regulation 14(3).
- The wording of the PD is inconsistent with the definition of an "*investment"* as set out in *Shawbrook & BPF v FOS*[3]. The prospect of a return is not the same as an investment.
- Being told that there is a specific Allocated Property and that there will be an amount returned at the end of the term is not selling the product as an investment, and merely describing the feature is not inherently objectionable.
- Selling an investment requires a finding of a representation by the seller that the reason, or significant reason for the purchase is the prospect of a financial gain/profit, and the corresponding motive on the part of the consumer. Referring to the prospect of a residual return does not satisfy this test.
- The reasoning given in the PD for the dismissal of the relevant disclaimers, signed by Mr and Mrs H is insufficient.

And finally, the Lender said that the incorrect legal test had been applied when determining whether the relationship was unfair:

- The test to be applied, as stated in *Carney v NM Rothschild and Sons Ltd,* was whether there was a "*material impact on the debtor when deciding whether or not to enter the agreement*".
- The Ombudsman has erred in the PD and applied a different test – reversing the burden of proof. It is necessary to assess whether there is sufficient evidence of a material impact on the decision to enter the agreement.

The Lender concluded that there is no clear and compelling evidence that the prospect of a financial gain was an important and motivating factor when Mr and Mrs H decided to go ahead with their Fractional Club purchase in April 2013, so their complaint should be rejected.

As both sides have now had the opportunity to respond fully, the matter has come back to me for further consideration.

What I've decided – and why

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

And having considered everything again, I still uphold Mr and Mrs H's complaint for the reasons set out in the extract of my PD above. I will also deal with the matters that the Lender raised in response. In doing so, I note again that my role as an Ombudsman is not to

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[3] *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').

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 have read the Lender's response in full, I will confine my findings to what I find are the salient points.

The witness testimony

The Lender said the PD had placed strong reliance on the witness testimony, dated over six years after the Fractional Club sale, despite it containing vague and brief allegations, as well as being rather generic, and the allegation that it was sold as an "investment" lacks detail. It said I had not adequately considered the veracity of the testimony in light of inconsistencies, omissions, and the contemporaneous evidence.

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

Mr and Mrs H's motivation to make the purchase

The Lender has pointed to evidence that Mr and Mrs H bought and then cancelled a fractional membership in 2012. It said the sales notes from the Supplier indicate they cancelled it because they *"feel they are too old for the % share to be of interest".*

But I don't think the sales notes provide persuasive evidence that Mr and Mrs H didn't purchase the Fractional Club membership a year later for the share in the Allocated Property. I think that because the sales notes don't indicate that it was only that Mr and Mrs H weren't interested in the potential return from the 2012 membership – the notes also say that *"they are just spending more money that they cannot afford".* Circumstances and mindsets change. And what they said in 2012 does suggest that the percentage share of the allocated property at that time was a consideration, and given that the membership would have been sold in 2012 in a very similar way to the Fractional Club sale that I am considering here, I think it likely that the *"% share"* would most likely have been presented as a profit. But it was the problems with affordability that contributed to their decision to cancel.

The Lender also points to Mr and Mrs H's use of the membership to take holidays as evidence of their motivation to make the purchase. But I don't find their taking holidays using a timeshare membership unsurprising given the nature of the membership at the centre of this complaint. It has also provided evidence that Mr and Mrs H wrote to the Supplier in 2017 saying they wished to terminate their membership citing increasing difficulties in using it due to their age. It says it is difficult to reconcile their wish to cancel the membership with the suggestion that the prospect of financial gain on the sale of the Allocated Property was an important or motivating factor in their original purchase of the Fractional Club.

But I don't see that this provides evidence of their motivation at the Time of Sale. I agree that it seems Mr and Mrs H, in 2017, were in circumstances which meant they felt they were unable to take the holidays the membership provided, so they thought they ought to cancel it, but as I've said, circumstances and mindsets change over time. And in any event, I can't see that the membership was actually cancelled by Mr and Mrs H. So I don't find this apparent desire to cancel the membership in 2017 persuasive evidence that it was not bought four years earlier as an investment.

The Lender said my PD was inconsistent with the idea that there was no prohibition on the sale of fractional timeshares per se, only a prohibition on the way they were sold. But this, in my view, takes too narrow a view of my PD and overlooks the part which reads:

> *"The term "investment" is not defined in the Timeshare Regulations. 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 H'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."*

However, for the avoidance of doubt, I recognise that it was possible to market and sell the Fractional Membership without breaching the relevant prohibition in Regulation 14(3). For instance, depending on the circumstances and when considering what an *investment* is, there is every chance that simply telling a prospective customer very factually that Fractional Club membership included a share in an allocated property, and that they could expect to receive a financial return or some money back on the sale of that property, would not breach Regulation 14(3). But the evidence in this case leads me to think, on the balance of probabilities, that the Supplier *did* breach Regulation 14(3).

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, and had been signed by Mr and Mrs H. 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 H signed to say they had read and understood that. But these disclaimers were contained in documents which were given to Mr and Mrs H 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 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 H 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 correct legal test

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

> *"In the PD, at page 9, the Ombudsman appears to have adopted a different test [sic] then that of cited in Carney, he states that "I think their purchase was 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) was material to the decisions 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 misunderstood what I had said. The burden of proof has not been reversed here. It is clear that it was on the basis that the Supplier's breach of Regulation 14(3) at the Time of Sale was material to their purchasing decision that I decided that the associated credit relationship had been rendered unfair.

So, I am satisfied, as I set out in the PD, that Mr and Mrs H were motivated to make their Fractional Club purchase because of the associated 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.

Conclusion

Having considered everything afresh in light of what has been said in response to the PD, 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 H 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 H. No further arguments or evidence was submitted by either side in relation to my proposed redress. So, having considered everything afresh, I see no reason to depart from my initial thoughts on compensation. For the avoidance of doubt, I shall repeat them below:

Fair Compensation

Having found that Mr and Mrs H 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 H 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. This is on the proviso that Mr and Mrs H agree to assign to the Lender 2,766 of their fractional points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs H were existing Vacation Club members, and their membership was traded in against the purchase price of Fractional Club membership. Under their Vacation Club membership, they had a number of Vacation Club Points, and like the Fractional Club membership, they had to pay annual management charges as Vacation Club members. So, had Mr and Mrs H not purchased 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 H 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 Vacation Club members.

On 1 April 2014 (the 'Time of Upgrade'), Mr and Mrs H upgraded their Fractional Club by trading in their existing fractional points, paying an additional £4,881 and entering a new purchase agreement for a total of 2,830 fractional points (Fractional Club 2). And the Credit Agreement remained in place after the upgrade.

Formally, the new purchase agreement superseded the old one, but in my view, it really just supplemented Mr and Mrs H's Fractional Club, rolling over their existing fractional points into the new membership. And as I've already said in my PD, I don't think the upgrade ended the unfairness under the Credit Agreement and related Purchase Agreement that stemmed from the acts and/or omissions of the Supplier at the Time of Sale given the facts and circumstances of this complaint. So, I think that there were ongoing effects of unfairness from Mr and Mrs H's original purchase of Fractional Club and the Credit Agreement for which the Lender is answerable.

However, I recognise that the upgrade in question was paid for by funding from the Lender, whose responsibility for any acts and/or omissions in the later sales presentation falls outside the scope of this decision. And for that reason, I'm not persuaded the Lender should have to answer for the financial consequences specifically associated with the 64 additional fractional points Mr and Mrs H purchased on 1 April 2014.

So, in my view, the Lender needs to refund a proportion of the management charges payable after the Time of Upgrade that relate to the 2,766 fractional points Mr and Mrs H held originally – which, in this occasion, equates to 97.74% of the annual management charges paid after the Time of Upgrade.

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

(1) The Lender should refund Mr and Mrs H'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 Mr and Mrs H's Fractional Club annual management charges paid, between the Time of Sale and the Time of Upgrade, and what their Vacation Club annual management charges would have been had they not purchased Fractional Club membership. The Lender should also refund the difference between 97.74% of the Fractional Club 2 annual management charges they actually paid after the Time of Upgrade and the annual management charges they would have paid had they not purchased Fractional Club.

(3) The Lender can deduct:

   i. The value of any promotional giveaways that Mr and Mrs H used or took advantage of at the Time of Sale;

   ii. Before the Time of Upgrade, the market value of the holidays* Mr and Mrs H took using their fractional points *if* the Points value of the holiday(s) taken amounted to

more than the total number of Vacation Club points they would have been entitled to use at the time of the holiday(s) as ongoing Vacation Club 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 H took a holiday worth 2,550 fractional points and they would have been entitled to use a total of 2,500 Vacation Club 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 Vacation Club points, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

And

iii. After the Time of Upgrade, the market value of the holidays* Mr and Mrs H took using their fractional points *if* the Points value of the holiday(s) taken amounted to more than the total number of Vacation Club points they would have been entitled to use at the time of the holiday(s) as ongoing Vacation Club members. However, this deduction should relate only to 97.74% of the additional fractional points that were required to take the holiday(s) in question.

For example, if Mr and Mrs H took a holiday worth 2,550 fractional points and they would have been entitled to use a total of 2,500 Vacation Club points at the relevant time, any deduction for the market value of that holiday should relate only to 97.74% of the 50 additional fractional points that were required to take it. But if they would have been entitled to use 2,600 Vacation Club 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 H's credit files in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr and Mrs H's Fractional Club 2 membership is still in place at the time of this decision, the Lender must ask the Supplier to reduce the number of fractional points they hold by 2,766 fractional points. What's more, the Lender must indemnify Mr and Mrs H against 97.74% of all ongoing liabilities as a result of their Fractional Club 2 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 H took using their fractional points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

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

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H and Mrs H to accept or reject my decision before 17 March 2026.

Chris Riggs
Ombudsman