DRN-6189332

The Complaint

Mr and Mrs M'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 M were existing members of a timeshare provider (the 'Supplier') and for ease, I will set out their purchasing history below:

- Trial membership in June 2007
- 250 Choice Points in March 2008 along with 870 Vacation Points
- 870 Vacation Points in September 2008
- 1,716 Fractional Club points in September 2011
- 2,060 Fractional Club points in May 2014
- 2,200 Fractional Club points May 2015

The complaint being considered here is regarding their purchase of the timeshare (the 'Fractional Club') on 13 May 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 2,060 fractional points. And after being given a trade in value for their previous Fractional Club membership, they ended up paying £5,962 for their Fractional Club membership (the 'Purchase Agreement').

Mr and Mrs M paid for their Fractional Club membership by taking finance of £5,962 from the Lender (the 'Credit Agreement').

When Mr and Mrs M upgraded their Fractional Club membership in May 2014, they only purchased an additional 344 points so it is the purchase of these points, which cost £5,962 that is the subject of my decision.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs M 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 M – using a professional representative (the 'PR') – wrote to the Lender on 2 November 2021 (the 'Letter of Complaint') to raise a number of different concerns. 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 M's concerns as a complaint and issued its final response letter on 4 Janaury 2022, rejecting it on every ground.

It was assessed by an Investigator who, having considered the information on file, didn't think it ought to be upheld. Mr and Mrs M disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

Having considered everything that had been submitted, I thought this complaint ought to be

upheld. As I had reached a different outcome to that of our Investigator, I issued a provisional decision (the 'PD') and invited all parties to respond with any new evidence or arguments that they wished me to consider before I made my final decision.

I've reproduced my provisional findings below, which form part of this 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 no different to that shared in several hundred ombudsman decisions on very similar complaints. And with that being the case, it is not necessary to set it out here. But if either side would like me to confirm what I think that context is, they can let me know in response to this provisional decision.

My provisional findings

I have considered all the available evidence and arguments to decide what is 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 M 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 M in the same or a better position than they would otherwise be in.

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 M 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 M 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 M 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 M 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, an 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 M'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 M 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 M, 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 M as an investment.

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And for reasons I'll now come on to, given

the facts and circumstances of this complaint, I think the Supplier is likely to have breached Regulation 14(3) of the Timeshare Regulations.

How the Supplier marketed and sold the Fractional Club membership

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

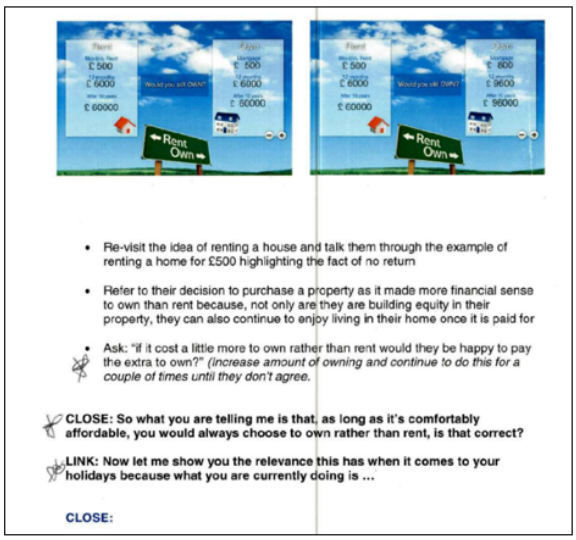
1. *a document called the 2013/2014 Sales Induction Training (the '2013/2014 Induction Training');*
2. *screenshots of a Electronic Sales Aid (the 'ESA'); and*
3. *a document called the "FPOC2 Fly Buy Induction Training Manual" (the 'Fractional Club Training Manual')*

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

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

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:

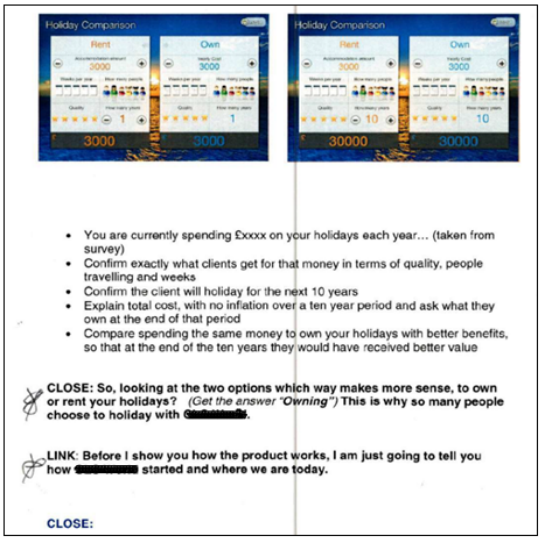


Indeed, one of the advantages of ownership referred to in the slide above is that it makes

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 FCM 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:



With the groundwork laid, sales representatives were then taken to the part of the ESA that explained how FCM 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 FCM 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 M) who were looking to buy holidays anyway, the comparison the slides make between the costs of FCM 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. However, if I were to only concern myself with express efforts to quantify to Mr and Mrs M 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.

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 M), 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 M recollections of the sale.

So, overall, on the balance of probabilities, I think the Supplier's sales representative was likely to have led Mr and Mrs M 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 M 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 M 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 M 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 M'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. And I'll explain why.

Below is what Mr and Mrs M say in relation to their first Fractional Club membership purchase in September 2011:

> *“We were told that we had the opportunity to enter into the Fractional Property Owners Club as this was the new scheme that they were offering members. We were told that*

[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

this was an option to part own a property. They sold it as a financial investment and we were told that after a number of years we would be able to get some money back from this. They told us this new scheme would be the solution to our problems. The rep told us that if we were to purchase this fractional property, this would be the easiest way to get ourselves out of the contract and make a good investment for the future. We were told that this would be an investment and that after so many years, the contract would come to an end. The property would then be sold, and we would receive our money back, plus profit. There was no mention of what would happen if it didn't sell, this was guaranteed to be sold at the end of the time period."

Although this purchase is not the subject of this complaint, I think it provides some context in relation to their purchasing decision in May 2014. As Mr and Mrs M go on and say:

"On 13th May 2014 we purchased 2060 more Fractional investment Points with [Supplier's] Costa Fractional Property Owners Club. We were on holiday and we attended a member's breakfast. In fact, this was actually a 4-hour long sales presentation, they were very pushy they used aggressive sales tactics and we did feel quite intimidated by them. We were told that if we upgraded our Fractional membership, this would move us up a membership level and allow us to access a higher standard of accommodation and more money back in the end once the investment matured. This was bought to increase our investment portfolio."

Having considered what Mr and Mrs M say, I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit. When they upgraded, Mr and Mrs M increased their points holding and went from two to three weeks so I think it would be reasonable for Mr and Mrs M to believe this would increase their investment portfolio and they would receive more money back at the end of their membership term. And based on what they've said, I think it was an important factor when they decided to upgrade. After all Mr and Mrs M say that their purchased this membership "to increase their investment portfolio".

That doesn't mean that they weren't interested in holidays as I think they quite clearly were - having purchasing a number of products from the Supplier prior to their first purchase of Fractional Club membership in September 2011. And that is not surprising given the nature of the product at the centre of this complaint.

But as Mr and Mrs M 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, for the reasons I've given, 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 decision they ultimately made.

Mr and Mrs M 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 M 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.

Fair Compensation

Having found that Mr and Mrs M would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable to put 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 M 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 M were existing Fractional Club members ('FC Membership 1') and their membership was traded in against the purchase price of Fractional Club membership in question ('FC Membership 2') at the Time of Sale. Under FC Membership 1, they had 1,716 of Fractional Points. And, like FC Membership 2, they had to pay annual management charges as part of FC Membership 1. So, had Mr and Mrs M not purchased FC Membership 2, they would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr and Mrs M from the Time of Sale as part of FC Membership 2 should amount only to the difference between those charges and the annual management charges they would have paid as part of FC Membership 1.

On 14 May 2015 (the 'Time of Upgrade'), Mr and Mrs M upgraded FC Membership 2 by trading in their existing Fractional Points for FC Membership 3, paying an additional £4,718 and entering into a new purchase agreement for a total of 2,200 Fractional Points. And the Credit Agreement remained in place after the upgrade at the time of the upgrade.

Formally, the new purchase agreement superseded the old one, but in my view, it really just supplemented their FC Membership 2, rolling over their existing Fractional Points into FC Membership 3. And as I've already said, 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 M's purchase of FC Membership 2 and the Credit Agreement that the Lender is answerable for.

However, I recognise that the upgrade in question was paid for by funding from a new lender who is likely to bear some responsibility for any acts and/or omissions in the sales presentation. And for that reason, I'm not persuaded the Lender should have to answer for the financial consequences specifically associated with the 140 additional Fractional Points Mr and Mrs M purchased on 14 May 2015.

So, in my view, the Lender needs to refund a proportion of the management charges

payable after the Time of Upgrade that relates to the 344 of Fractional Points Mr and Mrs M held under FC Membership 2 – which, on this occasion, equates to 16% of the annual management charges paid after the Time of Upgrade under FC Membership 3.

So, here's what I think needs to be done to compensate Mr and Mrs M with that being the case – whether or not a court would award such compensation:

(1) The Lender should refund Mr and Mrs M'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 the FC Membership 2 annual management charges Mr and Mrs M paid, between the Time of Sale and the Time of Upgrade, and what their FC Membership 1 annual management charges would have been at that time had they not purchased FC Membership 2. The Lender should also refund the difference between 16% of the FC Membership 3 annual management charges they paid after the Time of Upgrade.

(3) The Lender can deduct:

i. The value of any promotional giveaways that Mr and Mrs M used or took advantage of;

ii. Before the Time of Upgrade, the market value of the holidays Mr and Mrs M took using FC Membership 2 if the Points value of the holiday(s) taken amounted to more than the total number of Fractional Points they would have been entitled to use at the time of the holiday(s) as ongoing FC Membership 1 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 M took a holiday worth 2,550 Fractional Points after the Time of Sale and they would have been entitled to use a total of 2,500 Fractional Points under FC Membership 1 at the relevant time, any deduction for the market value of that holiday should relate only to the 50 additional Fractional Points that were required to take it. But if they would have been entitled to use 2,600 Fractional Points under FC Membership 1, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

And

iii. After the Time of Trade-in, the market value of the holidays Mr and Mrs M took using FC Membership 3 if the Points value of the holiday(s) taken amounted to more than the total number of Fractional Points they would have been entitled to use at the time of the holiday(s) as ongoing FC Membership 1 members. However, this deduction should relate only 16% of the additional Fractional Points that were required to take the holiday(s) in question.*

For example, if Mr and Mrs M took a holiday worth 2,550 Fractional Points after the Time of Trade-In and they would have been entitled to use a total of 2,500 Fractional Points under FC Membership 1 at the relevant time, any deduction for the market value of that holiday should relate only to 16% of the 50 additional Fractional Points that were required to take it. But if they would have been entitled to use 2,600 Fractional Points under FC Membership 1, 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 M's credit files in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr and Mrs M's FC Membership 3 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 344 Fractional Points. If the Supplier agrees to do that, then Mr and Mrs M must agree to hold the remaining Fractional Points for the benefit of the Lender (or assign them to the Lender if that can be achieved. What's more, the Lender must indemnify Mr and Mrs M against 16% of all ongoing liabilities as a result of FC Membership 2.

However, if in response to this provisional decision the Supplier doesn't agree to reduce the number of Fractional Points Mr and Mrs M hold, the Lender must let me know so that I can consider the most appropriate remedy with that being the case.

**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 M 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.*

Responses to my provisional decision

The PR on behalf of Mr and Mrs M responded to say they accepted my provisional findings.

The Lender responded to my PD. In its response, it raised a number of points that it would like me to take into consideration for future complaints which I've received and read. It does not however intend to challenge my decision to uphold Mr and Mrs M's complaint. However, it does disagree with my proposed redress methodology, in particular with my recommendation that it should refund a proportion of the management fees after the Time of Upgrade.

The Lender said they don't agree with my analysis that Mr and Mrs M's FC Membership 3 just supplemented their FC Membership 2 membership. It says when Mr and Mrs M upgraded in May 2015, this was a separate and distinct sales event. It doesn't believe it was a continuation of the existing agreement and therefore says that the relationship at the heart of this complaint ended in May 2015 so it should not be responsible for any management fees paid by Mr and Mrs M under their FC Membership 3.

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.

But, having considered what the Lender has said here, I don't agree. I'll explain.

For the reasons given in my PD, I think that there were ongoing effects of unfairness at the Time of Upgrade from Mr and Mrs M's purchase of FC Membership 2 and the Credit Agreement that the Lender is answerable for. In May 2015, Mr and Mrs M upgraded their FC Membership 2, paying an additional sum and adding a further 140 fractional points to their existing 2,060 by entering into a replacement Purchase Agreement. However, the loan from the Lender as a result of FC Membership 2 remained in place after the upgrade.

As a result of my recommendation, Mr and Mrs M should be put back in the position they would have been in had they not purchased the Fractional Club membership. This would ultimately mean that they wouldn't have had the additional 344 points within their FC Membership 3. Had they not, their membership fees would have been lower than what they were following FC Membership 3. Because of this, I think the Lender should be responsible for the management charges associated with the points that they ultimately funded.

This is ultimately the same reason why I don't think the Lender should be responsible for all management charges paid for following the purchase in question. This is because at the time of Sale, Mr and Mrs M held 1,716 fractional points under FC Membership 1 which the Lender did not fund. So, had Mr and Mrs M not purchased FC Membership 2, they would have always been responsible to pay an annual management charge of some sort. So I've proposed that any refund of the annual management charges paid by Mr and Mrs M from the Time of Sale, as part of FC Membership 2 should amount only to the difference between those charges and the annual management charges they would have paid as part of FC Membership 1.

I believe this is fair redress in the circumstances of this complaint. For this reason, I maintain my position that the Lender should refund a proportion of management fees paid after Mr and Mrs M's FC Membership 3 purchase in May 2015.

Putting things right

Taking into account all of the above, I'm satisfied that the redress I proposed in my provisional decision represents a fair and reasonable way for Shawbrook Bank Limited to resolve the complaint. For the avoidance of any doubt, I'll reiterate here the steps I require it to take:

Having found that Mr and Mrs M would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable to put 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 M 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 M were existing Fractional Club members ('FC Membership 1') and their membership was traded in against the purchase price of Fractional Club membership in question ('FC Membership 2') at the Time of Sale. Under FC Membership 1, they had 1,716 of Fractional Points. And, like FC Membership 2, they had to pay annual management charges as part of FC Membership 1. So, had Mr and Mrs M not purchased FC Membership 2, they would have always been responsible to pay an annual management charge of some

sort. With that being the case, any refund of the annual management charges paid by Mr and Mrs M from the Time of Sale as part of FC Membership 2 should amount only to the difference between those charges and the annual management charges they would have paid as part of FC Membership 1.

On 14 May 2015 (the 'Time of Upgrade'), Mr and Mrs M upgraded FC Membership 2 by trading in their existing Fractional Points for FC Membership 3, paying an additional £4,718 and entering into a new purchase agreement for a total of 2,200 Fractional Points. And the Credit Agreement remained in place after the upgrade at the time of the upgrade.

Formally, the new purchase agreement superseded the old one, but in my view, it really just supplemented their FC Membership 2, rolling over their existing Fractional Points into FC Membership 3. And as I've already said, 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 M's purchase of FC Membership 2 and the Credit Agreement that the Lender is answerable for.

However, I recognise that the upgrade in question was paid for by funding from a new lender who is likely to bear some responsibility for any acts and/or omissions in the sales presentation. And for that reason, I'm not persuaded the Lender should have to answer for the financial consequences specifically associated with the 140 additional Fractional Points Mr and Mrs M purchased on 14 May 2015.

So, in my view, the Lender needs to refund a proportion of the management charges payable after the Time of Upgrade that relates to the 344 of Fractional Points Mr and Mrs M held under FC Membership 2 – which, on this occasion, equates to 16% of the annual management charges paid after the Time of Upgrade under FC Membership 3.

So, here's what I think needs to be done to compensate Mr and Mrs M with that being the case – whether or not a court would award such compensation:

(1) The Lender should refund Mr and Mrs M'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 the FC Membership 2 annual management charges Mr and Mrs M paid, between the Time of Sale and the Time of Upgrade, and what their FC Membership 1 annual management charges would have been at that time had they not purchased FC Membership 2. The Lender should also refund the difference between 16% of the FC Membership 3 annual management charges they paid after the Time of Upgrade.

(3) The Lender can deduct:

   i. The value of any promotional giveaways that Mr and Mrs M used or took advantage of;

   ii. Before the Time of Upgrade, the market value of the holidays* Mr and Mrs M took using FC Membership 2 *if* the Points value of the holiday(s) taken amounted to more than the total number of Fractional Points they would have been entitled to use at the time of the holiday(s) as ongoing FC Membership 1 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 M took a holiday worth 2,550 Fractional Points after the Time of Sale and they would have been entitled to use a total of 2,500 Fractional Points under FC Membership 1 at the relevant time, any deduction for the market value of that holiday should relate only to the 50 additional Fractional Points that were required to take it. But if they would have been entitled to use 2,600 Fractional Points under FC Membership 1, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

And

iii. After the Time of Trade-in, the market value of the holidays* Mr and Mrs M took using FC Membership 3 if the Points value of the holiday(s) taken amounted to more than the total number of Fractional Points they would have been entitled to use at the time of the holiday(s) as ongoing FC Membership 1 members. However, this deduction should relate only 16% of the additional Fractional Points that were required to take the holiday(s) in question.

For example, if Mr and Mrs M took a holiday worth 2,550 Fractional Points after the Time of Trade-In and they would have been entitled to use a total of 2,500 Fractional Points under FC Membership 1 at the relevant time, any deduction for the market value of that holiday should relate only to 16% of the 50 additional Fractional Points that were required to take it. But if they would have been entitled to use 2,600 Fractional Points under FC Membership 1, 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 M's credit files in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr and Mrs M's FC Membership 3 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 344 Fractional Points. If the Supplier agrees to do that, then Mr and Mrs M must agree to hold the remaining Fractional Points for the benefit of the Lender (or assign them to the Lender if that can be achieved. What's more, the Lender must indemnify Mr and Mrs M against 16% of all ongoing liabilities as a result of FC Membership 2.

*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 M 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

My final decision is that I uphold Mr and Mrs M's complaint. To settle it, I require Shawbrook Bank Limited to take the steps I've set out at points 1-6 under the heading 'Putting Things Right' above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs M to accept or reject my decision before 30 March 2026.

Sameena Ali
Ombudsman