DRN-6225414

Financial Ombudsman Service

The complaint

Mr and Mrs K'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 K were members of a timeshare provider (the 'Supplier') – having purchased a variety of products from it over time.

From 2008 until February 2012, they were members of the Supplier's Vacation Club (the 'VC'), spending a total over that time of £27,377 on their VC points. This was a points-based membership where members could exchange their points for accommodation from the Supplier's portfolio of resorts. Different accommodation had different points values, dependent on its size and the time of year it was required.

But the product at the centre of this complaint is a type of 'fractional' membership sold by the Supplier. The Supplier, over time, sold three different versions of its 'fractional' membership, two of which were known as the Fractional Property Owners Club (FPOC) and the third was known as the Signature Collection. Unlike the VC, these were all asset backed, and with some differences in the way they worked and the way in which they were sold. I will refer to these three products as:

- 'FPOC1'
- 'FPOC2' and
- 'Signature Collection'.

Mr and Mrs K's fractional timeshare membership purchase history and the price paid (after any trade in value) is as follows:

1. 26 February 2012: FPOC1 – 4,482 fractional points - £6,459
2. 12 February 2013: FPOC1 – 5,175 fractional points - £14,875
3. 19 May 2015: FPOC2 – 5,480 fractional points - £5,598
4. 20 September 2017: Signature Collection – 1,540 fractional points - £10,548
5. **1 March 2018: Signature Collection – 2,400 fractional points - £15,846**
   Signature Collection – 1,100 fractional points - £499

Purchase 5 above on 1 March 2018 involved Mr and Mrs K entering into an agreement with the Supplier (the 'Purchase Agreements') to purchase the two 'Signature Collection memberships' whereby they traded in a total of 1,660 fractional points, comprising of the 2017 Signature Collection and two of the five FPOC2 fractions they held (thus retaining three FPOC2 fractions and 2,400 fractional points). They were given a trade in value of £21,580 for these 1,660 fractional points. Both of these Signature Collection memberships were asset

backed by ‘Allocated Properties’. It is the purchase of the two Signature Collection memberships (highlighted in bold) on 1 March 2018 that are the subject of this complaint.

Mr and Mrs K paid for their Signature Collection memberships by taking finance of £16,345 from the Lender (the ‘Credit Agreement’) repayable over 12 months at 0% interest.

Then, on 17 September 2019 Mr and Mrs K traded in their remaining three FPOC2 fractions (2,400 fractional points) towards a different type of membership from the Supplier called the Holiday Owners Club (the ‘HOC’). This was similar to the VC in that it was purely a points-based membership which was not asset backed in any way. They were given a trade in value of £31,200 for their 2,400 fractional points, and paid an additional £15,499 for this HOC membership.

So, for clarity, following their purchase of the HOC membership, Mr and Mrs K retained their two Signature Collection memberships with the associated interest in the Allocated Properties.

Mr and Mrs K – using a professional representative (the ‘PR’) – wrote to the Lender on 24 November 2021 (the ‘Letter of Complaint’) to raise a number of different concerns about their Signature Collection memberships 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 K’s concerns as a claim which it rejected on 5 February 2022.

Unhappy with this outcome, the PR, on 30 March 2022, referred Mr and Mrs K’s complaint to the Financial Ombudsman Service.

The Lender, having by then dealt with Mr and Mrs K’s concerns as a complaint, issued its final response letter to that complaint on 9 June 2022, rejecting it on every ground.

Mr and Mrs K did not agree with this outcome, and asked for their complaint to be considered by this Service. So, it was assessed by an Investigator who, having considered the information on file, thought it should be upheld.

The Investigator thought that the Supplier had marketed and sold the Signature Collection memberships as an investment to Mr and Mrs K at the Time of Sale in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the ‘Timeshare Regulations’). And given the impact of that breach on their purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr and Mrs K was rendered unfair to them for the purposes of Section 140A of the CCA.

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

The provisional decision

Having considered all of the evidence that had been submitted, I agreed with the Investigator that the complaint ought to be upheld. But as I was expanding somewhat on the reasons they had given for doing so, I set out my initial thoughts in a provisional decision (the ‘PD’) and invited both sides to submit any new evidence or arguments that they wished me to consider before I finalised my decision.

In the PD I said:

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

And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling the Signature Collection memberships to Mr and Mrs K as an investment, which, in the circumstances of this complaint, rendered the credit relationship between Mr and Mrs K 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 K in the same or a better position than they would otherwise be in.

The witness testimony

As part of the PR's submissions, a statement from Mr K was sent to this Service on 4 December 2023. It is unsigned but dated 18 May 2021. When setting out his recollections of all of their purchases from their first FPOC1 in February 2012 onwards Mr K says:

> *"Our next purchase was in February 2012. We were at another breakfast meeting on holiday when the reps told us about a new system [the Supplier] had brought out – fractional ownership. We were told that with this new system, we would be purchasing an actual piece of property. They said that the property would then be sold (they estimated 16-17 years later), and we would receive a share of the profits. It was sold as an investment, and we bought it for financial purposes and not for our own personal use.*
>
> *Therefore, on the 26th of February 2012, we purchased 4,482 fractional points, with our home resort being the Marina Del Sol. The cost for this was £6,459, and we paid by bank transfer.*
>
> *We purchased more fractions on another 4 occasions:*
>
> *Each time we purchased it was to increase our investment and future return. By the last purchase, our profit was estimated at £60,000.*
>
> *On the 12th of February 2013, we purchased 5,175 fractional points at the [Supplier]'s Paradise resort for £14,875. This was paid with a loan from [redacted] that the reps had organised for us.*
>
> *On the 19th of May 2013, we purchased 5,480 fractional points at Sunningdale Village for £5,598, we paid this with a credit card.*
>
> *On the 20th of September 2017, we purchased 1,540 fractional points, also at Sunningdale Village for £15,846. This was paid with a loan from [redacted].*
>
> *Our final fractional purchase was on the 1st of [sic] Marcy 2018. We purchased 2,400 points for £15,846 and 1,100 points for £499, both at the Sunningdale Village resort. The total for this was £16,345, and the reps organised a loan for us with Shawbrook Bank for the full amount.*
>
> *Our final purchase with [the Supplier] was in September 2019. Unfortunately, I don't have the purchase agreement for this one to confirm, but I believe we purchased 1-week at the*

Monterey Royale resort in a Signature Suite for £15,499. This was paid with another Shawbrook Bank loan that [the Supplier] had organised for us."

I have thought about how much weight I can place on the contents of the statement when considering the merits of Mr and Mrs K's complaint.

As I've said, the statement is dated 18 May 2021, but it was not sent to this Service until December 2023. But I can see on the statement that a telephone call booking was made with Mr and Mrs K for 31 May 2021, but this was changed to 18 May 2021, which is the date indicated on the statement, so it appears likely that a telephone call was set up to take details for the statement on that date. And from what I know about how this particular PR worked, the statement was probably prepared as part of its timeshare relinquishment work. So, on balance, I am satisfied that the statement was prepared on 18 May 2021.

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

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

When considering how much weight I can place on Mr K'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 written evidence Mr K 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 Ms Smith's evidence with the following in mind:*
>
> a. *In assessing oral evidence based on recollection of events which occurred many years ago, the Court must be alive to the unreliability of human memory. Research has shown that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts (Gestin and Kogan).*

b. *A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence (Kogan).*

c. *The task of the Court is always to go on looking for a kernel of truth even if a witness is in some respects unreliable (Arroyo).*

d. *Exaggeration or even fabrication of parts of a witness' testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony (Arroyo).*

e. *The mere fact that there are inconsistencies or unreliability in parts of a witness' evidence is normal in the Court's experience, which must be taken into account when assessing the evidence as a whole and whether some parts can be accepted as reliable (Arroyo).*

f. *Wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, may be neither reliable nor even truthful, the difficulty of discerning where the truth actually lies, what findings he can properly make, is often one of almost excruciating difficulty yet it is a task which judges are paid to perform to the best of their ability (Arroyo, citing Re A (a child) [2011] EWCA Civ 12 at para 20).”*

So, as I’ve said, I have thought about how much weight I can place on this statement when considering the merits of Mr and Mrs K’s complaint. And having done so, I feel able to place weight on its contents. I do so whilst being cognisant of the fact that memories can fade over time, and that inconsistencies in evidence are a normal part of someone trying to remember what happened in the past. So, I'm not surprised that there may be some inconsistencies between what he says has happened over the course of their purchases, and what other evidence shows. The question to consider, therefore, is whether there is a core of acceptable evidence from Mr K, 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 Signature Collection memberships.

I don’t, for example, find it in any way material that Mr K has been unclear regarding the details of his and Mrs K’s final purchase from the Supplier. He has been candid that he no longer has the purchase agreement, but he has made an error in describing it as a purchase in a Signature Suite, whereas it was points in the HOC. But this appears to be nothing more than an error, or confusion on his behalf about their final purchase. This is a detail that is not, in my view, material to whether or not their previous Signature Collection memberships were sold as an investment. I also do not think it is material to whether the testimony can be relied on. I don’t think this mistake or inconsistency fundamentally undermines the crux of the statement, which sets out that both of the Signature Suite memberships, were bought at the Time of Sale because of their investment potential.

So, overall, I am satisfied that I can place weight on Mr K’s testimony when considering what most likely happened at the Time of Sale and the merits of Mr K’s complaint.

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

The Lender does not dispute, and I am satisfied, that both of Mr and Mrs K’s Signature Collection memberships met the definition of a “timeshare contract” and each was a “regulated contract” for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling Signature Collection 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 K say that the Supplier did exactly that at the Time of Sale – saying, in summary, that they were told by the Supplier that Signature Collection membership was the type of investment that would increase in value.

The term “investment” is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and by reference to the decided authorities, an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit.

Mr and Mrs K’s share in the Allocated Properties 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 the Signature Collection memberships 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 <u>as an investment</u>. 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 Signature Collection. They just regulated how such products were marketed and sold.

To conclude, therefore, that the Signature Collection memberships were marketed or sold to Mr and Mrs K 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 the memberships to them as an investment, i.e. told them or led them to believe that Signature Collection membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

And there is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Signature Collection as an ‘investment’ or quantifying to prospective purchasers, such as Mr and Mrs K, the financial value of their share in the net sales proceeds of the Allocated Properties along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Signature Collection membership was not sold to Mr and Mrs K as an investment, and these disclaimers have been signed by both of them.

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 at the Time of Sale.

<u>How the Supplier marketed and sold the Signature Collection membership</u>

Over the course of the Financial Ombudsman Service’s work on complaints involving fractional timeshare sales, the Supplier has provided a training material document called “2015 SPAIN FRACTIONALS AT SIGNATURE SUITE COLLECTION SALES TRAINING MANUAL FOR FPOC AND VACATION CLUB OWNERS” (‘the Manual’) used to train its sales agents in the selling of the product purchased by Mr and Mrs K.

As I understand it, the Manual was in use at the time Mr and Mrs K made their purchase. It's not entirely clear whether they 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 agents would have got before selling Mr and Mrs K's Signature Collection memberships; and*

(2) *how the sales agents would have framed the sale of Signature Collection membership to them.*

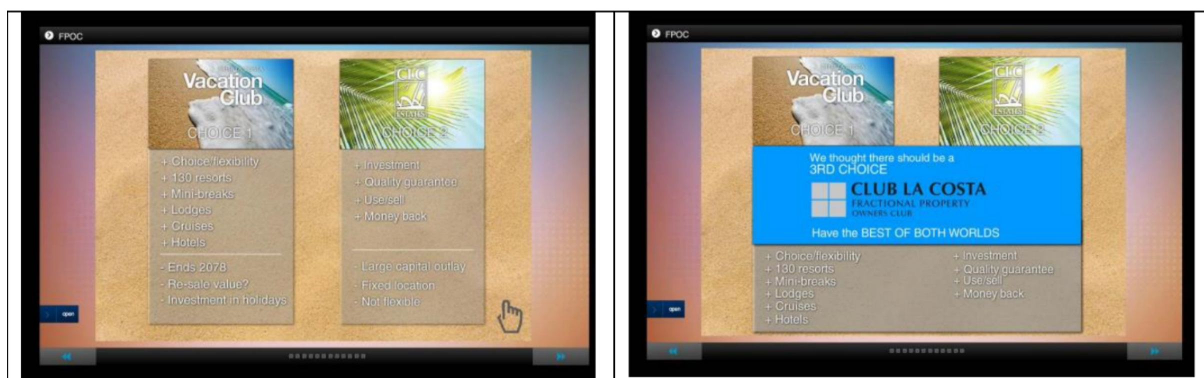
Having looked through the Manual, I am first drawn to the slide on page 11, which is the first slide that brings in the Signature Collection membership and its purpose. It says:

> *"When our members asked if they could buy a [Supplier] property in its entirety, we developed [Supplier] Estates which has been tremendously successful and has now sold over 2000 properties all around the world.*
>
> *In recent years our members requested shorter term products so to fulfil that demand we created our Fractional Property Owners Club which is a shorter term product with a fixed asset attached providing an exit in 19 years and money back"*

This slide strongly suggests the sales agent is likely to have made the point to the customer that purchasing the membership would allow them to own a physical asset, that being the fraction of a real property, and that this ownership would lead to "money back" at the end of the term.

From the off, therefore, it seems likely that the sales agent would have demonstrated that there was a significant financial advantage to gaining the membership that set it apart from membership of a 'standard' timeshare that only provided customers with holiday rights.

I've then considered the slides copied below, which are found on page 106:



These slides appear in a part of the presentation titled "In House Game Plan for Vacation Club Owners". Although they had been previously, at the Time of Sale Mr and Mrs K were not VC members but were existing fractional (FPOC2) and Signature Collection members. However, I've thought about what these slides show as being indicative of the sales practices by the Supplier at that time. And this includes the Supplier's use of the word "investment" to describe Signature Collection membership. So, although I accept this part of the slide deck was probably not shown to Mr and Mrs K, I also think it was likely that the Supplier's sales staff would have been trained to talk about Signature Collection memberships like Mr and Mrs K's as investments at the Time of Sale. That means there was a real possibility that was done in Mr and Mrs K's sale.

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

Indeed, if I'm wrong about that, I find it difficult to explain why, in paragraphs 77 and 78 followed by 99 and 100 of Shawbrook & BPF v FOS when, Mrs Justice Collins Rice said the following:

> *"[…] I endorse the observation made by Mr Jaffey KC, Counsel for BPF, that, whatever the position in principle,* ***it is apparently a major challenge in practice for timeshare companies to market fractional ownership timeshares consistently with Reg.14(3). […] Getting the governance principles and paperwork right may not be quite enough.***
>
> ***The problem comes back to the difficulty in articulating the intrinsic benefit of fractional ownership over any other timeshare from an individual consumer perspective****. […]* ***If it is not a prospect of getting more back from the ultimate proceeds of sale than the fractional ownership cost in the first place, what exactly is the benefit?*** *[…] What the interim use or value to a consumer is of a prospective share in the proceeds of a postponed sale of a property owned by a timeshare company – one they have no right to stay in meanwhile – is persistently elusive."*
>
> *"[...] although the point is more latent in the first decision than in the second, it is clear that both ombudsmen viewed fractional ownership timeshares – simply by virtue of the interest they confer in the sale proceeds of real property unattached to any right to stay in it, and the prospect they undoubtedly hold out of at least 'something back' – as products which are inherently dangerous for consumers.* ***It is a concern that, however scrupulously a fractional ownership timeshare is marketed otherwise, its offer of a 'bonus' property right and a 'return' of (if not on) cash at the end of a moderate term of years may well taste and feel like an investment to consumers who are putting money, loyalty, hope and desire into their purchase anyway.*** *Any timeshare contract is a promise, or at the very least a prospect, of long-term delight. [...] A timeshare-plus contract suggests a prospect of happiness-plus. And a timeshare plus 'property rights' and 'money back' suggests adding the gold of solidity and lasting value to the silver of transient holiday joy." (Emphasis is my own.)*

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

Having considered the training materials I've seen from the Supplier in the round, I recognise that the Manual is mainly taken up with explaining and selling the additional benefits of the Signature membership, namely the luxurious nature of the accommodation and the services on offer to members. But I note that there does not appear to be any attempt to minimise or explicitly reject the notion that the Signature Collection membership contained an investment element. Nor have I seen anything that contradicts or clashes with what Mr K has said about the way this and their previous fractional memberships were sold to them. Given this, I think it's more likely than not that the Supplier did, at the very least, imply that future financial returns (in the sense of possible profits) from the membership were a good reason to purchase it. Although this was set out in terms of their first FPOC1 purchase in 2012, when describing how they were told fractional memberships worked Mr K said:

> *"We were told that with this new system, we would be purchasing an actual piece of property. They said that the property would then be sold (they estimated 16-17 years later), and we would receive a share of the profits. It was sold as an investment…"*

And from what I've seen there was likely to have been little in the way the Signature Collection memberships were sold which would have dissuaded Mr and Mrs K that this assertion was not correct. So, overall, I think the Supplier's sales representative, during Mr and Mrs K's sale, was likely to have led them to believe that the Signature Collection membership was an investment that may lead to a financial gain (i.e., a profit) in the future.

But in addition to what they were likely told at the Time of Sale, it is important to note that this was Mr and Mrs K's fifth fractional membership purchase. They had previously bought FPOC1, FPOC2 and a Signature membership, so they had been through various sales presentations over the years.

Although I am not considering complaints about their previous purchases here, I think it is important to consider what they were likely told at these presentations by the Supplier, as they were likely to have set the tone for their subsequent purchases, and Mr K has said in his statement that the fractional memberships were all bought for the same investment reasons.

As I've said, Mr and Mrs K's first and second fractional memberships were bought in February 2012 and February 2013. The presentations that they were likely shown at these times would have been quite different to that shown at the later Signature sales. But, as I go on to explain below, when the FPOC1 was marketed to Mr and Mrs K in 2012 and 2013, I think the Supplier was likely to have set out that the FPOC1 memberships were an investment.

Alongside the information this Service has been given about the training and sales presentations that were associated with the selling of the type of Signature Collection I am considering here, we have also been provided training material used by the Supplier to prepare its sales representatives for selling the FPOC1 - 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 fractional membership, including the FPOC1 memberships sold to Mr and Mrs K. It isn't entirely clear whether Mr and Mrs K 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 FPOC1; and*

(2) *how the sales representatives would have framed the sale of FPOC1 membership to Mr and Mrs K.*

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 K 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 memberships and I think it suggests that sales representatives were likely to have made the point to Mr and Mrs K that FPOC1 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.*

So, in my view, as 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. And Mr K has said as much in his statement:

"We were told that with this new system, we would be purchasing an actual piece of property. They said that the property would then be sold (they estimated 16-17 years later), and we would receive a share of the profits. It was sold as an investment…"

Then, in May 2015 Mr and Mrs K traded in their existing FPOC1 points for an FPOC2 membership, with an additional 305 fractional points. This Service has also been provided with the training materials used to prepare the Supplier's sales representatives for the sale of this type of membership, including:

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

Neither the 2013/2014 Induction Training nor the ESA I've seen included notes of any kind. However, the Fractional Club Training Manual includes very similar slides to those used in the ESA. And according to the Supplier, the Fractional Club Training Manual (or something

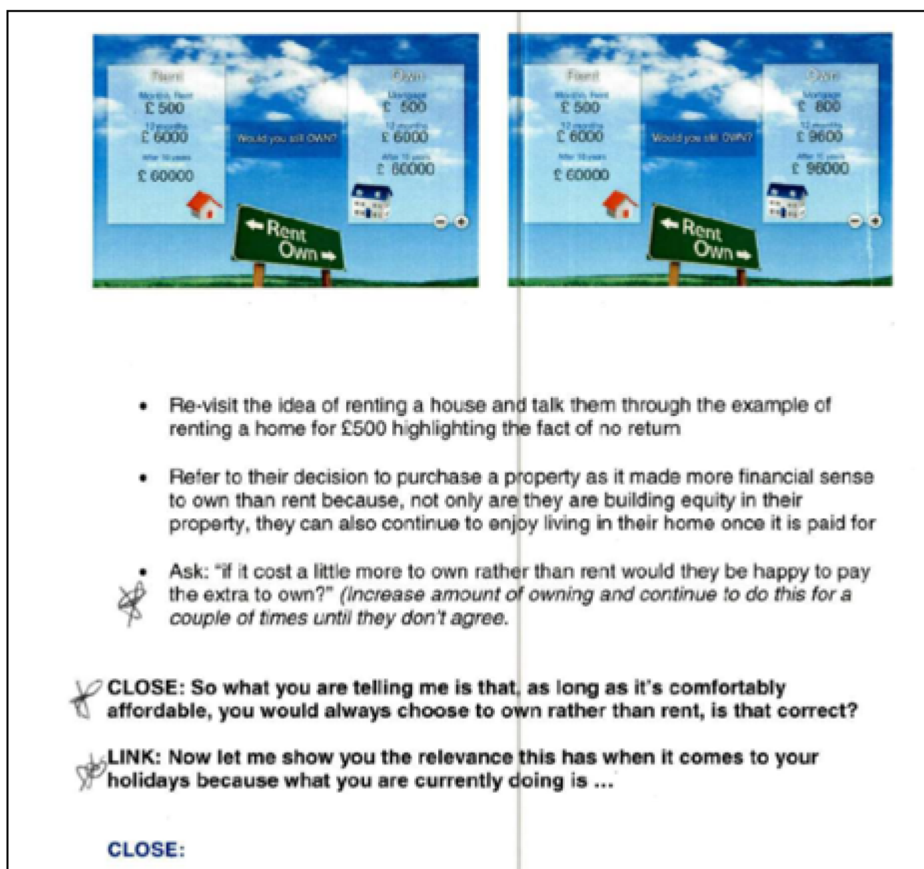
similar) was used by it to train its sales representatives in 2015. So, it seems to me that the Training Manual is reasonably indicative of:

(1) *The training the Supplier's sales representatives would have got before selling FPOC2; and*

(2) *how the sales representatives would have framed the Supplier's multimedia presentation (i.e., the ESA) during the sale of FPOC2 membership to prospective members – including Mr and Mrs K.*

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 FPOC2 worked and what it was intended to achieve.

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



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

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

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

CLOSE:

Indeed, one of the advantages of ownership referred to in the slide above is that it makes more financial sense than renting because owners "are building equity in their property". And as an owner's equity in their property is built over time as the value of the asset increases relative to the size of the mortgage secured against it, one of the advantages of ownership over renting was portrayed in terms that played on the opportunity ownership gave prospective members of the FPOC2 to accumulate wealth over time.

I acknowledge that these slides, unlike those which were probably shown in Mr and Mrs K's previous presentations, 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 FPOC2 membership was to strongly imply that 'owning' fractional points was a way of building wealth over time, similar to home ownership.

So, the point I am ultimately making here is that I think it likely, by 2015, Mr and Mrs K had bought three fractional memberships following presentations that either expressly described them as 'investments' or alluded to much the same concept.

And I think the way that the Signature Collection memberships were sold to them at the Time of Sale would have done little to dissuade them from that idea. And Mr K has said as much in his statement:

> *"We purchased more fractions on another 4 occasions:*
>
> *Each time we purchased it was to increase our investment and future return."*

As regards the Signature Collection memberships, the Lender may point to the contemporaneous sale documents and say they show that the Supplier didn't present the Signature Collection memberships as an investment because they contained disclaimers to that effect. But these disclaimers were contained in documents which were given to Mr and Mrs K to sign after they had been through the sales presentation, and after they had agreed to make the purchases on the basis of the presentation and what they had been told by the Supplier. And it's ultimately difficult to explain why it was necessary to include such disclaimers if there wasn't a very real risk of the Supplier marketing and selling the memberships 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 without breaching the relevant prohibition.

Further, I find it fanciful that the Supplier would not have highlighted the possible returns available to Mr and Mrs K when selling the Signature Collection memberships to them given that they already had a Signature Collection and FPOC2 membership which they were trading in to make the purchase.

So, when bearing this in mind, and given what I've said about the way I think their previous fractional memberships were likely sold and/or marketed to them in 2012, 2013, 2015 and 2017, I think it is likely that, on the balance of probabilities, the Supplier's sales representative led Mr and Mrs K to believe that the Signature Collection memberships, which were an upgrade of their existing Signature and FPOC2 memberships, were also an investment that may lead to a financial gain (i.e., a profit) in the future.

And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale.

<u>Was the credit relationship between the Lender and the Consumer rendered unfair?</u>

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 K 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 K 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 K's testimony, the prospect of a financial gain from their Signature Collection memberships was an important and motivating factor when they decided to go ahead with their purchase. It seems to me that it is likely, from a combination of what they would likely have been told, what they have said happened, and what they actually did, that all of their fractional membership purchases followed the same pattern and overall aim, and were based on the potential profit at the end of each of the membership terms. And Mr K has said so in his statement:

> *"Each time we purchased it was to increase our investment and future return."*

So, I think it likely that the continuing investment aim and potential profit from the new Allocated Properties associated with the Signature Collection memberships was a motivating factor when they decided to upgrade.

That doesn't mean they were not interested in holidays. Their own testimony and holiday reservation history demonstrates that they quite clearly were, which is unsurprising given the nature of the product at the centre of this complaint. And indeed, this is made clear by their final purchase from the Supplier.

As I've said, in September 2019 Mr and Mrs K traded in their remaining 2,400 fractional points from their FPOC2 membership towards the purchase of an HOC membership. And as this particular membership wasn't asset backed, it is clear that it was bought for holiday reasons. This is supported by the sales notes from the time which state:

> *"met members before, they wanted to get more [points] as they have [a] big family and their children are also using their membership. Keeping their [Signature Collection memberships] trading [in] FPOC2 2400 [points]."*

I have thought about this purchase carefully, because it doesn't follow the apparent investment strategy that Mr K says they had – after all, it raises the question, why would they have traded in a membership which they say was bought as an investment, for a product which was clearly not an investment. But I don't think this purchase in particular means their previous Signature Collection memberships were not bought for their investment potential. After all, these were retained by Mr and Mrs K and not, for example, traded in for the HOC membership. If they wanted the memberships just for the holidays they could provide, I can't see why they retained them – they could have purchased significantly more HOC points had they traded in these memberships too. So, they were clearly retained for a reason. And given everything that I have set out above, and because Mr K says (plausibly in my view) that the purchase of the Signature Collection memberships was to increase their investment and future return, on the balance of probabilities I think their purchase was motivated by their share in the Allocated Properties and the possibility of a profit.

Mr and Mrs K have not said or suggested, for example, that they would have pressed ahead with the purchases in question had the Supplier not led them to believe that Signature Collection 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 the Signature Collection memberships, 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 it rendered Mr and Mrs K's credit relationship with the Lender unfair to them.

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 K under the Credit Agreement and related Purchase Agreements for the purposes of Section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint."

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

The responses to the provisional decision

Mr and Mrs K accepted my provisional outcome with no further comment. The Lender also responded and said while it did not intend to challenge the outcome, it had some comments it wished to make.

As the deadline for further submissions has now passed, 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 done so, and having considered everything again in light of both sides' responses to the PD, I see no reason to depart from the outcome reached in the provisional decision. I remain satisfied that this complaint ought to be upheld, but I will address the concerns raised by the Lender in its response to the PD.

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

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

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

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

> *"The term "investment" is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and by reference to the decided authorities, an investment is*

a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit."

But the Signature Collection memberships were asset-backed by an Allocated Property, and the share in these properties clearly constituted an investment as it offered the member the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But there was no conflation of the word 'return' because I made it clear that the fact that the fractional membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*. So, the Timeshare Regulations did not ban products such as the Signature Collection membership. They just regulated how such products were marketed and sold.

The Lender also thought that the PD had dismissed the disclaimers contained in the contractual paperwork with no proper basis or explanation, despite observing that they emphasised that the products should not be seen as an investment, and had been signed by Mr and Mrs K. 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 memberships should *not* be looked at as a financial investment, and Mr and Mrs K signed to say they had read and understood that. But as I said in the PD, these disclaimers were contained in documents which were given to Mr and Mrs K to sign *after* they had been through the sales presentation, and *after* they had agreed to make the purchases on the basis of the presentation and what they had been told by the Supplier. And as I set out, that presentation suggested that the membership could lead to a financial gain (i.e. a profit) from the sale of the associated Allocated Property(s). 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 K from thinking that the memberships were an investment. It is also ultimately difficult to explain why it was necessary to include such disclaimers if there wasn't a very real risk of the Supplier marketing and selling membership as an investment, given the difficulty of articulating the benefit of fractional ownership in a way that distinguishes it from other timeshares from the viewpoint of prospective members.

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

"In the PD, at page 14, the Ombudsman appears to have adopted a different test than that of cited in Carney, he states "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 decisions 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 K were motivated to make their Signature Collection membership purchases because of the associated shares 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 decisions they ultimately made.

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

But the PD considered, in some detail, both the provenance and contents of the statement, and I was satisfied that what had been recorded was Mr K's recollections of their purchase. And I was satisfied, being cognisant of the fact that memories can fade over time, that Mr K's testimony could be relied on. Having reconsidered everything again, I remain satisfied that it is safe to place weight on Mr K'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 K's purchasing decisions.

Conclusion

So, although the Lender has said it would not challenge my provisional decision that this complaint ought to be upheld, I have considered everything that it has said in response. And having done so, I remain satisfied that this complaint ought to be upheld. I think the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs K 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 K. Neither side has made any comment on my proposed redress, so I see no reason to depart from my provisional thoughts on this issue.

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

Fair Compensation

Having found that Mr and Mrs K would not have agreed to purchase the Signature Collection memberships 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 Signature Collection memberships (i.e., not entered into the Purchase Agreements), and therefore not entered into the Credit Agreement, provided Mr and Mrs K both agree to assign to the Lender their 3,500 Signature Collection fractional points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs K were existing FPOC2 and Signature members, and these memberships were (partially in the case of the FPOC2) traded in against the purchase price of the Signature Collection memberships in question. Under their existing memberships, they had a total of 5,480 FPOC2 fractional points and 1,540 Signature fractional points. And, like their Signature Collection memberships, they had to pay annual management charges as part of their existing memberships. So, had Mr and Mrs K not purchased the Signature Collection memberships at the Time of Sale, 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 K from the Time of Sale as part of their Signature Collection memberships should amount only to the difference between those charges and the annual management charges they would have paid as part of their existing FPOC2 and Signature memberships.

I'm conscious that, under their existing FPOC2 and Signature memberships, Mr and Mrs K were entitled to a share in an allocated property for each. I set this out in the PD and asked Mr and Mrs K if, in light of that fact, they wanted their previous fractions reinstated if that could be achieved to the satisfaction of both parties to it. However, as Mr and Mrs K haven't said in response to the PD that they want these memberships reinstated, I won't consider this any further.

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

(1) The Lender should refund Mr and Mrs K'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 annual management charges paid after the Time of Sale under the Signature Collection memberships and what Mr and Mrs K's annual management charges would have been under their existing FPOC2 and Signature memberships.

(3) The Lender can deduct:

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

   ii. The market value of the holidays* Mr and Mrs K took using their Signature Collection memberships *if* the Points value of the holiday(s) taken amounted to more than the total number they would have been entitled to use at the time of the holiday(s) as ongoing FPOC2 and Signature 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 K 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 their FPOC2 and Signature memberships 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 their previous memberships 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 K's credit files in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr and Mrs K's Signature Collection memberships are still in place at the time of this decision, as long as they agree to hold the benefit of their interest in the Allocated Properties for the Lender (or assign those interests to the Lender if that can be achieved), the Lender must indemnify them against all ongoing liabilities as a result of their Signature Collection memberships.

*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 K took using their Signature Collection 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 Agreements seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

**HM Revenue & Customs may require the Lender to take off tax from this interest. If that's the case, the Lender must give Mr and/or Mrs K 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 K as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs K and Mr K to accept or reject my decision before 13 April 2026.

Chris Riggs
Ombudsman