DRN-4481481

The Complaint

1. Mr C says that, under Sections 75 and 140A of the Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) (the 'CCA'), Shawbrook Bank Limited didn't act fairly or reasonably in relation to a timeshare he and his wife (Mrs C) were sold on 18 February 2014 (the 'Time of Sale').

2. As the relevant timeshare was in both Mr and Mrs C's names, I'll refer to both of them throughout much of this Final Decision despite the claims in question and this complaint being in Mr C's name.

Background to the Complaint

3. The timeshare provider in this complaint is the operator of international resorts and hotels. Mr and Mrs C say that, while on holiday in 2011, they were approached by representatives of the timeshare provider and offered the chance of a promotional holiday if they went to a timeshare presentation. So, they went along and ended up purchasing Trial Membership that they subsequently cancelled within the cooling off period.

4. Then, sometime in 2013, Mr and Mrs C say that they received an unexpected call from the timeshare provider during which they were offered a promotional week-long holiday. Again, they accepted the offer and went to the timeshare provider's Paradise Resort (Tenerife) in February 2014. While there, Mr and Mrs C say that they had to go to a sales presentation on the 18th of that month. And during the presentation, they say they were introduced to a points-based timeshare called the 'Fractional Property Owners Club' (the 'FPOC'), given some information about it and shown around a holiday resort that they say they were told was representative of what they could expect to have access to if they became members of the FPOC.

5. Mr and Mrs C say that, having been told that membership of the FPOC was an investment, and after coming to the conclusion that it would provide a good standard of holidays, they agreed to join the FPOC and bought 1,500 Fractional Points for £16,820 (after a £3,900 discount). They paid for their membership, associated legal and administrative fees of £699 and the first year's management charges of £779[1] by taking finance from Shawbrook.

6. The Purchase Agreement dated 18 February 2014 (the 'FPOC Purchase Agreement') was made between one of the timeshare provider's sales companies and Mr and Mrs C. The sales company, which had the right to promote and sell Fractional Rights in the FPOC, was the supplier for the purposes of the CCA (the 'Supplier'). Under the FPOC Purchase Agreement, Mr and Mrs C agreed to be bound by the club rules (the 'FPOC Rules') and by the management agreement relating to the club (the 'FPOC Management Agreement').

[1] As per paragraph 69 in the witness statement of the Supplier's Sales Administration Director ('DF').

7. The loan from Shawbrook came about as follows. At first, Mr C entered into a 15-year Fixed Sum Loan Agreement for restricted-use credit provided by a lender other than Shawbrook (Lender 1). But on the 23 February 2014, he contacted the Supplier with some queries about the finance before letting it know on the 25th of that month that he had arranged finance from elsewhere. However, on 4 March 2014, Mr C contacted the Supplier again – this time in the hope that the finance from Lender 1 could be renegotiated on an interest free basis. As it couldn't be, the Supplier ended up arranging finance for Mr C on an interest free basis from Shawbrook instead. And as a result, Mr C signed a two-year, restricted-use Fixed Sum Loan Agreement for £18,298[2] (the 'Credit Agreement').

8. Under the terms of FPOC, Mr and Mrs C could exchange their Fractional Points for holidays. And at the end of their projected membership term of 19 years, they also had a share in the net sale proceeds of a property tied to their membership (the 'Allocated Property') – which was referred to as A402 (Monterey resort (Tenerife)) on their FPOC Purchase Agreement. As their interest in the Allocated Property was limited to a share in its net sale proceeds, they didn't have any preferential rights to stay in the Allocated Property or use it in any other way.

9. In addition to the £3,900 discount on the price of Mr and Mrs C's Fractional Points, they were also given a Travel Savings Bonus – which was payable into their bank account over 18 months at £120 per month – along with 500 Premium Bonus Points per year for three years.

10. Not long after becoming members of the FPOC at the Time of Sale, Mr and Mrs C say that they were offered a promotional holiday as a reward for their purchase. So, they went to Spain in October 2014. And after attending another sales presentation as part of the promotion, they agreed to upgrade their membership on the 27th of that month by acquiring an additional 550 Fractional Points on top of the 1,500 they already had – taking their total to 2,050.

11. The upgrade in October 2014 came about in the following way. After a tour of the relevant resort, Mr and Mrs C say that they were asked about where they would like to holiday during their sales presentation. And when they stated Florida, they say they were told that they didn't have enough Fractional Points to help make that happen.

12. So, to give themselves enough Fractional Points to holiday in Florida, Mr and Mrs C say they agreed to upgrade having continued to be attracted by the fact that FPOC membership was an investment. The purchase price was £28,449 less the trade-in value of their existing membership – which was £19,500.[3] That left them owing £8,949 that they paid for using restricted-use credit. However, as the credit in question was provided by a different lender (Lender 3), Mr and Mrs C's purchase in October 2014 isn't the subject of this complaint.

13. Unhappy with what had happened at the Time of Sale, Mr and Mrs C – using a professional representative ('PR') – wrote to Shawbrook on 26 October 2017 (the 'Letter of Claim') to make claims under:

    (1) Section 75 of the CCA for misrepresentation; and
    (2) Section 140A of the CCA for an unfair debtor-creditor relationship.

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[2] This was the total payable according to the FPOC Purchase Agreement: £17,519 was for the "Purchase Price" (including the legal and administrative fees of £699) and £779 was for "Membership/Dues" – which, as per paragraph 69 of DF's witness statement, was the first year's annual management charge.

[3] As to the Travel Saving Bonus, 8 monthly payments of £120 were paid before the upgrade and it was agreed at the time of the upgrade that Mr and Mrs C would be receive a further 10 payments after the upgrade.

14. The assertions that underpinned each of the claims, as far as they are relevant to what happened at the Time of Sale, can be summarised as follows:

    (1) The FPOC was misrepresented. Mr and Mrs C weren't told that the product was a timeshare. But they were told that:

        i. As members of the FPOC, they would have "*a share in a specific property in a specific resort"* by buying *"bricks and mortar"*.
        ii. Membership would be a "*fantastic investment"*.
        iii. *"Property value only goes up"*.
        iv. Their membership of the FPOC had a *'fixed term of 19 years'* – guaranteeing, their representative says, the end date in 2033, after which membership would *'end completely'* and they would no longer be liable for it.
        v. After the 19-year term, they would get their investment back, plus £5,769 profit – a figure that Mr C wrote down at the Time of Sale.
        vi. The Supplier would buy back the Allocated Property after 19 years.

    (2) Mr and Mrs C also say that, during a holiday in October 2015, they met non-members at the resort they were staying at – which was contrary to what they had been told by the Supplier at the Time of Sale about the exclusivity of the resorts they could holiday at.

    (3) Mr and Mrs C experienced difficulties with their membership of the FPOC because they were unable to book holidays where they wanted and when they wanted to.

    (4) Mr and Mrs C were pressured into paying for membership of the FPOC.

    (5) The duration of Mr and Mrs C's FPOC membership along with the obligation to pay annual management charges for the duration of their membership were unfair and breached the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').

15. PR also argued that Shawbrook had breached the Office of Fair Trading's (the 'OFT') Guide on Irresponsible Lending.

16. As a result, Mr and Mrs C sought the following in compensation (as far as it was relevant to this complaint):

    (1) A refund of the payments made to Shawbrook under the Credit Agreement
    (2) A refund of all the annual management charges.
    (3) Interest from the date of each payment until the date of settlement;
    (4) The removal of any adverse information on Mr C's credit file;
    (5) A separate award for distress, inconvenience and upset; and
    (6) A separate award for their reasonably incurred legal fees.

17. In April 2018, Mr C – with help from PR – referred a complaint to the Financial Ombudsman Service.

Assessment One

18. The complaint was then eventually passed to an investigator who came to the initial conclusion that it ought to be upheld because the Supplier, who as a statutory agent of Shawbrook, had failed to disclose to Mr and Mrs C important information about the Allocated Property – which put them at a significant disadvantage. And as a result, she thought it was likely that a court would conclude that there was an unfair debtor-creditor relationship under Section 140A.

19. Shawbrook disagreed and provided extensive submissions that needed to be read in conjunction with several witness statements and accompanying exhibits. It isn't practical to set out the submissions in full here. But I have summarised them in the paragraph below.

20. Shawbrook didn't think that membership of the FPOC had been misrepresented to Mr and Mrs C. It argued that membership couldn't have been sold as an investment because doing so was prohibited by the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations') and the evidence made it clear that the FPOC was not sold as an investment – including the fact that there isn't any reliable evidence to suggest that Mr and Mrs C were provided with an estimate or guarantee in regard to what the Allocated Property was going to be worth in the future. Shawbrook said that Mr and Mrs C's allegation that they were 'pressured' into purchasing membership is demonstrably untrue. It also argued that, while the sales process could take some time, it didn't think that was inappropriate nor did it think that resulted in undue pressure on consumers. Instead, Shawbrook said that the appropriate amount of time was taken to ensure that the FPOC was fully and accurately explained to consumers so that they properly understood what they were purchasing. And as Mr and Mrs C were provided with all the key information (none of which was misleading), Shawbrook thought that it was clear that they made a fully informed decision when purchasing membership of the FPOC. However, Shawbrook went on to say that, even if there was an unfair debtor-creditor relationship between it and Mr C, the relationship didn't remain unfair because Mr and Mrs C's upgrade in October 2014 ended the unfairness.

Assessment Two

21. Having looked at the complaint again in light of everything that had been said and provided, the new information led the investigator to change her mind – concluding that it wasn't fair or reasonable to uphold the complaint given what she now knew.

22. PR disagreed and provided extensive submissions, an Opinion from Counsel and a copy of a report by the Department for Business Innovation & Skills called *"Disposal of Timeshares and Other Long-term Holiday Products"*. Again, it isn't practical to set out the submissions in full here. But I have summarised them in the next four paragraphs below.

23. PR argued that Mr and Mrs C were pressured into purchasing FPOC membership because they had to complete the transaction on the day in question.

24. PR said that the sales process focused almost entirely on the potential benefits of membership with little to no detail about the potential risks, downsides and how membership worked in practice – suggesting that the price Mr and Mrs C paid for their share in the Allocated Property differed from the purchase price of real estate because the price of acquiring Fractional Points was not directly linked to the market value of the Allocated Property.

25. PR also argued that the ongoing cost of FPOC membership was opaque and included various expenses and capital contributions to the FPOC along with administration and affiliation fees – which made it difficult if not impossible for average consumers to gauge whether the finance and other costs were worthwhile. And overall, PR thought that the transaction created an unfair debtor-creditor relationship because there was a clear imbalance of knowledge.

26. As for Counsel's Opinion, he didn't think it could be argued with force that Mr and Mrs C were pressured into the FPOC Agreement at the Time of Sale because it wasn't until April that year when Mr C agreed to the finance from Shawbrook. He also thought that Mr C was strong and sensible enough to insist on seeking his own finance rather than what was initially offered from Lender 1. And while he thought that there were clearly examples of poor conduct by the Supplier, he didn't think they had an impact on Mr and Mrs C's ability to consider FPOC membership at their leisure. Instead, he thought the better points included the product not being accurately described and the explanations given being misleading. What's more, while the purchase of further points in October 2014 was to try and remedy the lack of available holidays, he hadn't seen any contemporaneous evidence of such concerns being recorded – which he thought was entirely consistent with the suggestion that Mr and Mrs C only discovered problems with the FPOC much later. And he thought that they were persuaded to purchase more Fractional Points because they wanted to holiday in Florida.

27. As an informal resolution to this complaint didn't prove possible, the complaint was referred for an ombudsman's decision – which is why it was passed to me.

<u>My Provisional Decision</u>

28. I issued a Provisional Decision ('PD') on 12 May 2021 upholding this complaint. And in summary, I thought that:

    (1) The relevant legal and regulatory context included:

        i. the CCA;
        ii. case law on Section 140A;
        iii. the law on misrepresentation;
        iv. the Timeshare Regulations;
        v. the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations'); and
        vi. the UTCCR.

    (2) The Resort Development Organisation – Code of Conduct (1 January 2010) (the 'RDO Code') represented good industry practice that was appropriate to take into account.

    (3) The negotiations conducted by the Supplier during the sale of Mr and Mrs C's membership of the FPOC were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b) of the CCA. That made them antecedent negotiations under Section 56(1)(c) of the CCA – which, in turn, meant that they were conducted by the Supplier as agent for Shawbrook as per Section 56(2) of the CCA. And for that reason, I thought the Supplier's pre-contractual acts and/or omissions were relevant to the claims against Shawbrook under Sections 75 and 140A.

(4) Mr and Mrs C's FPOC membership wasn't misrepresented by the Supplier in such a way as to make it liable under the law of misrepresentation. So, Shawbrook's handling of Mr C's claim under Section 75 of the CCA *wasn't* unfair or unreasonable.

(5) There wasn't the evidence to argue that the loan from Shawbrook was unaffordable for Mr C, given his circumstances.

(6) A court would be likely to find that the debtor-creditor relationship in question, which arose out of the loan from Shawbrook taken together with the FPOC Purchase Agreement, was unfair given all of the circumstances of this complaint.

(7) When looking at what happened at the Time of Sale entirely as a question of what was fair and reasonable in all the circumstances of this complaint, Shawbrook (by its statutory agent, the Supplier) didn't act fairly or reasonably in conducting the pre-contractual negotiations with Mr C. The decision he and Mrs C made to purchase membership of the FPOC was prejudiced and, as a result, they suffered financially – having paid for FPOC membership that they wouldn't have purchased had it not been for the relevant breaches by the Supplier. So, Shawbrook's handling of Mr C's claim under Section 140A *was* unfair and unreasonable.

29. I gave both sides a month to respond with new arguments and/or evidence – a deadline I ultimately agreed to extend to 10 weeks, giving both parties until 21 July 2021 to submit new evidence and/or arguments.

30. On 1 July 2021, Shawbrook wrote to our Interim Chief Executive and the Chair of our Board of Directors. It set out a brief history of its own timeshare complaints since they were referred to us before touching on my PD – which, in summary, it found difficult to rationalise and thought took a different approach to the courts following a number of County Court claims I've listed in this Final Decision.

31. On 16 July 2021, PR responded to my PD – providing its own submissions, another Opinion from Counsel, the judgment from a Court of Appeal case called *Martin v Kogan* [2019] EWCA Civ 1645, a copy of the Finance and Leasing Association's (the 'FLA') Lending Code 2012 and the FPOC Rules and Management Agreement from September 2013.

32. It isn't necessary to summarise what Counsel had to say in his most recent Opinion as he didn't introduce any new arguments or add to what he said in his first Opinion. But PR's submissions, which it said supplemented its submissions on behalf of Mr C dated 27 November 2020 (which it said were adhered to), can be summarised as follows:

(1) PR asked me to reconsider what I said in paragraph 76 of my PD – which dealt with a handwritten note that PR argued was evidence that Mr and Mrs C would get their investment back plus £5,769 profit – because it says that:

i. I accepted that there was no reason to doubt the honesty and credibility of Mr and Mrs C and I hadn't identified in my PD anything in the evidence provided by Shawbrook that had a direct bearing on the note in question.
ii. I found that I didn't doubt the words *"You would get your investment back plus £5,769 profit"*.

iii. Mr C stated in PR's letter of 26 October 2017 that "*the key for him was that [the FPOC] would be an investment and [that he and Mrs C] would get [their] money back, and more"*.
iv. I implicitly accepted that the investment-related disclaimers in the paperwork were not read or understood by Mr and Mrs C at the Time of Sale because of the urgency with which the documents were provided to them at the end of the day.

(2) The guidance in *Gestmin SGPS S.A. v Credit Suisse (UK) Limited* [2013] EWHC 3560 ('*Gestmin*') doesn't enable a decision maker to ignore documents that relate to the facts in issue. And if the guidance in *Gestmin* is relevant, then in the absence of direct evidence relating to the sale from the Supplier's sales team, Mr and Mrs C were told – on the balance of probabilities – that they would make a profit of £5,769.

(3) PR asked me to reconsider paragraph 75 of my PD, in which I found that three representations made by the Supplier to Mr and Mrs C didn't look like anything more than the expression of honestly held opinions. PR argued that it hadn't seen any witness evidence from the Supplier that supports the conclusion that those working for the Supplier at the Time of Sale had reasonable grounds to believe that Mr and Mrs C would make a profit, let alone a profit of £5,769.

(4) Shawbrook's failure to follow the FLA's Lending Code 2012 meant that its own acts or omissions created an unfair relationship under Section 140A.

(5) Mr and Mrs C say that the FPOC Rules and Management Agreement were not discussed at all when they signed their FPOC Purchase Agreement.

(6) For reasons previously given, Mr and Mrs C were unable to afford FPOC membership if they could not use it effectively for holidays.

(7) In response to paragraph 250 of my PD, Mr and Mrs C said that the holiday they took in October 2015 using their Fractional Points was worth £1,000 as it took place at the end of the season and all of their flights and transfers had been paid for separately.

(8) In response to the assumption I made in paragraph 249 of my PD that Mr and Mrs C's Fractional Rights had been permanently forfeited for non-payment of annual management charges, Mr and Mrs C say that neither the Supplier nor the Trustee had confirmed that their membership had been forfeited. So, PR said that Mr and Mrs C should be indemnified against any ongoing liabilities and suggested that the Supplier should confirm that their membership has been terminated.

(9) Mr and Mrs C lost a substantial amount of money because of their FPOC membership. It caused them sleepless nights, anxiety, lots of distress and uncertainty – which merits a separate award.

(10) Mr and Mrs C have also incurred legal fees because they could not have provided focused submissions throughout this complaint without access to specialist legal help. So, redress should include the legal costs they've reasonably incurred.

33. On 28 July 2021, Shawbrook responded to my PD. And along with its own submissions, it included a witness statement from the Supplier's Group General Counsel ('EM') and six associated exhibits along with a judgment from the case of *Wilson v Clydesdale Financial Services (trading as Barclays Partner Finance)* (19 July 2021, County Court Portsmouth).

34. Shawbrook's response can be summarised as follows:

    (1) There had been a number of timeshare mis-selling cases to reach trial in court in recent years that, while not authoritative, were and are indicative of the types of decisions that courts are actually making. And in light of these and Shawbrook's experience more generally, it said that a court would not find that an unfair relationship existed given the circumstances of this complaint.

    The FPOC Wasn't Sold as an Investment

    (2) The conclusion in my PD that FPOC membership was sold as an investment to Mr and Mrs C was driven by a belief that it was designed to include an investment element and that their beneficial interest in the Allocated Property was an important and distinguishing feature of the product. In Shawbrook's view, there were and are two fundamental difficulties with this reasoning: (1) it fails to recognise that fractional-type products were established products in the sector and considered in the drafting of both the 2008 Timeshare Directive and the Timeshare Regulations in 2010; and (2) it fails to appreciate the distinction between the Supplier accurately and factually describing a key feature of the FPOC and the Supplier actively selling or marketing the product as an investment.

    (3) It's apparent that domestic and European legislatures anticipated that beneficial timeshares could be sold by accurate reference to their features without improperly implying that the product was an investment – which was the conclusion reached in *Brown v Shawbrook* (18 June 2020, County Court Wrexham).

    (4) In any event, In Shawbrook's view, there was no evidence to suggest that unfairness arose as a result of a breach of Regulation 14(3) of the Timeshare Regulations. So, such a breach didn't give rise to an unfair relationship for the purpose of Section 140A.

    The Availability of Holidays

    (5) Mr and Mrs C booked holidays during October half-term in 2014, 2015 and provisionally in 2016. So, it can't be concluded that there was any restriction or limitation on their ability to take holidays during school holidays other than the usual pressures and demands which any reasonable holiday ownership product customer would understand. Many of the Supplier's customers need to travel in the school holidays and successfully do so. This is clear from paragraphs 39 to 43 of EM's witness statement when he said that every year, *"approximately 4,000 owners who have 1,501 points or fewer booked school holidays. This represents approximately 30% of all bookings made by owners with fewer than 1,501 points".*

    (6) What's more, none of the material relied on in my PD could properly be said to have implied that there would not be high demand during school holidays or that accommodation would not be subject to availability. It would have been obvious

to all consumers and certainly Mr and Mrs C (who were described as 'average consumers' in my provisional findings) that demand in school holidays would be high and booking early was recommended.

Information Provision: The Investment Potential

(7) The Supplier wasn't required to provide information on the current market value of the Allocated Property or the main matters which might impact on the value over time.

Information Provision: The Availability of Holidays

(8) The requirement to include restrictions in the Standard Information Form was aimed at restrictions that actually prevent a customer from booking certain weeks or certain properties. The Supplier wasn't required to state the obvious and specify that there was a finite amount of accommodation.

Information Provision: The Ongoing Charges

(9) Shawbrook accepted that Paragraph 4 of Part 3 of the Standard Information Form should have gone beyond the summary in Part 1. But it argued that it would have been inappropriate to comprehensively reproduce the full terms governing all the charges. The Supplier provided an accurate description of the principal additional charge (the annual management charge) and a description of how that was calculated. And the Standard Information Form did refer to the FPOC Rules in which full details could be found under the section clearly headed *"5. Management Charge"*.

(10) Even if there was some technical failure by the Supplier to provide enough information about the additional charges in the Standard Information Form, that didn't give rise to unfairness because Mr and Mrs C weren't charged any additional charges and neither Mr and Mrs C nor PR complained about the Supplier's disclosure of the special management charge, sinking fund contributions or default charges (the 'Additional Charges') or the management charge shortfalls.

Unfair Terms

(11) In my PD, I found that a number of terms in the FPOC Purchase Agreement "unfairly favoured the Manager". But Shawbrook says that is not the test under Regulation 5 of the UTCCRs. The is whether the terms in question caused a significant imbalance in the parties' (being the consumer and the trader) rights and obligations arising under the contract, to the detriment of the consumer. In Shawbrook's view, the terms thought to be unfair did not affect the balance between the timeshare provider and Mr and Mrs C's rights at all. As EM confirmed in his witness statement, the timeshare provider was responsible for paying the annual management charges on unsold inventory – which means that any increases adversely affected the timeshare provider in the same way that they affected all other Members.

(12) What's more, the FPOC was run on a not-for-profit, break-even basis – which means it was impossible for the manager to benefit from the terms that were criticised in the PD. And while the terms included provision for special levies and sinking funds, the timeshare provider ensured that members (like Mr and Mrs C) were adequately protected from such charges by imposing an obligation on the

manager to arrange comprehensive insurance. So, no reasonable tribunal could conclude that the terms in question were contrary to the requirement of good faith.

(13) In Shawbrook's view, I was wrong to suggest in my PD that the relevant terms fell within paragraph 1(l) of Schedule 2 of the UTCCR. None of the relevant charges allowed the timeshare provider to change the amount of money it was charging Mr and Mrs C for their membership under their FPOC Purchase Agreement. Instead, it was the manager that was permitted by the terms to levy fees on the members and the timeshare provider.

(14) The FPOC Rules were amended in March and June 2014. One of the amendments was the introduction of an independent committee to set the annual management charge – which consisted of an independent chairman, two representatives appointed by the timeshare provider and two representatives appointed by the members (including Mr and Mrs C). And one of the other amendments was the introduction of a member's right to reinstatement for a period of 5 years after defaulting on their annual management charges. As a result, initial defaults can only result in the suspension of a member's membership and permanent cancellation can only occur after the default runs on for at last 5 years.

Unfairness under Section 140A

(15) Even if Shawbrook was wrong about the points above, it thought that no unfair relationship arose because Mr and Mrs C got what they bargained for – which was significant holiday rights and investment potential. None of the terms criticised in the PD had been applied against Mr and Mrs C. And as per paragraph 46 of *Link Financial Ltd v Wilson* [2014] EWHC 252 (Ch), the mere existence of unfair terms is not the end of the enquiry and doesn't, by itself, give rise to unfairness under Section 140A. Moreover, the PD adopted a rigid 'but for' approach to causation when determining whether the issues in question gave rise to unfairness and what remedy should flow – which was wrong in law: see paragraph 214 of *Kerrigan & 11 others v Elevate Credit International Limited (t/a Sunny) (in administration)* [2020] EWHC 2169 (Comm).

Redress

(16) The remedy proposed in my PD was based on an assumption in paragraph 249 that isn't the case: Mr and Mrs C's FPOC membership hadn't been terminated. The redress was also disproportionate and gave them a significant windfall because:

i. On a proper contractual analysis, the contract Mr and Mrs C entered into in October 2014 replaced, in full, the contract they entered into earlier that year with Shawbrook's funding.
ii. A 'trade in value' was attributed to Mr and Mrs C's initial FPOC membership that was more than they paid in the first instance.
iii. A strict 'but for' causative approach to redress was wrong in law. Instead, thought should have been given to the nature and the degree of unfairness along with the remedy required to right it.
iv. Returning all of the sums paid under Mr C's loan agreement would provide a significant and unjustified windfall to him because he and Mrs C would remain entitled to reinstate their membership and take advantage of annual holidays and the beneficial interest in the Allocated Property without having paid for

those benefits. Returning the annual management charges would also be unjust because those fees enabled Mr and Mrs C to reserve holidays in October 2015 and provisionally 2016.

v. 8% simple interest would also give Mr C an unjustified windfall. And it's apparent from case law that a court would not award interest at 8% given that the base rate had been so low for years.

See *Oyesanya v Mid-Yorkshire Hospital NHS Trust (Rev 1)* [2015] EWCA Civ 1049 and *Carrasco v Johnson* [2018] EWCA Civ 87.

Oral Hearing

35. Included in Shawbrook's response to my PD was an oral hearing request under DISP 3.5.6 of the Financial Conduct Authority's (the 'FCA') Handbook. Shawbrook asked for a hearing because it wanted the chance to test Mr and Mrs C's oral evidence. And it wanted that opportunity because it says that a large number of claims and complaints about timeshares are driven by professional representatives and, when exposed to analysis in court, are found to be groundless.

36. I provided Shawbrook with my initial response on 3 August 2021 turning down its request. I thought that the reason for its request was very general in nature rather than specific to the merits of Mr C's complaint. So, it wasn't clear what it was about his complaint that could only be assessed after oral evidence was given. I acknowledged the County Court cases cited by Shawbrook. But as they were small in number and were decided on their own merits, I wasn't persuaded that they or Shawbrook's view of complaints by professional representatives more generally warranted a hearing given the particular circumstances of Mr C's complaint.

37. I pointed out that both parties had already provided lengthy submissions during the course of this complaint. And as much of that had been shared with both sides since the investigator issued Assessment One, both parties had already had the opportunity to test each other. As a result, I wasn't persuaded that there was a dispute about the facts that could only be assessed by listening to what both sides had to say in person. And as it was in everyone's interest to resolve this complaint as soon as possible, to grant a hearing at such a late stage would have inevitably prolonged its resolution.

38. I also made the point that, because a hearing doesn't involve taking evidence under oath or both parties interrogating each other, it wouldn't necessarily provide Shawbrook with the opportunity it thought it would anyway.

39. In response, Shawbrook provided me with more specific reasons for its hearing request. It said that there were a number of factual allegations that should be tested orally – including, for example:

    (1) Mr and Mrs C's allegation of pressure.
    (2) The suggestion that Mr and Mrs C were told that they would make a profit of £5,769.
    (3) The reason Mr and Mrs C gave for cancelling their trial membership.

40. So, I reconsidered what Shawbrook had to say. But I pointed out that I wasn't persuaded to provisionally uphold the complaint because of Mr and Mrs C's allegation of pressure or the suggestion that they were told that they would make a profit of £5,769. So, it wasn't necessary to orally test allegations I wasn't initially persuaded by.

41. I also made the point that Shawbrook took the opportunity to respond at length to my PD having seen Mr and Mrs C's testimony and the submissions from PR – as did the timeshare provider.

42. As a result, I remained of the view that the information we had on file at that time did enough to cover all of the issues I needed to consider in order to come to a decision fairly. And as I would consider everything on file, including the specific points made by Shawbrook as part of its hearing request, I remained of the view that a hearing request wasn't necessary.

43. However, during my review of this complaint in light of the arguments and information provided in response to my PD, I noticed an inconsistency in the representations allegedly made by the Supplier to Mr and Mrs C at the Time of Sale. As a result, I needed to look afresh at the allegations in question. I asked PR to provide me with some comments Mr and Mrs C made on 20 November 2020 in response to the witness statement of the Supplier's Sales Administration Director ('DF') as well as the comments they made on 21 May 2021 in response to my PD. And that led me to ask for some written testimony by Mr and Mrs C dated 14 July 2017.

44. In light of what I now knew, I decided that I needed to hear from Mr and Mrs C and, if possible, the sales representative involved in their purchase ('SB') at the Time of Sale – who was the only member of the Supplier's sales team who, having been directly involved, provided a witness statement as part of this complaint. And holding an oral hearing allowed me to cover the relevant issues in a way that was fair to both sides (the 'Hearing').

45. I held the Hearing on 14 April 2022. It was attended by Mr and Mrs C, who were represented by PR, and Shawbrook who were represented by Counsel. SB couldn't attend.

46. I didn't make any findings or decisions at the end of the Hearing. But when I summed up at the end, I mentioned that there was the prospect of a judicial review in relation to ombudsmen's decisions on two timeshare complaints involving the sale of timeshares that were similar to Mr and Mrs C's. And I explained that I would have to consider my next steps with that prospect in mind.

47. In the meantime, I shared an audio recording of the Hearing with both sides and invited further submissions in response to what was said during it.

48. Counsel for Mr and Mrs C, while not present at the Hearing, listened to the recording of it and responded first. I won't repeat his submissions here in detail. But I will summarise them:

    (1) His submissions supplemented earlier submissions, on behalf of Mr and Mrs C, of 27 November and 15 June 2021.
    (2) Mr and Mrs C's evidence was frank, and clearly given in good faith. They were honest when they couldn't remember. Their recollections were consistent with earlier statements.
    (3) Mr and Mrs C accepted that they didn't read the detailed contractual documents presented to them by the Supplier's employees at the very end of a day's sales presentation. They were not given enough time to do so if they wanted to accept the terms the Supplier offered them that day.
    (4) Neither Mr nor Mrs C had any real understanding of FPOC membership and relied on the Supplier's employees to explain it to them.

(5) Mr and Mrs C confirmed that the representations made in the Letter of Claim were made to them. Specifically:

i. The phrase “bricks and mortar”. Mr and Mrs C used the word “brick” during the Hearing – which Mrs C understood to mean they were getting a share in a property.
ii. Mrs C remembered the use of the phrase “no brainer” by the Supplier’s employees.
iii. Mrs C recalled that SB had said that the Supplier was “always selling parts of properties” when asked how they could get their money back at the end of 19 years.
iv. Mrs C understood from SB that she and Mr C were “actually buying” a part of property.
v. Mr and Mrs C understood from SB that he couldn’t show them the Allocated Property because it was rented out and that was how the “investment” part of the product worked.
vi. SB and some of the Supplier’s other sales representatives (who Mrs C spoke to when she had a cigarette) said that “it was such a good deal” that “it was a no brainer”.

(6) Inevitably, some 8 years after the purchase at the Time of Sale, there will be some differences of phrase, or apparent differences of recollection between what was said by Mr and Mrs C in 2017 and during the Hearing. That is a completely normal feature of oral evidence many years after the event. The key underlying issue is to assess the overall accuracy of a witness’s evidence.
(7) Phrases such as “no brainer” and “why would you wish to waste money on paying for holidays” and “fantastic investment” were taken by Mr and Mrs C to mean that FPOC membership was a good investment and that there were good chances of seeing it increase in value. Mr C was honest enough to admit that there was a chance that it might not increase in value. That is common to all investments. The “return” that Mr C was looking for on his money was the reward for taking the risk – a calculated risk. Like any other investment.
(8) Mr and Mrs C were clear that the handwritten note (exhibit 1.1. in the final hearing bundle) was written at the Time of Sale. And they were clear that SB didn’t want them to take the note away with them.
(9) Mr and Mrs C’s evidence rang true and was consistent with the inherent probability that their FPOC membership was sold as an investment:

i. Mr C had some experience in business and he was unlikely to spend £18,000 without getting some kind of return.
ii. They were unable to take holidays except during school holidays.
iii. They were unwilling to take finance at the interest rate suggested.
iv. They saw FPOC membership as a way of buying a interest in property.

49. Shawbrook responded shortly after PR. Again, I won’t repeat the submissions here in full. But I will summarise them:

(1) Shawbrook maintained all of the submissions it had previously made.
(2) The Hearing confirmed Shawbrook’s original concerns about the veracity of the standard allegations made in this type of complaint and the allegations made by Mr and Mrs C specifically. When their evidence was explored during the Hearing, it became apparent that the allegations lacked merit and weren’t supported by reliable evidence. For example:

i. When Mr and Mrs C were given the opportunity to explain, in their own words, what was said to them that made them believe that their purchase was an investment, they only mentioned the alleged representations at paragraph 72(a) and 72(b) of the PD. Instead of substantiating the allegations at paragraph 72(c) to 72(e), they instead referred to more generic marketing speak such as “no brainer” (audio recording at 10:18).

ii. It was initially unclear from Mr and Mrs C’s evidence as to who made the alleged representations. For example, Mrs C suggested that she relied on conversations she had outside with unidentified third parties rather than statements made by SB or anybody else involved in the sale process (audio recording 13:07). It was only when I turned Mr and Mrs C to paragraph 72 of my PD and my summary of the alleged misrepresentations that they confirmed that those alleged representations were made (audio recording 16:30). Even then, they didn’t confirm that the representations were made by SB.

    When I invited Mr and Mrs C to confirm if the alleged representations were made by SB, they said *“most of them would have been… but backed up by reps outside”*. It was never explained what *“most of them would have been”* meant but, in Shawbrook’s view, it’s clear that Mr and Mrs C couldn’t recall SB making each of the alleged representations (audio recording 21:45).

    And despite the fact that Mr and Mrs C hadn’t mentioned the alleged misrepresentations until prompted by me, they unrealistically maintained that they were 100% sure that the representations were made (audio recording 22:45).

iii. Mr and Mrs C couldn’t adequately explain why their initial witness statement didn’t include the alleged representations at paragraph 72(a) and (e) of the PD (audio recording 24:50). The explanation they gave (that they had not yet located the handwritten note) did not justify the absence of the alleged representations (as the note didn’t relate to those representations).

iv. Mr and Mrs C initially confirmed that all of the information in the handwritten note was taken down at the Time of Sale (audio recording 30:24). However, they couldn’t explain how information about a two-year interest free loan appeared in the note when interest free finance wasn’t discussed until weeks later (audio recording 57:30).

v. Mr and Mrs C couldn’t explain how they had reached the figure of £5,769 included in their handwritten note (audio recording 31:00 and 33:00).

vi. When discussing the figure in the handwritten note and the “return” on investment, Mr and Mrs C appeared to conflate estimated savings on holidays with a return from the Allocated Property (audio recording 34:30).

vii. Mr and Mrs C accepted that they understood that they may not receive a positive return from FPOC membership (audio recording 38:20). They also understood that any return would be above the cost of membership rather than the cost of the finance (audio recording 41:45) and they accepted that they didn’t rely on the £5,769 as some kind of guaranteed return (audio recording 46:30).

(3) In light of the above, and together with Shawbrook's previous submissions, it submitted that Mr and Mrs C's recollections were unreliable as they were inconsistent with the initial allegations and internally inconsistent. Shawbrook also thought that Mr and Mrs C had confused what happened at the Time of Sale with what happened in October 2014 – which, in its view, fundamentally undermined their evidence of what happened at the time in question.

(4) In light of Mr and Mrs C's oral testimony in response to questions that were specifically directed to what was said to them and what documentation was used at the Time of Sale, Shawbrook submitted that it was difficult to see how I could maintain my conclusion in paragraph 112 of the PD:

i. In response to my question (audio recording 17:20) about the point at which the specific words were used as alleged, Mrs C explained that SB started the process by discussing her and Mr C's holiday habits and expenses and wrote that all down on a gridded sheet of paper. That seems very likely to have been a reference to the Holiday Planner, the primary purpose of which was to help identify whether FPOC membership was likely to have been suitable given the sorts of holidays that could be taken. It wasn't related to the share in the net sale proceeds of the Allocated Property.

   Mr and Mrs C didn't make any reference to the net sale proceeds of the Allocated Property when asked questions about when the specific words were used as alleged. So, in Shawbrook's view, it's difficult to see how, on the evidence now available, the Allocated Property can be reliably described as front and centre of the sales presentation.

ii. I asked a question (audio recording 28:05) about whether most of the sales presentation was focused on the investment element of FPOC membership and whether there was any talk of the holiday rights. Mrs C stated there was talk of that but that it was an "add on" (despite previously saying SB started the sales presentation going through holidays and habits). Mrs C went on to describe her understanding about "banking weeks" and the ability to stay elsewhere other than in the specific resorts. Mr C referenced the "massive book" of all the properties (which must be the Vacation Club holiday brochure). But, again, no reference was made in Mr and Mrs C's recollections to the net sales proceeds of the Allocated Property.

iii. The PD placed significant weight on what Mr and Mrs C were shown as part of the ESA in related to the Allocated Property. I asked them about the slides (audio recording 35:35). Mrs C stated that *"the slides showed where you could go, how you liked to holiday, but the bit about how much money we would save was done on paper…"* (36:42). That matches entirely the evidence given by the Supplier, which was that the overwhelming majority of the sales presentation related to holidays. Mrs C then, again, referred to the "paper with the grid on", which was a reference to the Holiday Planner.

50. As I've already said, at the time of the Hearing, there was the prospect of a judicial review in relation to two complaints about the sale of timeshares similar to Mr and Mrs C's. And not long after the Hearing, an application for permission to apply for judicial review was granted by the High Court.

51. The complaints at the centre of that judicial review raised many of the same points of law that Mr and Mrs C's complaint did, which the judicial review was expected to clarify. And with that being the case, it seemed to me to be in everyone's interests to

wait for the outcome of the judicial review before revisiting the outcome of this complaint.

52. On 5 May 2023, judgment was handed down by the High Court in *R. (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R. (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').

53. In the decision at the centre of Shawbrook's challenge, I had concluded that there was an unfair debtor-creditor relationship because the fractional timeshare had been mis-sold. I also thought that the contractual arrangement, including the associated loan, should be unwound as a result. And I reached that decision on a number of alternative bases – which, in summary, included the following:

    (1) The supplier contravened the Timeshare Regulations by marketing and selling the timeshare as an investment contrary to Regulation 14(3).
    (2) The supplier contravened Regulation 12 of the Timeshare Regulations, Regulation 6 of the CPUT Regulations and the RDO Code by failing to give the complainants information on the value of their allocated property and the main matters that had a bearing on how the value might change over time – including the risks of investing in it.

54. As for the decision at the centre of Clydesdale Financial Service's challenge, it had been decided by another ombudsman that there was also an unfair debtor-creditor relationship because the fractional timeshare had been mis-sold. And he also thought that the contractual arrangement, including the associated loan, should be unwound as a result. He had his own reasons for coming to that decision. But he too found that the supplier had:

    (1) Contravened the Timeshare Regulations by marketing and selling the timeshare as an investment contrary to Regulation 14(3).
    (2) Contravened Regulation 12 of the Timeshare Regulations and the RDO Code by failing to give the complainants information on the value of their allocated property and the main matters that had a bearing on how the value might change over time – including the risks of investing in it.

55. Mrs Justice Collins Rice held that:

    (1) I hadn't erred in law in my construction of, or approach to, Regulation 14(3) of the Timeshare Regulations.
    (2) Neither I nor the other ombudsman erred in law when we concluded that Section 56 of the CCA, when read together with Section 140A(1)(c) of the CCA, meant that the acts and/or omissions of the suppliers during the negotiations in the lead up to the sales were tantamount to things done or not done by or on behalf of Shawbrook and Clydesdale Financial Services, respectively, for the purpose of an assessment of unfairness under Section 140A.
    (3) Neither I nor the other ombudsman erred in law when we decided that an unfair debtor-creditor relationship had been created for the purposes of Section 140A or when we set out our remedies having had regard to the provisions of Section 140B of the CCA.

56. Mrs Justice Collins Rice reached a number of other conclusions, some of which, while not determinative of the proceedings, are relevant considerations in this complaint. They included (amongst other things) that:

    (1) Both the other ombudsman and I erred in law when finding that there had been a breach of Regulation 12 of the Timeshare Regulations when the suppliers hadn't given the complainants information on the value of their allocated property and the main matters that had a bearing on how the value might change over time, including the risks of investing in it.
    (2) I erred in law by misstating and misapplying Regulation 6 of the CPUT Regulations when I found that it had been contravened by the supplier for not having provided the information set out in (1) above.
    (3) Neither I nor the other ombudsman erred in law in finding that good industry practice, as embodied in the RDO Code, demanded that the complainants be provided with the information set out in (1) above.

The Legal and Regulatory Context

The Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) (the 'CCA')

57. Mr and Mrs C paid for their FPOC membership at the Time of Sale when Mr C entered into a restricted-use Fixed Sum Loan Agreement that was regulated by the CCA. As a result, their purchase was covered by certain protections afforded to Mr C by the CCA provided the necessary conditions are met. The relevant sections as at the Time of Sale are below:

    - Section 11: Restricted-Use Credit and Unrestricted-Use Credit
    - Section 12: Debtor-Creditor-Supplier Agreements
    - Section 19: Linked Transactions
    - Section 56: Antecedent Negotiations
    - Section 140A: Unfair Relationships Between Creditors and Debtors
    - Section 140B: Powers of the Court in Relation to Unfair Relationships
    - Section 140C: Interpretation of Sections 140A and 140B

The Law on Misrepresentation

58. The law relating to misrepresentation is a combination of the common law, equity and statute – though, as I understand it, the Misrepresentation Act 1967 didn't alter the rules as to what constitutes an effective misrepresentation. It isn't practical to cover the law on misrepresentation in full in this decision – nor is it necessary. But, summarising the relevant pages in *Chitty on Contracts (33rd Edition)*, a material and actionable misrepresentation is an untrue statement of existing fact or law made by one party (or his agent for the purposes of passing on the representation, acting within the scope of his authority) to another party that induced that party to enter into a contract.

59. The misrepresentation doesn't need to be the only matter that induced the representee to enter into the contract. But the representee must have been materially influenced by the misrepresentation and (unless the misrepresentation was fraudulent or was known to be likely to influence the person to whom it was made) the misrepresentation must be such that it would affect the judgement of a reasonable person when deciding whether to enter into the contract and on what terms.

60. However, a mere statement of opinion, rather than fact or law, which proves to be unfounded, isn't a misrepresentation unless the opinion amounts to a statement of fact and it can be proved that the person who gave it did not hold it or could not reasonably have held it. It also needs to be shown that the other party understood and relied on the implied factual misrepresentation.

61. Silence, subject to some exceptions, doesn't usually amount to a misrepresentation on its own as there is generally no duty to disclose facts which, if known, would affect a party's decision to enter into a contract. And the courts aren't too ready to find an implied representation given the challenges acknowledged throughout the case law.

Case Law on Section 140A

62. The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') remains the leading case.

63. The judgment of the Court of Appeal in *Scotland & Reast v British Credit Trust Limited* [2014] EWCA Civ 790 sets out a helpful interpretation of the deemed agency and unfair relationship provisions of the CCA.

64. *Deutsche Bank (Suisse) SA v Khan and others [2013]* EWCA Civ 1149 is also helpful as Hamblen J summarised – in paragraph 346 – some of the general principles that apply to the application of the unfair relationship test.

65. In *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*'), it was held by the High Court that determining whether or not the relationship complained of was unfair had to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"* – which was the date of the trial in the case of an existing relationship or otherwise the date the relationship ended.

66. The position in *Patel* was more recently adopted by the Supreme Court in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*').

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

67. The relevant rules and regulations that the Supplier in this complaint had to follow were set out in the Timeshare Regulations. I'm not deciding – nor is it my role to decide – whether the Supplier (which isn't a respondent to this complaint) is liable for any breaches of these Regulations. But any breaches are relevant to this complaint insofar as they inform and influence the extent to which the debtor-creditor relationship in question was unfair. After all, they signal the standard of commercial conduct reasonably expected of the Supplier when acting as Shawbrook's agent in marketing and selling FPOC membership.

68. The Regulations have been amended in places since the Time of Sale. So, I refer below to the most relevant regulations as they were at the times in question:

- Regulation 12: Key Information
- Regulation 13: Completing the Standard Information Form
- Regulation 14: Marketing and Sales
- Regulation 15: Form of Contract
- Regulation 16: Obligations of the Trader

69. The Timeshare Regulations were introduced to implement EC legislation, Directive 122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts (the '2008 Timeshare Directive'), with the purpose of achieving 'a high level of consumer protection' (Article 1 of the 2008 Timeshare Directive). The EC had deemed the 2008 Timeshare Directive necessary because the nature of timeshare products and the commercial practices that had grown up around their sale made it appropriate to pass specific and detailed legislation, going further than the existing and more general unfair trading practices legislation.[4]

70. Before the 2008 Timeshare Directive was implemented in the UK, the Government of the day consulted businesses, consumers, enforcement authorities and other interested parties in July 2010 (the 'BIS's Timeshare Consultation') to ensure that it took the right approach to implementing the Directive. And in December that year it published its final impact assessment (the 'BIS's Timeshare FIA').

Court Cases on the Sale of Timeshares

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

72. *Hitachi v Topping* (20 June 2018, Country Court at Nottingham).[5]

73. *Brown v Shawbrook Bank Limited* (18 June 2020, County Court at Wrexham).

74. *Wilson v Clydesdale Financial Services Limited* (19 July 2021, County Court at Portsmouth).

75. *Gallagher v Diamond Resorts (Europe) Limited* (9 February 2021, County Court at Preston).

76. *Prankard v Shawbrook Bank Limited* (8 October 2021, County Court at Cardiff).

Relevant Publications

77. The Timeshare Regulations provided a regulatory framework. But they represented a minimum standard. And as the parties to this complaint already know, I'm also required to take into account, when appropriate, what I consider was good industry practice.

The Resort Development Organisation's Code of Conduct 1 January 2010 (the 'RDO Code')

78. Part 1 of the RDO Code said that it was designed to establish the industry's "best practice" standards and *"complement and reinforce all applicable laws"*.

79. The RDO Code also said that all members had to undertake to comply with all of the conditions of membership and to carry out their *"Industry Activities with integrity and propriety in accordance with industry best practice [...]".*

[4] See Recital 9 in the Preamble to the 2008 Timeshare Directive.
[5] The claim was withdrawn following cross-examination of the claimant.

80. Part 2 set out the Principles that members had to follow. And the most relevant to this complaint are below:

1.1 RDO's Members will ensure that consumers can make informed purchase decisions when contracting with a RDO Member.

1.2 RDO Members in particular will ensure:

1.2.1 – Appropriate disclosure of all elements of the product and/or service to the consumer and in a manner the consumer fully understands;

1.1 RDO Members will in no case mislead a consumer into believing that a product or service has other features and/or benefits than those laid down in the contract.

2.2 RDO Members will in particular ensure:

2.2.1 – Appropriate marketing techniques that make it clear what the object of the approach to the consumer is;
2.2.2 – Appropriate selling methods that treat the consumer with respect and allow the consumer choice between purchasing and reflection; and
2.2.3 – The provision of any necessary assistance to consumers to enable them to make an informed decision.

The Finance and Leasing Association's Lending Code (2012) (the 'FLA's Lending Code')

81. The FLA Code set out the standards of good practice in consumer lending. So, I think it represents good industry practice that I now need to take into account following PR's response to my PD.

My Findings

82. I've read and considered all the available evidence and arguments to decide what is, in my opinion, fair and reasonable in the circumstances of this complaint. When doing that, I'm required by DISP 3.6.4 R of the FCA's Handbook to take into account the:

"(1) relevant:

(a) law and regulations;
(b) regulators' rules, guidance and standards;
(c) codes of practice; and

(2) ([when] appropriate) what [I consider] to have been good industry practice at the relevant time."

83. The legal and regulatory context that I think is relevant to this complaint is set out above – which forms part of this Final Decision. Neither party disputes the context I set out in my PD, nor have they questioned the relevance of the RDO Code. But in light of what's happened since my PD, I've added the Finance and Leasing Association's Lending Code (2012) (the 'FLA's Lending Code') to that context, a number of timeshare mis-selling cases to reach trial in court in recent years and, of course, *Shawbrook & BPF v FOS*.

84. Shawbrook provided transcripts of a number of County Court judgments. And while they were decided on their own facts, I've read and considered them. I've also read Shawbrook's summary of *Hitachi v Topping* (20 June 2018, Country Court at Nottingham), and it looks like the claim in that case was discontinued following the conclusion of cross-examination.

85. When evidence is incomplete, inconclusive, incongruent or contradictory, I've made my decision on the balance of probabilities – which, in other words, means I've based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

86. And having read and considered all the available evidence and arguments, I still think this complaint should be upheld.

87. However, before I get on to the substance of my findings, I want to repeat what I said in my PD about my role as an ombudsman. It isn't to address every single point that's been made to date. Instead, it's to decide what's fair and reasonable given the circumstances of this complaint. And for that reason, I'm only going to refer to what I think are the most salient points when I set out my conclusions and my reasons for reaching them. But, having read all of the submissions from both sides in full, I will continue to keep in mind all of the points that have been made, insofar as they relate to Mr C's complaint, when doing that.

Section 56: Antecedent Negotiations

88. As I said in my PD, Section 56 created a statutory agency relationship between the Supplier and Shawbrook because it states that any negotiations between Mr C (as debtor) and the Supplier before a transaction (membership of the FPOC) financed by a debtor-creditor-supplier agreement (i.e. Mr C's restricted-use Fixed Sum Loan Agreement) are deemed to have been conducted by the Supplier as an agent of Shawbrook (as the creditor). And in light of what the High Court had to say on the matter in *Shawbrook & BPF v FOS*, I remain satisfied that the Supplier was acting 'on behalf of' Shawbrook during the negotiations leading up to Mr and Mrs C's membership of the FPOC at the Time of Sale, such that the Supplier's pre-contractual acts and/or omissions are relevant to this complaint.

Section 75: Misrepresentation

89. Shawbrook doesn't dispute that Mr and Mrs C entered into a contract with Paradise Trading SLU, as the Supplier, for services financed by a debtor-creditor-supplier agreement in Mr C's name. And as I'm satisfied that Section 75 applies, it remains the case that, if I find that the Supplier is liable for having misrepresented something to Mr and Mrs C, Shawbrook – as the creditor – is also liable.

90. This part of this complaint was made for several reasons which, being familiar to both sides, aren't necessary to repeat here. However, as I said in my PD, and despite holding the Hearing, I still haven't seen or heard enough evidence to say, on balance, that false statements of *fact* were made to Mr and Mrs C by the Supplier. I continue to recognise that they have concerns about the way in which their FPOC membership was sold. But given the evidence in this complaint, I'm not persuaded that there's an actionable misrepresentation by the Supplier for the reasons Mr and Mrs C allege. And for that reason, I don't think Shawbrook acted unfairly or unreasonably when it dealt with Mr C's Section 75 claim.

Section 140A: Unfair Relationship

91. I've acknowledged before that only a court has the power to decide whether the relationship between Mr C and Shawbrook was unfair for the purpose of Section 140A. But, as it's relevant law, when deciding what a fair and reasonable outcome is in this complaint given its particular circumstances, I still have to consider it along with what I think a court is likely to conclude.

92. So, I've looked again at the sale of Mr and Mrs C's FPOC membership and the Supplier's obligations during the precontractual negotiations while also taking into account that the FPOC Purchase Agreement qualifies under Section 19(1)(b) of the CCA as a 'related agreement' to the credit agreement between Shawbrook and Mr C. I have then reconsidered whether I think a court is likely to conclude that the relationship in question was unfair.

93. When I looked at the Supplier's sales process for the purpose of my PD, I did so in two broad parts:

    (1) The Supplier's sales and marketing practices; and
    (2) The provision of information by the Supplier.

94. But in light of the High Court's findings in *Shawbrook & BPF v FOS*, I won't repeat what I had to say about the provision of information in relation to the Allocated Property under Regulation 12 of the Timeshare Regulations and Regulation 6 of the CPUT Regulations. And as it isn't necessary (for reasons that will become apparent) to make any formal findings on the Supplier's disclosure of the FPOC's ongoing costs and the fairness or otherwise of the terms governing those costs, I've focused on the Supplier's sales and marketing practices in this Final Decision.

The Supplier's Sales and Marketing Practices

95. I've already explained that I'm not persuaded that the contract entered into by Mr and Mrs C was misrepresented by the Supplier in a way that makes for a successful claim by Mr C under Section 75 of the CCA. But, in the context of Section 140A, there are other aspects of the sales process that Mr and Mrs C remain dissatisfied with. These include, amongst other things, the alleged use of pressure during the sale and a breach of the Timeshare Regulations.

Pressure

96. This allegation was made for reasons that both sides are familiar with. So, I won't repeat them here. I acknowledge, as I did in my PD, that Mr and Mrs C may have felt weary after a sales process that went on for several hours. But against the straightforward measure of pressure as its commonly understood, I still find it hard to argue that Mr and Mrs C purchased FPOC membership at the Time of Sale when they simply didn't want to.

97. As I said in my PD, there were numerous phone calls to and from Mr C following the sale and I haven't been provided with any evidence to demonstrate that he said something during one or more of them to suggest that he and Mrs C made their purchase when they didn't want to. Moreover, Mr and Mrs C haven't provided a credible explanation for why they didn't cancel their membership during the 14-day cooling off period and went on to upgrade their membership in October 2014 if they only went ahead with the purchase in February that year because they were pressured into it. So, I still find this aspect of their complaint difficult to explain.

98. Indeed, Mr and Mrs C stated in their written testimony that they knew that they had a 14-day cooling off period and could cancel their purchase during that time as a result. And as it wasn't until 21 April 2014 when Mr C agreed to take finance from Shawbrook on an interest free basis rather than proceed with what had been initially agreed at the Time of Sale, that suggests he (and Mrs C) were able to exercise choice.

99. So, on balance, I'm still not persuaded that there's sufficient evidence to demonstrate that Mr and Mrs C made the decision to purchase FPOC membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

100. However, as I also said in my PD, I find it surprising that, in paragraph 152 of DF's witness statement, he said that prospective members (like Mr and Mrs C) weren't obliged to stay any longer than they wanted to during the Supplier's sales presentation and were free to leave at *any time.* Mr and Mrs C were on a promotional "Fly Buy" holiday at the Time of Sale and the witness statement of the timeshare provider's Group Sales Operations Director (PR) and an extract[6] of the timeshare provider's business plan called *"Target Market and Target Customers"* make it clear the holiday was subject to attendance at a sales presentation – which means that Mr and Mrs C's sales presentation was compulsory. With that being the case, I found and find it difficult to reconcile the condition on which Mr and Mrs C's promotional holiday was granted with the suggestion that it *wasn't* incumbent on them to sit through the presentation for at least a minimum amount of time – especially when the sales process was relatively involved, which I think was likely to have cost the Supplier time, effort and money.

[6] I acknowledge that the extract isn't dated. But neither Shawbrook nor the timeshare provider have disputed its relevance in response to my PD. And it does appear to have been in place when the particular type of product in question ('FPOC2') was being sold because a footnote in the extract refers to 'full membership' as one of the timeshare provider's products with a membership term of 19 to 80 years – the first of which is consistent with the term of the product purchased by Mr and Mrs C i.e. FPOC2.

101. What's more, I've seen nothing in response to my PD to persuade me that what I said about slide 55 of the Supplier's 2013/2014 Sales Induction Training (that sales representatives were encouraged to try and complete their sales on the day of their presentations) was wrong. And given the prearranged nature of Mr and Mrs C's sale, it still isn't clear how the Supplier's sales representative would have done that if there weren't measures in place to keep them engaged for as long as possible and stop them from immediately leaving a presentation that had been agreed and organised in advance. So, the apparent emphasis on same-day sales in the Induction Training coupled with the knowledge that presentations seem to have often been prearranged and may well have been subject to a certain level of investment suggests, in my view, that the Supplier's sales representatives were working in a high-pressured environment that could plausibly have coloured the sale. And as the timeshare provider's business plan suggests that the sales representatives were self-employed and earning an income based entirely on commission from the sale of the FPOC, I think that was also likely to have contributed to that environment.

102. As a result, I continue to question whether Mr and Mrs C's sales presentation was as 'relaxed' and accommodating as DF suggests it was. And while this doesn't alter the conclusion I've reached on the extent to which there's the evidence that Mr and Mrs C were pressured into their purchase, I think it remains relevant when thinking about the circumstances in which they were told about membership of the FPOC and provided with information about its features.

Holiday Availability

103. Mr and Mrs C say that they were told by the Supplier that they would always be able to holiday at any of the resorts available to them whenever they wanted to. But they say that – as working parents with children who were at school – they found it difficult to book the holidays they wanted even when they tried to do so well in advance.

104. The contact notes of conversations between the timeshare provider and Mr and Mrs C still suggest that they had difficulty booking what they wanted to book after joining the FPOC. A record of a call with Mr C on 18 March 2015, for example, makes it clear that he had complained at that time that they could *"never"* get what they wanted. And as Mr C also felt it necessary on 18 December that same year to try and sell the Fractional Points he and Mrs C had purchased, it certainly looks as if they weren't satisfied.

105. However, in response to my PD, the timeshare provider's Group General Counsel ('EM') provided me with more information on Mr and Mrs C's holiday requests and what they were offered by the Supplier in response. And between 20 February 2015 and 20 March that year, it looks like Mr and Mrs C made a total of 6 requests for a half-term holiday in October 2015. In response to the first 4 of those requests, the Supplier offered them availability.[7] But those requests were replaced by the one they made on 20 March for 6 people – which they went on to complete in October that year.

106. It now seems clear to me, therefore, that Mr and Mrs C were more likely to have been pushing up against the limits of what their Fractional Points would get them rather than against a more fundamental problem for FPOC members who needed to holiday during the school holidays.

[7] While Mr and Mrs C requested a 3-bedroom apartment for 1 week in Europe during October half-term, EM says that they were offered 2 separate 2-bedroom apartments in several different resorts for the week in question.

107. Indeed, EM has shown me evidence that's demonstrates that there was extensive availability in August (which is typically the middle of a school's summer holiday) across a large number of resorts for families of four with the same number of points as Mr and Mrs C. I accept that the list of resorts only represents what was possible to book. But EM did say (which I have no reason to doubt) that roughly 4,000 of the Supplier's members with 1,501 or fewer points make reservations during the school holidays every year – which he said at that time represented approximately 30% of all of the bookings made by members with fewer than 1,501 points. And as it's clear from Mr and Mrs C's own holiday requests that, with the exception of a request they made on 18 March 2015, they were able to book holidays during half-term before making changes to them themselves, what happened in practice suggests that there was likely to be (and was) a reasonable amount of availability for Mr and Mrs C given how many points they had.

108. So, the fact that Mr and Mrs C had children of school age and needed to holiday at particular times of the year doesn't now appear to have rendered FPOC membership unsuitable for them. And for that reason, I don't think their decision to go ahead with their purchase was prejudiced as a result of the way in which the Supplier presented the risks and benefits of the FPOC's holiday rights with this issue in mind.

Regulation 14(3)

109. Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling membership of the FPOC as an investment. But Mr and Mrs C say it did exactly that.

110. In response to Assessment One, Shawbrook acknowledged that the Supplier told Mr and Mrs C about their entitlement to a share of the net sale proceeds of the Allocated Property when it was sold. But Shawbrook argued that the available evidence made it clear that the Supplier didn't market or sell membership of the FPOC to Mr and Mrs C as an investment. And, in summary, it pointed to the following in support of that argument:

    (1) The contemporaneous documentation made it clear that the FPOC was not sold as an investment.
    (2) The sales representatives were carefully trained and monitored to ensure that they didn't sell FPOC membership as an investment – and had it been discovered that a sales representative had sold membership as an investment, they would have been subject to disciplinary action, including dismissal if necessary.
    (3) SB stated in his witness statement that he would not have told Mr and Mrs C that FPOC membership was an investment – nor would he have given them that impression. And he also said that he wouldn't have given them any information about the Allocated Property's current value, potential future value or potential profit.
    (4) Had FPOC membership been sold as an investment, it is to be expected that certain information would normally have been provided – including the:

        i. specifics of the asset being invested in;
        ii. current value of the asset;
        iii. predicted value of the asset at maturity; and
        iv. potential percentage gain or profit.

But none of this information was provided by the Supplier. And as explained in PR's witness statement, the sales representatives didn't have access to this information. So, it wasn't shared with customers.

111. I've taken all of that into account. However, I still think the argument from Shawbrook on why the Supplier hadn't breached Regulation 14(3) takes too narrow a view of the prohibition against marketing and selling timeshares as an investment. As I said in my PD, 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. The BIS's Timeshare Consultation said 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)).''* And that seems correct to me because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing or selling a timeshare as an investment were interpreted too restrictively.

112. I'm not persuaded, therefore, that the prohibition in Regulation 14(3) was confined, for example, to using the word 'investment' when promoting or executing a timeshare contract. And I think that, in an appropriate case, the prohibition may capture the promotion of investment features incorporated into a timeshare to persuade consumers to purchase – which includes leading a potential purchaser to expect a financial gain from a timeshare.

113. In other words, if a supplier implied to consumers that future financial returns from a timeshare were a good reason to purchase it, its conduct was likely, in my view, to have fallen foul of the prohibition against marketing or selling the product as an investment.

114. In response to my PD, Shawbrook argued that there were two fundamental difficulties with my reasoning on the question I'm concerned with here – one of which is that it fails to appreciate the distinction between the Supplier accurately and factually describing a key feature of the FPOC and actively marketing and selling it as an investment.

115. I recognise that, if the Supplier presented FPOC membership in a way that didn't use the financial interest in an allocated property to persuade consumers to purchase membership, that would not amount to marketing or selling the product as an investment, contrary to Regulation 14(3). And I accept that the mere presence of a share in the Allocated Property wouldn't have triggered a breach of Regulation 14(3) of the Timeshare Regulations, unless the Supplier leveraged it in order to entice Mr and Mrs C, as prospective members, into their purchase.

116. However, as I've suggested above, to describe the investment element(s) of a product in a way that suggests those features were a major reason to purchase the product does, in my view, amount to marketing and selling the product as an investment. And if the Supplier gave the prospect of a financial return on the Allocated Property – however unpredictable it might have been – importance during its presentation to Mr and Mrs C by portraying their share in the Allocated Property's ultimate proceeds of sale as a significant benefit, it's hard to see why that wouldn't have amounted to marketing and selling FPOC membership as an investment.

117. The Allocated Property was plainly a major part of the FPOC's rationale and a justification for its cost to Mr and Mrs C. And it wouldn't have made much sense if the Supplier included this feature in the product without relying on it to promote sales. Yet, in my view, that's exactly what the Supplier's likely to have done at the Time of Sale. After all, it was DF who made the point that *"[it] is correct to say that receiving the net proceeds of sale is presented as an important feature of the club. It is plainly one of the distinguishing features of the product."* And, taken against that background, when the Supplier's own account of how FPOC membership was likely to have been presented to Mr and Mrs C is considered in conjunction with their recollections, the Supplier's 2013/2014 Sales Induction Training, and the Supplier's website just before the Time of Sale, I think it's more likely than not that the Supplier presented FPOC membership to Mr and Mrs C at the Time of Sale in a way that suggested to them that the Allocated Property was a major reason to purchase the product.

118. I acknowledged in my PD, as I still do, that there is evidence in this complaint that the Supplier made efforts to avoid specifically describing FPOC membership as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs C, the financial value of the proprietary interest they were offered along with the investment considerations, risks and rewards attached to it. And I continue to recognise that there were disclaimers in the contemporaneous paperwork that go some way to suggesting that FPOC membership wasn't sold to Mr and Mrs C as an investment – which I accept are supported by a reasonable amount of witness evidence.

119. The Standard Information Form, for example, stipulated the following on page 8 under the heading *"Primary Purpose"*:

    "The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for direct purposes of a trade in nor as an investment in real estate. [The timeshare provider] makes no representation as to the future price or value of the Allocated Property or any Fractional [R]ights".

120. Mr and Mrs C's signed Member's Declaration from the Time of Sale also said:

    "We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that [the timeshare provider] makes no representation as to the future price or value of the Fraction."

121. When read on their own and together, these disclaimers go some way to making the point that the purchase of Fractional Rights shouldn't be viewed as an investment. But they weren't to be read on their own. They had to be read in conjunction with what else the Standard Information Form had to say – which included the following disclaimer under the heading "Investment advice":

    "The Vendor, any sales or marketing agent and the Manager and their related businesses (a) are not licensed investment advisors authorized by the Financial Services Authority to provide investment or financial advice; (b) all information has been obtained solely from their own experiences as investors and is provided as general information only and as such it is not intended for use as a source of investment advice and (c) all purchasers are advised to obtain competent advice from legal, accounting and investment advisors to determine their own specific investment needs; (d) no warranty is given as to any future values or returns in respect of an Allocated Property."

122. This disclaimer seems to have been aimed at distancing the Supplier from any investment advice that was given by its sales agents, telling customers to take their own investment advice, and repeating the point that the returns from membership from the FPOC weren't guaranteed.

123. Yet I think it would be fair to say that, while a prospective member who read the disclaimer in question might well have thought that they would be wise to seek professional investment advice in relation to membership of the FPOC, rather than rely on anything they might have been told by the Supplier, it wouldn't have done much to dissuade them from regarding membership as an investment. In fact, I think it would have achieved rather the opposite.

124. It's also difficult to explain why it was necessary to include such a disclaimer in the Standard Information Form if there wasn't a very real risk of the Supplier marketing and selling membership of the FPOC 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.

125. What's more, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And given the facts and circumstances of this complaint, I'm still not persuaded that printed disclaimers like the ones in paragraphs 119 and 120 above were likely to have sufficiently mitigated the impression created by the Supplier that FPOC membership was an appealing investment opportunity for Mr and Mrs C as they allege.

126. At the Hearing, having read out the disclaimer in paragraph 119 above, I asked Mr and Mrs C if they queried it at the Time of Sale. And in response, Mrs C said (at 1:07:55 of the audio recording):

"We never saw that. We don't remember seeing that at all….even in the back with Miss whatever her name was".

127. I asked Mrs C to clarify whether she was saying that she and Mr C hadn't seen the Standard Information Form in its entirety or the disclaimer in question. And in reply, Mrs C said the following (from 1:08:14 of the audio recording):

"I think we've seen this. We've seen the document. But you don't get time to read through all the documents. Obviously we've seen it since we've done [this complaint]. But I don't know if we saw it at the time. […] We must have seen it. But we weren't given any time to read it or ask any questions about it.[…] We wouldn't have read it through anyway because we weren't given the chance, the opportunity to go through anything in any detail because it was half past four, quarter to five…they were closing…if you don't take the deal, then the deal's not the same on the next day. It was all just a little bit pressured."

128. I then pointed out that there was a similar disclaimer in the one-page Member's Declaration signed by Mr and Mrs C (see paragraph 120 above). And I asked them if they had queried that at the Time of Sale. Mrs C was the first to respond, saying (from 1:09:57 of the audio recording):

"Again, we signed it…When you've been in a place…and it's very difficult to try and explain it…when you've been sat inside somewhere and told how wonderful this product is and then you've gone outside and other people have confirmed exactly the same…the chap who was sat with us who was training, he also had invested years and years and years ago…he said there wouldn't be all these people investing if it was not a good profit, not a good product rather. So, by the time you get to doing any paperwork, 6 hours down the line, your head's banging and you really…you don't have time to take it all in. You've gone through and done all the financial paperwork, which is not just sign here and tick the box here…that you read through. But this, yes we signed it, but we never got to read it. We were told everything in there is what has been discussed. And you take people, stupidly at their word."

Mr C then said (from 1:11:12 of the audio recording):

"I suppose, when you're done doing it, when we got finished, then we were supposed to go back, get changed, sort the kids out…do this that and the other…then we were meeting this chap later on to have this dinner with him. They were paying for all this was [the Supplier]. So that we could go and have this dinner with him. And you get sat talking to him and […] he was still telling us how good it sort of was. And he was a nice chap and so you believe what people sort of tell you."

And Mrs C followed this with (at 1:11:50 of the audio recording):

"The next day around the pool you'd question people laid around the pool…are you a member…have you bought in…yes, it's a really good package, a really good deal."

Mr C then said: *"So we didn't feel out of sync with anyone if you know what I mean"*. And shortly after that, Mrs C said (at 1:12:04 of the audio recording):

"But as for signing and reading it, yes we signed it but there was no way we read through that. Stupidly. Then, when we went into the back, we didn't get the opportunity. Literally, you were in there for a couple of minutes, signed everything and then you were out."

129. I have no reason to doubt the honesty of what Mr and Mrs C told me above. And I haven't seen enough to doubt the credibility of what they said above either. As I've said before, slide 55 of the Supplier's 2013/2014 Sales Induction Training suggests that sales representatives were encouraged to try and complete their sales on the day of their presentations – which is consistent with what Mrs C said during the Hearing. Furthermore, as Mr and Mrs C were on a promotional holiday at the Time of Sale, the Supplier was clearly invested in the sale. And as it looks like the Supplier's sales representatives were working in a high-pressured environment that was likely to have coloured the sale, I don't find it hard to believe that Mr and Mrs C didn't properly read the Standard Information Form and didn't pay that much attention to the Member's Declaration because they weren't given or didn't feel like they had the time and space to do so.

130. Following the Hearing, Shawbrook submitted that Mr and Mrs C's recollections were unreliable because it says they were inconsistent with the initial allegations and internally inconsistent. And one of the examples Shawbrook gave concerned Mr and Mrs C's answer to a question I asked during the Hearing in relation to differences between the Supplier's alleged representations in their initial witness statement and those set out in the Letter of Claim. In Shawbrook's view, Mr and Mrs C couldn't adequately explain why their initial witness statement didn't include the alleged representations at paragraph 72(a) and (e) of my PD (audio recording 24:50) – which are the same as (1) and (5) in the relevant paragraph below. As far as Shawbrook was concerned, the explanation Mr and Mrs C gave during the Hearing (i.e., that they had not yet located the handwritten note) didn't justify the absence of the alleged representations in their initial witness statement as the note in question didn't relate to those representations.

131. When I asked Mr and Mrs C at the start of the Hearing to describe, in broad terms, what the Supplier had said to them at the Time of Sale that led them to believe that FPOC membership was an investment, Mrs C said the following (from 10:12 of the audio recording) – which Mr C agreed with:

"When we were sat having the sales pitch, um, SB – who I couldn't remember the name of […] – ***he actually told us that it was an investment****. […] We wouldn't have invested in something that…we wouldn't have put the money in for a timeshare basically. During the conversation we were told it was a no brainer. We were also told it was bricks and mortar because it was part of a property we were buying and that would be invested for 19 years. And at the end of the 19 years, the property would be sold – albeit a fraction of the property would be sold […] – and we would then receive the money from the sale at the end of the 19 years unless we wanted to reinvest for a further 19 years."*

(My emphasis added)

132. Just over 17 minutes into the Hearing, I then asked Mr and Mrs C if all of the representations below were made at the Time of Sale. And on two separate occasions during the Hearing Mr and Mrs C told me they were (at 17:09 and 22:45 of the audio recording):

(1) *"You will have [a] share in a specific property in a specific resort;*
(2) *You are buying bricks and mortar;*
(3) *[You] would get [your] investment back, plus £5,769 profit;*
(4) *This is a fantastic investment; and*
(5) *Property value only goes up"*

133. When I then asked Mr and Mrs C if they could remember the point(s) at which the representations above were made at the Time of Sale, Mrs C explained that the sales presentation started with a focus on their holiday habits before saying the following (from 17:57 of the audio recording):

"At the end of that, he [i.e., SB] dealt with some figures. He didn't show us any figures. […] And that's when he said ***"well, all of the money that you're spending on your holidays is wasted money. What you can do is you can do it this way and then you are investing in a property for the future."*** *So, that's where the investment part came in…that we were spending £10,000 every time we went on a holiday and in return all we got was the holiday. […] So, he suggested that doing it this way, we would get the accommodation free for a holiday [..] but there would be…what goes back into. What he said was that what went back in…if we had one part of that building and there were, I don't know, 1,000 parts (because that's how he explained it), if there were a thousand bricks in that property, we were buying a brick. Albeit one brick, we still own that brick. So, the other people who owned the however many bricks also had the same rights over that property as what we had. So, we did quiz…if there's so many owning a brick in the property, how could it be sold in 19 years and how could our money be put back out there and how would we be refunded our investment. And he said that they were always selling parts of properties. And those were the words he actually used. They were always selling bricks of the properties. So, that covers why we believe we were buying into a property. And he took us out and showed us the apartment where we were buying the brick for want of a better term."*

(My emphasis added)

134. As (1) and (5) above were in the Letter of Claim but weren't in Mr and Mrs C's initial written testimony, I asked them to explain why they thought that was the case before asking them if the exact words in (1) above were used. This is what Mrs C said:

"I'll start back from the beginning. […] We went to see [PR] way back. And we went through little bits that we had in our paperwork. We went through and wrote down everything as per [the initial witness statement]. This is what we started with. Now, when we've sat and gone through our stuff, our diaries and things like that, we've come across more stuff. For instance, the piece of paper that [Mr C] had written the figure on. I honestly can't say how he's come to that figure of £5,769. But there were certain questions written down on that piece of paper that, at the time of writing [the initial witness statement], I couldn't remember that he'd written that and I didn't know that we still had that piece of paper […]. So, when we said about the shares, that's when they said you were buying a part of the property. You were buying a brick of the property. So, we were believing that's what we were buying was a share of the property." (from 24:50 of the audio recording)

"I mean, we're talking however many years ago. But, in my mind, that is what we were told…that we would be buying a share of a property. A brick of a property. […] We never ever set out to buy a timeshare. I actually sat down and asked that particular question. Is this a timeshare we are buying? And he said no. You were buying into property. […] We were guaranteed that this was not a timeshare. This was…we were physically buying something." (from 26:32 of the audio recording)

135. I don't doubt that trying to recall what was said and/or done at the Time of Sale would have been an increasing challenge for Mr and Mrs C as more and more time passed by. And while the Supplier's alleged representations differed in their initial witness statement and the Letter of Claim, having now heard from Mr and Mrs C, I'm satisfied that, on balance, it's more likely to be the case that their allegations evolved after their initial witness statement as they tried to piece together more of what had been said and/or done by the Supplier at the Time of Sale – which is something I don't find surprising or unusual.

136. Shawbrook also says that Mr and Mrs C's answers to my questions during the Hearing on Mr C's contemporaneous handwritten note are examples of the inconsistencies it's concerned about.

137. At roughly 30 minutes into the Hearing, I asked Mr C if the contents of his handwritten note were captured in their entirety at the Time of Sale. This is what he said (from 30:30 of the audio recording):

"I wanted to know what we got back after 19 years. […] As he was going through and talking, that's when I would probably write down…I did write down…that £5,769. I don't know how we got to that figure. But through talking, and what he was saying and explaining, for whatever reason, that figure got written down. So we got what we would get from the property…what we will get in 19 years when they sold it…plus this extra bit. Because that's what…you know…what do you get back after 19 years. It was a question. It was there for me to ask him at some stage while we were talking. And so that's what was written down."

138. Mr C acknowledged that he couldn't recall exactly how the £5,769 was arrived at. And both he and Mrs C accepted that they weren't given a guaranteed return by the Supplier – all of which Shawbrook relies on to support its assertion that Mr and Mrs C's allegation that FPOC membership had been marketed and sold as an investment lacked merit.

139. However, after Mr C acknowledged that he couldn't recall exactly how the £5,769 was arrived at, this is what Mrs C went on to say a couple of minutes later (from 32:36 of the audio recording):

"I was sat with [Mr C] while that conversation was happening. As I can recall, [Mr C] had put down what the cost of the property was going to cost us, he asked the question what would we get back in 19 years and so SB had put down, well if you used to bank in the UK….at the moment they're at 0.01% (whatever they were at), you would end up with this much back after 19 years. If you use this as an investment, you will get back this after your 19 years. But I can't tell you the percentage he worked on to get to that. I don't know how he found that figure out."

140. I then asked Mr and Mrs C to tell me what made them believe such an accurate estimation. It was in response to that question that Mr and Mrs C accepted that they weren't given a guaranteed return by the Supplier. But Mrs C also said the following (from 44:35 of the audio recording):

"He couldn't say that was definitely what we'll get but if we work on the guidelines of where we were with interest rates then, that is the possible amount we could receive. […] We would be able to holiday well with our children up until such time that we needed that money to then retire. We didn't invest into thinking we were going to come out with twice as much money as we put in. That wasn't why we were doing it. We were doing it so that we were investing that money so that we could have a good standard of holidays and because that money was safe in that piece of property. And at the end of the 19 years, yes we would still have maintenance to pay on that property through the 19 years, but at the end of the 19 years we would get at least what we had put into it as an investment for us to use for our retirement. […] That is the sole reason why we did it. The money was safe somewhere doing something…earning maybe a bit, maybe not…but at the end of the day, as long as we got that bit, we weren't losing out we were only gaining."

141. So, when I consider Mr and Mrs C's testimony as a whole, while I acknowledge that they weren't always able to answer my questions as clearly and consistently as they might have done had they been asked to recall what was said and/or done at the Time of Sale only weeks or months after the event, I'm not persuaded to overturn my PD for the reasons Shawbrook suggests I should.

142. In my experience, inconsistencies are a normal part of trying to recollect an event that happened a long time ago and must be taken into account when assessing the reliability of Mr and Mrs C's evidence as a whole. And inconsistencies don't automatically exclude the possibility that there is a core of acceptable evidence within the overall body of a complainant's testimony (*Arroyo v Equion Energia Ltd (formerly BP Exploration Co (Colombia) Ltd) [2016]* EWHC 1699 (TCC). So, even if there are parts of Mr and Mrs C's testimony that could be clearer or might be more difficult to explain, I shouldn't simply ignore everything else they had to say about what they were told at the Time of Sale and why they purchased FPOC membership.

143. It's also clear from case law that the credibility of an allegation can be assessed by considering how inherently probable it was and/or is. In *Onassis v Vergottis* [1968] 10 WLUK 101, Lord Pearce referred to the need to look at *"probabilities"*, as well as contemporaneous documents and admitted or incontrovertible facts, when weighing the credibility of a witness's evidence (see page 431). In *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1986] 2 W.L.R. 1063, Goff LJ also referred to looking at *"the overall probabilities"* when ascertaining the truth (see page 57). And in *Gestmin*, which is the court case Shawbrook relied on after Assessment One to argue that the correct approach to take to the evidence in this complaint is to prefer the contemporaneous documentation, Leggatt J suggested in paragraph 22 that factual findings should be based on *"inferences drawn from the documentary evidence and known or* ***probable*** *facts"*. (My emphasis added)

144. As I said in my PD, the Supplier's 2013/2014 Sales Induction Training covered how membership of the FPOC worked on slide 27. It didn't say much. Yet it did say *'You Buy A Fraction Of [the Supplier's] Property'*. I acknowledge the language was neutral in nature. But I remain of the view that the focus on the relevant slide clearly wasn't on holidays; it was on the investment element of membership (i.e., the share in the Allocated Property). And as neither Shawbrook nor the Supplier have told me that the Induction Training wasn't in place to help the sales representatives sell FPOC membership in 2014, I still think that the slide in question was likely to have informed what the focus was on when the sales representatives framed membership to Mr and Mrs C.

145. As I also said in my PD, the timeshare provider's website, just before the Time of Sale, also stated on its 'Members Page' that *"Vacation Club membership also underpins our most innovative products, such as [the timeshare provider's] Fractional Property Owners Club which combines flexible, carefree holiday taking and a stake in property ownership, all in one."* And as the Supplier chose to advance *"property ownership"* as a key benefit in this way on its website (which neither Shawbrook nor the Supplier have persuaded me wasn't the case in response to my PD), that suggests the same would have been done by the Supplier in person. The Allocated Property was 'owned' by FPOC members only to the extent that they ultimately had the right to participate in the net proceeds from its sale. They didn't have any preferential rights to stay in their Allocated Property or use it in any other way. So, the relevant notion of "property ownership" was confined to its potential investment benefit.

146. With that likely to be the case, I also agree with the High Court's comments in *Shawbrook & BPF v FOS* when, in paragraphs 77 and 78, 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."

147. Yet, in this complaint, looking at the evidence in the round, I think the Supplier failed to negotiate this difficulty successfully when it sold FPOC membership to Mr and Mrs C.

148. Overall, therefore, when I consider Mr and Mrs C's testimony as a whole, and in conjunction with a combination of evidence from the Supplier that, in my view, adds credence to the allegation in question, I think it's more likely than not that Mr and Mrs C were led by the Supplier to expect a financial gain from FPOC membership as an inducement to them to purchase. And with that being the case, I still think the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale.

The Relevant Debtor-Creditor Relationship

149. In response to my PD, PR argued that Mr and Mrs C were unable to afford FPOC membership if they couldn't use it effectively for holidays. But as neither PR nor Mr and Mrs C have said much to persuade me that the lending was unaffordable for Mr C given his financial circumstances at the Time of Sale (or provided any supporting evidence to bolster what they have said), I'm not persuaded to uphold the complaint on this basis.

150. PR also argued that Shawbrook's failure to follow the FLA's Lending Code meant that its own acts or omissions created an unfair relationship under Section 140A. But for reasons that will become apparent, this wouldn't change the outcome of this complaint. So, it isn't necessary to make any formal findings on this point.

151. Insofar as Shawbrook's response to my PD is now relevant following *Shawbrook & BPF v FOS,* it argues that no unfair relationship arose even if the Supplier did sell FPOC membership to Mr and Mrs C as an investment because they got what they bargained for: significant holiday rights (during the school holidays) and investment potential.

152. The phrase "got what they bargained for" seems to me to apply to a situation when parties negotiate and, in turn, know what they stood to give and receive in return. Indeed, the bottom line for anyone investing their money is to avoid investments that they don't understand. But I think that's exactly what happened at the Time of Sale because Mr and Mrs C weren't given any helpful information about the Allocated Property. And with that being so, it must follow that they can't have got what they bargained for.

153. Shawbrook also said that I had adopted a rigid 'but for' approach to causation when determining whether the matter in question gave rise to unfairness – which was the wrong approach to take.

154. But I disagree. While I found that there had been a number of regulatory breaches by the Supplier (some of which now no longer apply in light of *Shawbrook & BPF v FOS*), I didn't argue that such breaches alone caused a particular loss to Mr and Mrs C. Instead, it was and is the impact on them that led and leads me to conclude that the relationship between Mr C and Shawbrook was unfair.

155. As the High Court said in paragraph 185 of *Shawbrook & BPF v FOS*:

> *"Breaching Reg.14(3) by selling a timeshare as an investment – whether doing so explicitly or implicitly, whether in a slideshow or in a to-and-fro conversation with individual consumers – is conduct that knocks away the central consumer protection safeguard the law provides for consumers buying timeshares. The ombudsmen held the breach in each case to be serious/substantial and the constituent conduct causative of the legal relations entered into: timeshare and loan. As such, it is hard to fault, or discern error of law in, a conclusion that the relationship could scarcely have been more unfair. It was constituted by the acts/omissions of the timeshare companies in the antecedent negotiations leading up to the contractual commitments. Those are acts/omissions for which the banks are 'responsible' by operation of law. The timeshare companies and lenders clearly benefited overall thereby and the consumers, as the ombudsmen found as a matter of fact, were disproportionately burdened. No error of law appears from the ombudsmen's conclusions in any of these respects. I am satisfied their findings of unfairness were properly open to them on this basis alone."*

156. Indeed, as Mr and Mrs C have strongly intimated more than once that they wouldn't have gone ahead with the purchase had the Supplier not leveraged a share in the Allocated Property in order to entice them into purchasing FPOC membership, I'm persuaded that a court would find the relationship between Mr C and Shawbrook unfair.

157. I recognise, as I did in my PD, that Mr and Mrs C's purchase at the Time of Sale wasn't their first encounter with the Supplier. They had purchased trial membership in 2011 before cancelling it within the cooling off period. But, as I've said before, that was a very different, much simpler product that only offered Mr and Mrs C five weeks' worth of holidays. And as their trial membership was sold to them roughly three years before they purchased FPOC membership at the Time of Sale, I don't think they could have reasonably known or assumed certain facts about the FPOC because of some retained knowledge and experience from 2011 even if they had been told about it at that time.

<u>The October 2014 Upgrade</u>

158. On 27 October 2014, Mr and Mrs C upgraded their FPOC membership, paying an additional sum and adding a further 550 Fractional Points to their existing 1,500 by entering into a different purchase agreement, thereby replacing the FPOC Purchase Agreement – though the loan from Shawbrook remained in place after the upgrade.

159. As a result of that upgrade, it was and is necessary to consider whether the relationship between Mr C and Shawbrook remained unfair.

160. In response to Assessment One, Shawbrook argued that, even if the relationship between itself and Mr C was unfair as a result of their purchase at the Time of Sale, it was no longer unfair[8]. And it made this argument because it said that, when they upgraded their membership, they received a £19,500 credit for it from the Supplier (despite only having originally paid £18,298, including the first year's annual management charge of £779). And as Mr and Mrs C also received £2,160 from the Travel Saving Bonus, Shawbrook argued that they made a profit of £3,362 within 8 months.

161. When coming to my PD, I recognised that, on the face of it, it might look like Mr and Mrs C hadn't suffered a loss in light of their upgrade. But I wasn't persuaded the argument was as open and shut as Shawbrook had suggested it was. And that remains the case now.

162. While the Supplier gave Mr and Mrs C credit of £19,500 for their original FPOC membership, I'd point out again that the credit in question wasn't the equivalent of cash. It was a deduction from a starting price *set by the Supplier itself* for Mr and Mrs C's upgrade. And as I still don't know what the market value was of the allocated property tied to their upgrade, there still isn't any evidence that the starting price of their upgrade represented the objective value of the benefits under the upgrade agreement, as opposed to a commercial opening position from which the Supplier would and could profitably offer deductions or discounts such as that granted to Mr and Mrs C. And for that reason, I'm not persuaded that the upgrade agreement improved their position financially, despite the notional 'profit' Shawbrook pointed to.

163. Nonetheless, I have thought once more about the extent to which responsibility for the situation after the upgrade must be laid at the door of the second supplier and Lender 3. After all, the upgrade was agreed to after a presentation by that supplier, who may have repeated a similar process to that which Mr and Mrs C went through at the Time of Sale. The upgrade was also paid for by funding from Lender 3 who is likely to bear responsibility for any acts and/or omissions in the precontractual presentation. And for that reason, I'm not persuaded that Shawbrook should have to answer for the financial consequences specifically associated with the 550 additional Fractional Points Mr and Mrs C purchased in October 2014.

164. Formally, the agreement entered into in October 2014 was a new contract that superseded the old one. And this is the position Shawbrook takes in its response to my PD. But as I said in my provisional findings, in my view, the purpose of Mr and Mrs C's upgrade was to continue and supplement their existing FPOC membership. And when Mr and Mrs C purchased membership at the Time of Sale, it looks like it had always been likely that they would upgrade their membership in this way.

165. Mr and Mrs C say that they upgraded their FPOC membership in order to take holidays in Florida, for which their original 1,500 Fractional Points were insufficient. And I still think that was the main reason they chose to purchase more points.

166. When Mr and Mrs C completed their Holiday Survey at the Time of Sale, they gave Florida as an answer to two questions: (1) "*Realistically, where do you see yourself*

[8] *Patel v Patel* [2009] EWHC 3264 QB It was held by the court that determining whether or not the relationship complained of was unfair had to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"* – which was date of the trial in the case of an existing relationship or otherwise the date the relationship ended. Mr C made his last loan repayment on 8 May 2016. So, this is the date at which a court would have to determine whether the relationship in question was unfair; see *Smith v RBS* [2023] UKSC 34.

holidaying over the next ten years?" and (2) "*If you won a dream holiday anywhere in the world, which two places would you choose?"* And on the Holiday Planner completed at that time, Florida was listed as an example of a possible holiday destination in December 2015. However, as the example suggested that it was only available in exchange for 1,750 Fractional Points, it was clear to both Mr and Mrs C and the Supplier that they didn't have enough Fractional Points longer term (putting to one side the time-limited 500 bonus points they were given when they first purchased membership of the FPOC, which were only allocated once a year for the first three years).

167. Mr and Mrs C also say that they were told in October 2014 that they didn't have enough Fractional Points to holiday in Florida despite, it seems, having the benefit of the bonus points awarded to them earlier that year. But this wasn't, in substance, a fresh beginning so much as a fairly routine upgrade. Persuading existing customers, such as Mr and Mrs C, to supplement their points in this way was seen as a feature of the Supplier's business model as the following extract from the timeshare provider's business plan suggests:

    "On average clients do buy further product[s] as initially they may not purchase sufficient [points] to cover all their holiday needs until they are fully confident in the system. It is very much in our commercial interest to ensure that clients are loyal and happy - we believe that this propensity to upgrade substantiates that we are managing to keep the right balance."

168. With all of that being the case, therefore, I think the upgrade agreement was really just a top-up of Mr and Mrs C's Fractional Points by rolling over those that they had and leaving them as members of the FPOC with enough points to enable them to holiday in Florida – albeit while also carrying an interest in the net sale proceeds of a different allocated property. And as the very function of the Supplier's £19,500 credit was to roll over Mr and Mrs C's existing Fractional Points into their upgrade, and as the loan from Shawbrook remained in place after October 2014, I'm still not persuaded that what happened on the 27th of that month was a fresh start, such that it was the exclusive cause of *everything* that followed. In other words, I still think that Mr and Mrs C's original purchase under the FPOC Purchase Agreement and the loan from Shawbrook had ongoing financial consequences for them, which continued the unfair relationship with Shawbrook. And for that reason, Shawbrook is still answerable for them, in my view.

Detriment

169. Shawbrook argues that concluding that Mr C suffered financially fails to take into account the significant benefits he and Mrs C obtained by entering into their FPOC Purchase Agreement – which included an annual holiday entitlement and a beneficial interest in the Allocated Property.

170. But Shawbrook hasn't submitted any supporting evidence to demonstrate that, objectively speaking, Mr and Mrs C's share in the Allocated Property was worth more at the time of their Upgrade in October 2014 than it was at the Time of Sale – nor has Shawbrook persuaded me that they benefited from membership to such an extent in some other way that Mr C's overall position wasn't prejudiced by the Supplier's breach of Regulation 14(3) of the Timeshare Regulations. Instead, it's clear to me that Mr C ended up borrowing and repaying a substantial sum of money while he and Mrs C entered into a long-term financial commitment that they wouldn't have subjected themselves to had the Supplier not leveraged a share in the Allocated Property in order to entice them into purchasing FPOC membership. So, I'm persuaded that

Mr C's position was prejudiced by the Supplier's breach of Regulation 14(3).

Conclusion

171. Given the facts and circumstances of this complaint, I think it's likely a court would find the relationship between Shawbrook and Mr C unfair for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to uphold Mr C's complaint on that basis.

172. In addition, putting aside the question of how a court might consider the matter under Section 140A, I've also looked at what happened as a question of what is fair and reasonable in all the circumstances of this complaint, bearing in mind that the Supplier was Shawbrook's statutory agent for the purposes of its pre-contractual negotiations. Looking at the matter in that way, in light of the Supplier's breach of Regulation 14(3) of the Timeshare Regulations and the impact that had on Mr and Mrs C's purchasing decision, I also consider it fair and reasonable to uphold Mr C's complaint on the basis that (even leaving Section 140A to one side) he was unfairly treated by the Supplier acting on Shawbrook's behalf.

Fair Compensation

173. When I find that a business has done something wrong, I would normally direct that business – as far as it's reasonably practicable – to put the complainant in the position they *would be in now* if the mistakes it made hadn't happened. In this case, that would mean putting right the unfairness that stemmed from the Supplier's acts and omissions that I find had breached its obligations.

174. DISP 3.7.1 R of the FCA's Handbook states that, when a complaint is determined in favour of the complainant (as is currently the case on this occasion), my determination may include a money award, an interest award or a costs award against Shawbrook – or another direction. And DISP 3.7.2 R states that a money award may be an amount that I consider fair redress for one or more of the following (whether or not a court would award compensation):

    (1) Financial loss (including consequential or prospective loss); or
    (2) Pain and suffering; or
    (3) Damage to reputation; or
    (4) Distress or inconvenience

175. I must, of course, take into account Section 140B of the CCA as relevant law. It sets out a wide range of extensive powers that a court can exercise if it finds that a relationship was unfair. The court is given a wide discretion on how to use those powers. If it decides to make an order this should reflect and be proportionate to the nature and degree of the unfairness which the court has found; and it should not give the claimant a windfall but should approximate as closely as possible the overall position that would have applied had the matters giving rise to the perceived unfairness not taken place.[9]

[9] *Carney v NM Rothschild and Sons [2018] at paragraph 101.*

176. So, with all of this in mind, and having found that Mr C (and Mrs C) would not have purchased FPOC membership at the Time of Sale but for the Supplier's failing (which means he wouldn't have borrowed any money from Shawbrook), I think it would be fair and reasonable to put him back in the position he would have been in had he not entered into the FPOC Purchase Agreement and associated credit agreement, provided Mr and Mrs C agree to either assign to Shawbrook their 1,500 Fractional Points or hold them on trust for Shawbrook if that can be achieved.

177. Here's what I think needs to be done to compensate Mr C with that being the case – whether or not a court would award such compensation:

    (1) Shawbrook should refund Mr C's repayments to it under the Credit Agreement – covering the £17,519 "Purchase Price" and "Membership/Dues" of £779 (which was, as I understand it, the first year's annual management charge).
    (2) Shawbrook should deduct any promotional giveaways that Mr and Mrs C used or took advantage of – like the monthly Travel Savings Bonus payments for instance – before they upgraded on 27 October 2014.

    (The difference between (1) and (2) are the 'Net Repayments')

    (3) 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 Shawbrook settles this complaint.
    (4) Shawbrook should remove any adverse information recorded on Mr C's credit file in connection with the loan it provided at the Time of Sale.

178. However, as I don't think that the effects of the unfairness in question ended when Mr and Mrs C upgraded their FPOC membership in October 2014, and as I think that their original 1,500 points were essentially rolled over into their upgrade and had ongoing financial consequences for them, the compensation needs to reflect that. So, in my view, Shawbrook also needs to refund the proportion of the management charges payable after 27 October 2014 that relates to those 1,500 Fractional Points – which, being 73% of the 2,050 Mr and Mrs C ended up with, means:

    (1) Shawbrook should refund 73% of the annual management charge(s) paid by Mr and Mrs C from 27 October 2014 onwards less a deduction for the holiday they took in October 2015 using Fractional Points – which I discuss in paragraphs 179 to 185 below (the 'Net Ongoing Charges').
    (2) Simple interest* at 8% per annum should be added to the Net Ongoing Charges from the date each charge was paid until the date Shawbrook settles this complaint.

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

179. Mr and Mrs C used their Fractional Points to holiday in October half-term 2015 (the 'Half-Term Holiday'). So, when I set out redress in my PD, I asked both parties to provide me with their submissions (along with supporting evidence) on what they thought the market value was of that holiday as I thought that needed to be deducted from Mr C's compensation to avoid giving him an unjustified windfall.

180. Shawbrook didn't respond in specific terms to this request – though it says that returning to Mr C the management charges would be unjust because they enabled him and Mrs C to reserve holidays in October 2015 and 2016. But being able to reserve holidays is not the same as taking them. And I can't see that there was an opportunity cost to the Supplier because the reservations weren't cancelled, for example. So, the fact that Mr and Mrs C were able to provisionally book a holiday in 2016 (that was subsequently cancelled by the Supplier because Mr and Mrs C chose not to confirm the booking) is no reason, in my view, to withhold the management charge they paid that year let alone in other years when they wouldn't have paid such charges in the first place had Mr and Mrs C not purchased FPOC membership.

181. PR says that the Half-Term Holiday was worth £1,000 because it was the end of the season and the flights and transfers had been paid for separately. But neither PR nor Mr and Mrs C have provided any evidence to support this submission despite my request for it.

182. In contrast, Mr and Mrs C's Holiday Planner from the Time of Sale set out the cost of a number of different holidays in 2014 and 2015, some of which suggest that £1,000 may not reflect the market value of the Half-Term Holiday. Those holidays included:

    (1) £1,200 for a one-week holiday in a one-bedroom apartment for up to 4 people at the timeshare provider's Paradise resort (Tenerife) in week 7 of 2014 – which, according to the FPOC Owners Guide relevant to the Time of Sale, was the week commencing 15 February 2014 i.e., half-term, at least for some schools.
    (2) £1,200 for a one-week holiday in a single two-bedroom apartment for up to 6 people at the timeshare provider's Ponta Grande resort (Portugal) in week 43 of 2015 – which, according to the FPOC Owners Guidance relevant to the Time of Sale, was the week commencing 24 October 2015 i.e., half term, at least for some schools.

183. But I recognise that the costs of these holidays on Mr and Mrs C's Holiday Planner were provided by the Supplier itself and may not represent the objective value of them and can't necessarily be taken at face value and used as a reliable guide as to the value of the Half-Term Holiday.

184. With all of that being the case, I'm not persuaded that I've seen enough evidence from either side to accurately determine the likely market value of the Half-Term Holiday.

185. As a result, I must paint with a broad brush here. I can see that the annual management charge paid by Mr and Mrs C for 2015 was €2,097 – which was roughly £1,600 based on the Euro to Pound exchange rate on 1 January 2015. That was a charge that they had to pay that year, like every year of their FPOC membership, if they wanted to use their Fractional Points to holiday. It strikes me as a practical and proportionate reflection of Mr and Mrs C's use of their membership in 2015. And in the absence of any information to help me more accurately calculate the market value of the Half-Term Holiday, I think it would be fair and reasonable to allow Shawbrook to withhold 73% of that particular charge in order to reflect Mr and Mrs C's usage that year.

186. Both sides told me in response to my PD that Mr and Mrs C's Fractional Rights hadn't yet been permanently forfeited. Instead, the Supplier said that they had been suspended in line with Rule 5.5.1 of the FPOC Rules. If that's still the case, I take Shawbrook's point that Mr and Mrs C are still entitled to reinstate their FPOC membership – which means that the remedy I had proposed in my PD does risk providing Mr C with an unjustified windfall. So, to mitigate the risk of that happening, as I've already said, Mr and Mrs C will have to agree to hold the benefit of 1,500 Fractional Points for Shawbrook or assign them to Shawbrook, if that can be achieved.

187. However, as the Supplier may also pursue Mr and Mrs C for other costs in addition to the annual management charges arising from their FPOC membership, there is also the possibility of continuing detriment that I think it fair to address. So, in keeping with and in addition to what I've said above, Shawbrook should indemnify Mr C against 73% of any other liabilities accruing from 27 October 2014 onwards as a result of his and Mrs C's ownership of Fractional Rights. That, together with what I've said in the paragraph above, will achieve, as closely as I can in this complaint, the same financial situation for Mr C as if he and Mrs C had never joined the FPOC in the first place.

188. Shawbrook also argued, in response to my PD, that the application of 8% simple interest provides Mr C with an unjustified windfall because it says that there was no reasonable basis on which to suggest that it reflects the rate he and Mrs C could have earned in a savings account.

189. 8% simple interest per annum is the rate of interest we normally award when directing a business to pay compensation. It's also the current interest rate on judgment debts and Parliament hasn't deemed it necessary to change it. It is a higher rate than Mr and Mrs C might have achieved on deposit as saving accounts had been one of the worst performing ways of investing money for some time before the Bank of England's recent rate rises. So, I recognise that 8% simple interest is likely to be more than Mr C would have earned in most saving accounts during much of the period in question.

190. However, the size of Mr and Mrs C return depends entirely on how they would have chosen to invest their money had they not purchased FPOC membership. Yet Shawbrook hasn't explained why it thought and thinks that a savings account would have been Mr and Mrs C preferred option given the rates of return on offer before February 2014 when there is little if any evidence to suggest that a savings account is where they would have put their money.

191. What's more, it's often difficult to determine with any certainty what the opportunity cost is to someone when they're deprived of money. So, I think 8% simple interest per annum reflects the fact that the money in question might have influenced a wide range of decisions by Mr and Mrs C about spending and borrowing over the relevant period of time. And for that reason, I think it's a reasonable rate of interest to award.

192. PR says that Mr and Mrs C's FPOC membership led to a substantial financial loss and caused them sleepless nights, anxiety, lots of distress and uncertainty – which it says merits a separate award to Mr C. But I disagree. The compensation I've set out above already reflects the loss suffered. And while I don't doubt they may have found the complaints process difficult at times, as Mr and Mrs C haven't elaborated on what PR says in response to my PD, I've seen nothing particularly persuasive to suggest that their interactions with Shawbrook during the course of this complaint have had an impact beyond the usual frustrations of a complaints process.

193. PR also argues that Mr and Mrs C have incurred legal fees because they could not have provided such focused submissions without access to specialist legal help. So, it says that redress should include the legal costs they've reasonably incurred. While some of PR's submissions may have been helpful to Mr and Mrs C, the same can't be said for all of them. And as it hasn't explained why the work it has carried out on this particular complaint justifies a separate award for its fees, I'm not persuaded to make such an award.

My Final Decision

For the reasons set out above, I uphold this complaint and direct Shawbrook Bank Limited to compensate Mr C in line with everything I've said above, which in summary, includes taking the following steps provided Mr and Mrs C agree to either assign to Shawbrook their 1,500 Fractional Points or hold them on trust for Shawbrook if that can be achieved:

(1) Shawbrook should refund Mr C's repayments to it under the Credit Agreement – covering the £17,519 "Purchase Price" and "Membership/Dues" of £779 (which was, as I understand it, the first year's annual management charge).
(2) Shawbrook should deduct any promotional giveaways that Mr and Mrs C used or took advantage of – like the monthly Travel Savings Bonus payments for instance – before they upgraded on 27 October 2014.

(The difference between (1) and (2) are the 'Net Repayments')

(3) 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 Shawbrook settles this complaint.
(4) Shawbrook should remove any adverse information recorded on Mr C's credit file in connection with the loan it provided at the Time of Sale.
(5) Shawbrook should refund to Mr C 73% of the annual management charge(s) he and Mrs C paid from 27 October 2014 onwards except for 73% of the annual management charge paid by them in 2015 in order to reflect their usage that year i.e. the Half-Term Holiday (the 'Net Ongoing Charges').
(6) Simple interest* at 8% per annum should be added to the Net Ongoing Charges from the date each charge was paid until the date Shawbrook settles this complaint.
(7) Shawbrook should indemnify Mr C against 73% of any other liabilities accruing from 27 October 2014 onwards as a result of his and Mrs C's ownership of Fractional Rights.

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 5 January 2024.

Morgan Rees
Ombudsman