DRN-4529796

The complaint

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

Background to the Complaint

Mr and Mrs R first became customers of a timeshare provider (the 'Supplier') when they purchased a Trial membership in September 2009. They upgraded to a Vacation Club membership in May 2010 and made a further Vacation Club purchase in August 2010. In October 2012, they upgraded to a Fractional Club membership after trading in their existing membership. This purchase was funded by other means.

Mr and Mrs R purchased membership of a timeshare (the 'Fractional Club') from the Supplier on 8 October 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 2,400 fractional points at a cost of £6,479 (the 'Purchase Agreement'), trading in their existing Fractional membership.

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

Mr and Mrs R paid for their Fractional Club membership by trading their existing membership, which was valued at £26,910, and by taking finance of £6,479 from the Lender in their joint names (the 'Credit Agreement'), bringing the total cash value of the membership to £33,389.

Mr and Mrs R – using a professional representative (the 'PR') – wrote to the Lender on 17 September 2018 (the 'Letter of Complaint') to complain about the Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

The Letter of Complaint set out several reasons why Mr and Mrs R say that the credit relationship between them and the Lender was unfair to them under Section 140A of the CCA. In summary, they include the following:

1. Fractional Club membership was marketed and sold to them as an investment in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. They were pressured into purchasing Fractional Club membership by the Supplier.
3. The Supplier received a payment of commission from the Lender, and this was not declared.
4. The Supplier misrepresented the nature of Fractional Club membership to them.
5. The Lender did not undertake a proper assessment of their ability to repay the loan before deciding to lend to them.

The Lender dealt with Mr and Mrs R's concerns as a complaint and issued its final response letter on 9 January 2019, rejecting it on every ground.

Mr and Mrs R then referred the complaint to the Financial Ombudsman Service.

Sadly, Mr R passed away in January 2022. As the loan was repaid in full before then, his estate is a joint eligible complainant along with Mrs R.

The complaint was assessed by an Investigator who, having considered the information on file, upheld the complaint on its merits.

The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr and Mrs R at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of that breach on their purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr and Mrs R was rendered unfair to them for the purposes of section 140A of the CCA.

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

And having considered the complaint, I agreed with the outcome reached by the Investigator. I agreed Mrs R and the estate of Mr R's complaint should be upheld, but in reaching that conclusion I expanded on the reasons why. So, I set out my initial thoughts in a Provisional Decision ('PD'). I invited both Mrs R and the PR and the Lender to respond with any new evidence or arguments if they wished to.

In my PD, I began by setting out the legal and regulatory context:

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under DISP 3.6.4R to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:

- *The CCA (including Section 75 and Sections 140A-140C).*
- *The law on misrepresentation.*
- *The Timeshare Regulations.*
- *The Unfair Terms in Consumer Contracts Regulation 1999.*
- *The Consumer Protection from Unfair Trading Regulations 2008.*
- *Case law on Section 140A of the CCA – including, in particular:*

    - *The Supreme Court's judgment in Plevin v Paragon Personal Finance Ltd [2014] UKSC 61 ('Plevin') (which remains the leading case in this area).*
    - *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
    - *Patel v Patel [2009] EWHC 3264 (QB) ('Patel').*
    - *The Supreme Court's judgment in Smith v Royal Bank of Scotland Plc [2023] UKSC 34 ('Smith').*
    - *Carney v NM Rothschild & Sons Ltd [2018] EWHC 958 ('Carney').*
    - *Kerrigan v Elevate Credit International Ltd [2020] EWHC 2169 (Comm) ('Kerrigan').*

- *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').*

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time – which, in this complaint, includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code').

I then set out my thoughts on Mrs R and the estate of Mr R's complaint:

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

However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I recognise that there are a number of aspects to Mrs R and the estate of Mr R's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the timeshare was misrepresented to them and that the Lender did not conduct proper affordability checks at the Time of Sale, because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mrs R and the estate of Mr R in the same or a better position than they would be if the redress was limited to misrepresentation or the decision to lend the money.

What is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

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

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between Mr and Mrs R and the Lender was unfair.

Under Section 140A of the CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as "a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]". And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to "finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr and Mrs R's membership of the Fractional Club 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). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

Antecedent negotiations under Section 56 cover both the acts and omissions of the Supplier, as Lord Sumption made clear in Plevin, at paragraph 31:

"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.' […] Sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. […] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."

And this was recognised by Mrs Justice Collins Rice in Shawbrook & BPF v FOS at paragraph 135:

"By virtue of the deemed agency provision of s.56, therefore, acts or omissions 'by or on behalf of' the bank within s.140A(1)(c) may include acts or omissions of the timeshare company in 'antecedent negotiations' with the consumer".

In the case of Scotland & Reast, the Court of Appeal said, at paragraph 56, that the effect of Section 56(2) of the CCA meant that "negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law" before going on to say the following in paragraph 74:

"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator

and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."[1]

So, the Supplier is deemed to be Lender's statutory agent for the purpose of the pre-contractual negotiations.

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in Patel (which was recently approved by the Supreme Court in the case of Smith), 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 credit relationship or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in Plevin (at paragraph 17):

"Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with […] whether the creditor's relationship with the debtor was unfair."

Instead, it was said by the Supreme Court in Plevin that the protection afforded to debtors by Section 140A is the consequence of all of the relevant facts.

I have considered the entirety of the credit relationship between Mr and Mrs R and the Lender along with all of the circumstances of the complaint and I think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. *The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale; and*
2. *The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*
3. *Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;*
4. *The inherent probabilities of the sale given its circumstances.*

I have then considered the impact of these on the fairness of the credit relationship between Mr and Mrs R and the Lender.

The Supplier's breach of Regulation 14(3) of the Timeshare Regulations

The Lender does not dispute, and I am satisfied, that Mr and Mrs R's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling Fractional Club membership as an investment. This is what the provision said at the Time of Sale:

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[1] The Court of Appeal's decision in *Scotland* was recently followed in *Smith*.

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

But Mr and Mrs R say that the Supplier did exactly that at the Time of Sale. By way of background, in October 2012, Mr and Mrs R bought a membership from the Supplier that was also asset backed, it being linked to a different allocated property. In relation to that sale (which is not the subject of this complaint), they said:

"In October 2012, we were in Tenerife when the representatives again invited us to breakfast to tell us about a new product that we could make money on. This again turned into a long meeting where the representatives told us about the Fractional Owners Property Club. The representatives advised that this would give us the ability to own a fraction of a property. This property would be sold on a given date and that we would get a big lump sum back almost three times what we had paid. We were also told that we would have a guaranteed exit date on that date to allow us to make a decision on our membership."

Following that, Mr and Mrs R went on to purchase 2,070 fractional points and an interest in the sale proceeds of one of the Supplier's properties.

In respect of the events that led to the purchase in question, they said:

"In October 2014, we were again on holiday in Malaga when we were approached by the representatives. Again, this was for a quick chat that turned into another lengthy meeting. We were advised that there were new properties available for fractional purchase in Sierra Marina. Again, we were told that there would be a sale date and that on that date the properties would be sold and that we would make a profit on the investment we had made."

Mr and Mrs R alleged, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because they were told by the Supplier that they would make a profit on the sale of Fractional Club membership.

The term "investment" is not defined in the Timeshare Regulations. In Shawbrook & BPF v FOS, the parties agreed that, by reference to the decided authorities, "an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit" at [56]. I will use the same definition.

Mr and Mrs R's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.

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

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs R, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to them as an investment. For example, the Member's Declaration provided to me, and signed and initialled by Mr and Mrs R, included the following:

"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 Supplier] makes no representation as to the future price or value of the Fraction".

When read on its own, this disclaimer goes some way to making the point that the purchase of Fractional Rights shouldn't be viewed as an investment. But it had to be read in conjunction with what else the Standard Information Form had to say, which included the following disclaimer:

"11. 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".

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 sale of the Allocated Property weren't guaranteed.

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 Fractional Club, 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.

It's also difficult to explain why it was necessary to include such a disclaimer if there wasn't a very real risk of the Supplier marketing and selling membership of the Fractional Club 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.

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And there are a number of strands to Mr and Mrs R's allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that membership of the Fractional Club was expressly described as an "investment" in several different contexts and (2) that membership of the Fractional Club could make them a financial gain and/or would retain or increase in value.

So, I have considered:

(1) *whether it is more likely than not that the Supplier, at the Time of Sale, sold or marketed membership of the Fractional Club as an investment, i.e. told Mr and Mrs R or led them to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered them the prospect of a financial gain (i.e., a profit); and, in turn,*
(2) *whether the Supplier's actions constitute a breach of Regulation 14(3).*

And for reasons I'll now come on to, given the facts and circumstances of this complaint, I think the answer to both of these questions is 'yes'.

How the Supplier marketed and sold the Fractional Club membership

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

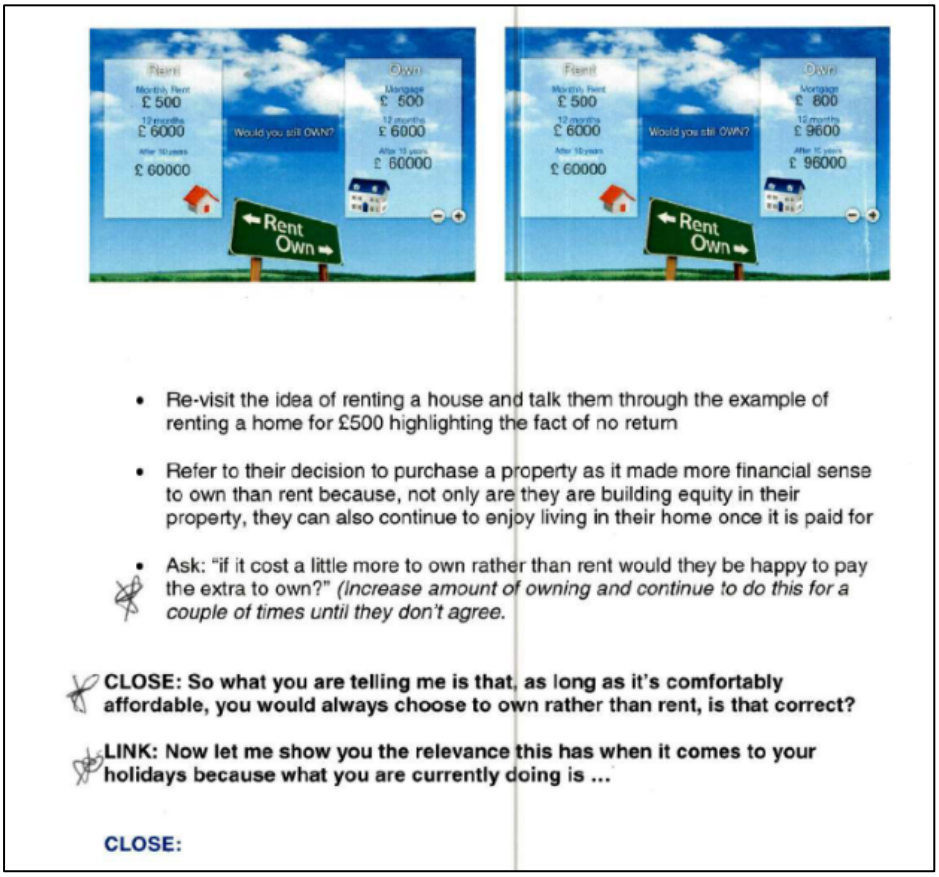
1. *A document called the 2013/2014 Sales Induction Training (the '2013/2014 Induction Training');*
2. *Screenshots of a Electronic Sales Aid (the 'ESA'); and*
3. *A document called the "FPOC2 Fly Buy Induction Training Manual" (the 'Fractional Club Training Manual')*

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

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

The "Game Plan" on page 23 of the FPOC 2 Induction Training Manual indicates that, of the first 12 to 25 minutes, most of that time would have been spent taking prospective members through a comparison between "renting" and "owning" along with how membership of FPOC 2 worked and what it was intended to achieve.

Page 32 of the FPOC 2 Induction Training Manual covered how the Supplier's sales representatives should address that comparison in more detail – indicating that they would have tried to demonstrate that there were financial advantages to owning property, over 10 years for example, rather than renting:



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

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

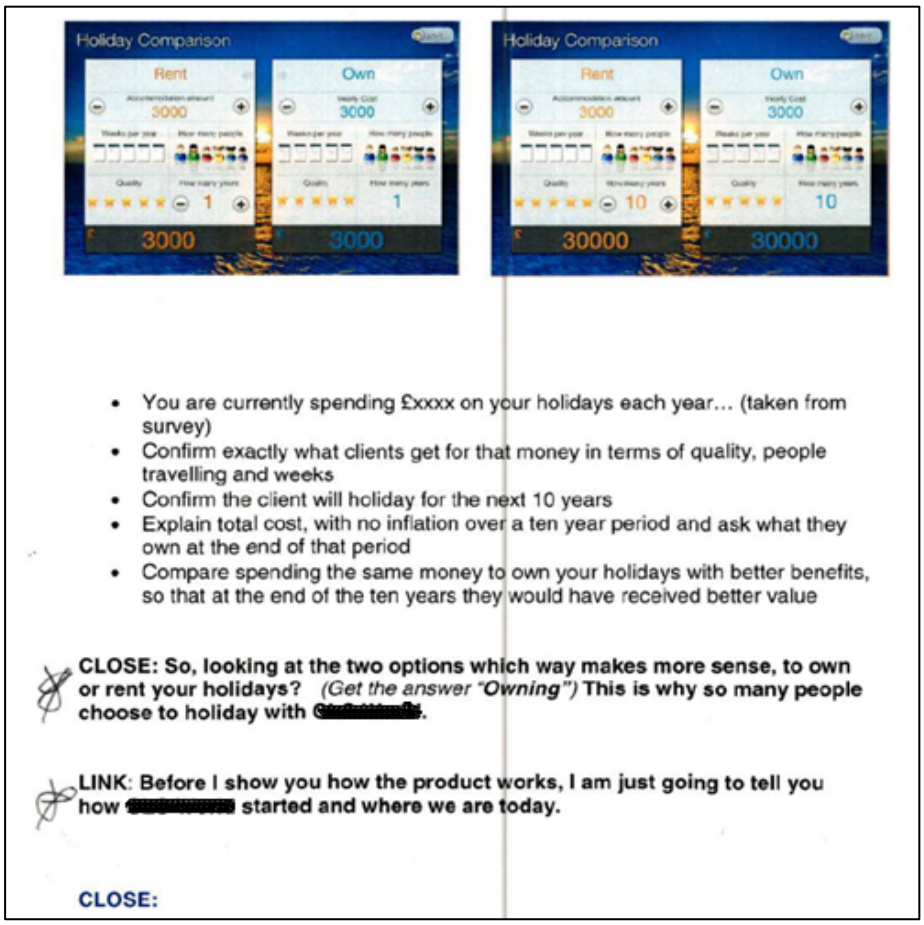
LINK: Now let me show you the relevance this has when it comes to your holidays because what you are currently doing is …

CLOSE:

Indeed, one of the advantages of ownership referred to in the slide above is that it makes more financial sense than renting because owners "are building equity in their property". And as an owner's equity in their property is built over time as the value of the asset increases relative to the size of the mortgage secured against it, one of the advantages of ownership over renting was portrayed in terms that played on the opportunity ownership gave prospective members of FPOC 2 to accumulate wealth over time.

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

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



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

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

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

CLOSE:

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

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

[…]

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

SUMMARISE LAST SLIDE:

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

[…]

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

[…]

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

(My emphasis added)

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

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

[…]

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

(My emphasis added)

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

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

[…]

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

I acknowledge that the slides above set out a "return" that is less than the total cost of the holidays and the "initial outlay". But that was just an example and, given the way in which it was positioned in the Training Manual, the language did leave open the possibility that the

return could be equal to if not more than the initial outlay. Furthermore, the slides above represent Fractional Club membership as:

(1) *The right to receive holiday rights for 19 years whose market value significantly exceeds the costs to a Fractional Club member; plus*
(2) *A significant financial return at the end of the membership term.*

And to consumers (like Mr and Mrs R) who were looking to buy holidays anyway, the comparison the slides make between the costs of Fractional Club membership and the higher cost of buying holidays on the open market was likely to have suggested to them that the financial return was in fact an overall profit.

I also acknowledge that there was no comparison between the expected level of financial return and the purchase price of the Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to prospective purchasers, such as Mr and Mrs R, the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like. 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 it remains my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.

So, if a supplier implied to consumers that future financial returns (in the sense of possible profits) from a timeshare were a good reason to purchase it, I think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment.

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

"[…] I endorse the observation made by Mr Jaffey KC, Counsel for BPF, that, whatever the position in principle, ***it is apparently a major challenge in practice for timeshare companies to market fractional ownership timeshares consistently with Reg.14(3). […] Getting the governance principles and paperwork right may not be quite enough.***

The problem comes back to the difficulty in articulating the intrinsic benefit of fractional ownership over any other timeshare from an individual consumer perspective*. […]* ***If it is not a prospect of getting more back from the ultimate proceeds of sale than the fractional ownership cost in the first place, what exactly is the benefit?*** *[…] What the interim use or value to a consumer is of a prospective share in the proceeds of a postponed sale of a property owned by a timeshare company – one they have no right to stay in meanwhile – is persistently elusive."*

"[...] although the point is more latent in the first decision than in the second, it is clear that both ombudsmen viewed fractional ownership timeshares – simply by virtue of the interest they confer in the sale proceeds of real property unattached to any right to stay in it, and the prospect they undoubtedly hold out of at least 'something back' – as products which are inherently dangerous for consumers. ***It is a concern that, however scrupulously a fractional ownership timeshare is marketed otherwise, its offer of a 'bonus' property right and a 'return' of (if not on) cash at the end of a moderate term of years may well taste and feel like an investment to consumers who are putting money, loyalty, hope and desire into their purchase anyway.*** *Any timeshare contract is a promise, or at the very least a prospect, of long-term delight. [...] A timeshare-plus contract suggests a prospect of happiness-plus. And a timeshare plus 'property rights' and 'money back' suggests adding the gold of solidity and lasting value to the silver of transient holiday joy."*

(My emphasis added)

I think the Supplier's sales representatives were encouraged to make prospective Fractional Club members consider the advantages of owning something and view membership as an opportunity to build equity in an allocated property rather than simply paying for holidays in the usual way. That was likely to have been reinforced throughout the Supplier's sales presentations by the use of phrases such as "bricks and mortar" and notions that prospective members were building equity in something tangible that could make them some money at the end. And as the Fractional Club Training Manual suggests that much would have been made of the possibility of prospective members maximising their returns (e.g., by pointing out that one of the major benefits of a 19-year membership term was that it was an optimum period of time to see out peaks and troughs in the market), I think the language used during the Supplier's sales presentations was likely to have been consistent with the idea that Fractional Club membership was an investment.

Overall, therefore, as the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members, they indicate that the Supplier's sales representative was likely to have led Mrs and Mr R to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e., a profit) in the future. And with that being the case, I don't find them either implausible or hard to believe when they say they were told they would make a profit.

On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mrs and Mr R were led by the Supplier to believe at the relevant time. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

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

Having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr and Mrs R and the Lender under the Credit Agreement and related Purchase Agreement.

As the Supreme Court's judgment in Plevin makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in Carney and Kerrigan (respectively) on causation.

In Carney, HHJ Waksman QC said the following in paragraph 51:

"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"

And in Kerrigan, HHJ Worster said this in paragraphs 213 and 214:

*"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court **may** make an order **if** it determines that the relationship is unfair to the debtor. […]*

[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs R and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) (which, having taken place during its antecedent negotiations with Mr and Mrs R, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender) lead them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

As noted above, Mr and Mrs R were clear in their evidence of why they purchased Fractional Club membership and what they took from the sales process. They explained that in 2012 they bought a membership similar to the one in question as they expected it to generate a profit when the membership came to an end and the allocated property was sold. They then said that they bought Fractional Club membership when new properties were available, again with the expectation they would make a profit on the sale of the Allocated Property.[2] So I think Mr and Mrs R entered into the purchase at the Time of Sale already believing Fractional Club membership to be an investment product and, given the breach of Regulation 14(3) that I have found, I think this was an important part of their purchasing decision.

The Lender has commented on Mr and Mrs R's testimony, which it received at the same time as the Investigator's findings. It says that "without a witness statement, it has been difficult to decipher what has come directly from the consumer and what has been influenced by [the PR]". It says: "the lack of direct testimony means that there is nothing credible about the claim made".

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[2] From what I know about how the Supplier sold memberships in 2012, I do not think Mr and Mrs R's memories that their earlier membership was sold to them as an investment was fanciful.

I can see the document titled "Client Statement" is headed with the PR's logo and as such I am aware that this is not direct testimony in the sense that it does not appear to have been written by Mr and Mrs R in their own exact words. But I have no reason to doubt the veracity of the information provided and am persuaded that the PR has drafted the statement having spoken with Mr R as there are some specific details about the events at the Time of Sale, which are also consistent with the claim letter. Further, this statement was provided by the PR when the complaint was first referred to the Financial Ombudsman Service in February 2019 and it appears to be their honest memories of the sale.

The Lender points out that Mr and Mrs R did not say they only purchased Fractional Club membership for the possibility of a profit. However, I disagree. Mr and Mrs R have not said, explicitly, why they took out Fractional Club membership, but they did say this about the sales process:

"Again, we were told that there would be a sale date and that on that date the properties would be sold and that we would make a profit on the investment we had made."

Given that was the only part of the sales presentation they commented on, I think it is fair to infer that the expectation of a profit on the sale of the Allocated Property was a central motivation to their purchasing decision. Further, I don't think that the possibility of a profit needs to be the sole reason for entering the agreement, in order to render the relationship unfair. Only that it needs to have been an important motivating factor that was material to their decision to enter the agreement, which I find it was in this case.

On my reading of Mr and Mrs R's testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. That doesn't mean they were not interested in holidays - their own testimony demonstrates that they quite clearly were as they have talked about the problems they say they had booking holidays. And that is not surprising given the nature of the product at the centre of this complaint. But as Mr and Mrs R said (plausibly in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit as that share was one of the defining features of membership that marked it apart from the more 'standard' type of timeshare available to them. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

The Lender has said that Mr and Mrs R were experienced timeshare members who bought timeshares before this purchase, including a Fractional Club membership. However, I can't see how that was relevant to whether the breach of Regulation 14(3) led to an unfair credit relationship as, for example, it is not said that Mr and Mrs R ought to have not relied on or believed in what they were told by the Supplier at the Time of Sale due to their previous purchasing history.

The Lender says: "The sales notes provided at the time of the sale are our most credible documents as they are from the time of the direct sale. Upon reviewing the sales notes there is no mention of the term investment or profit which puts emphasis to the fact that [Mr and Mrs R] did not purchase the fractional product as a means of investment."

…

"Further to this within the notes provided by [the Supplier] the customers have commented by saying we don't expect any money at all."

I requested a copy of the sales notes and can see that these are very limited in what they say in general and give no details about Mr and Mrs R's motivation to enter the agreement. And I have not seen the note from the Supplier where Mr and Mrs R's comment that they were not expecting a profit is recorded. So, I have considered the sales notes provided to me, but I am not persuaded that they provide any real insight on Mr and Mrs R's motivation for entering the agreement. Further, given the prohibition in Regulation 14(3), I would be surprised if the Supplier recorded that Mr and Mrs R were motivated by the possibility or expectation of a profit.

Mr and Mrs R did not say or suggest, for example, that they would have pressed ahead with the purchase in question had the Supplier not led them to believe that Fractional Club membership was an appealing investment opportunity. And as they faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I have not seen enough to persuade me that they would have pressed ahead with their purchase regardless.

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

I then set out what I thought the Lender should do to resolve the complaint.

The responses to the PD and my findings

The PR, on behalf of Mrs R and the estate of Mr R replied to say it agreed with my provisional decision and that Mrs R did not want any previous timeshare to be reinstated.

The Lender disagreed. It provided a comprehensive response to my PD. It asks me to reconsider my position on the complaint because:

i. the PD is premised on a material error of law in its approach to the prohibition under Regulation 14(3) of the Timeshare Regulations, and (further or alternatively) it errs in its application of that prohibition to the underlying documentation in support of the FPOC 2 sale;
ii. the above errors, in turn, undermine the Ombudsman's approach to the witness testimony supporting [Mrs R and the estate of Mr R's] complaint; and
iii. the PD is also premised on a material error of law in its approach to the legal test to determine the existence of an unfair relationship.

In particular, the Lender argues:

- The wording in my PD is inconsistent with the premise that there is no prohibition to the sale of fractional timeshares, only a prohibition on the way they were sold, and the definition of 'investment' that I used. It argues that I took the position that *"the mere existence of the "prospect of a financial return" constituted an "investment". In particular, the PD falls into that error by conflating two different meanings of the word 'return': (i) a 'return on investment', which is normally understood to mean the measure of profit (the return) on the original investment; and (ii) a customer being told that some money will be 'returned' upon sale, which carries no connotation of investment or profit."*
- I erred by making "*inferences about the conduct of the sale based on generic assumptions"* about the type of timeshare purchased by Mr and Mrs R, rather than engaging with the specific facts in this case.

- None of the sales materials or documents from Mr and Mrs R's sale described Fractional Club membership as an "investment" and the allegations are generic in nature and Mr R's testimony failed to explain exactly how it was sold as an "investment".
- Telling a customer that there would be a financial return from the sale of the Allocated Property would not breach Regulation 14(3).
- Mr and Mrs R were not shown the sales presentation documents I refer to in my PD at the Time of Sale – but they do not demonstrate a breach of Regulation 14(3) in any case.
- Mr and Mrs R confirmed that they understood the relevant disclaimers that Fractional Club membership was for the "*primary purpose of holidays"* and not an investment.
- I have not interpreted the contents of the training materials correctly, for several reasons.
- The training materials were found to have not breached Regulation 14(3) by the District Judge in *Prankard v Shawbrook Bank Limited, G28YJ515, 8 October 2021* and I ought to follow that judgment.
- The Supplier says it found discrepancies in Mr R's testimony, which is not signed and dated and was not received by the Lender until recently, suggesting that it cannot be relied upon.
- The PR may have altered the testimony "*after the fact*".
- There are "*reasonable grounds to suspect*" Mr R's testimony has been *"tainted by the influence of"* the PR.
- Mr R's testimony contains inconsistencies and lacks detail.
- A contact note from the Supplier shows Mr R was unhappy with other aspects of his purchase and did not mention the Fractional Club membership being sold as an investment.
- Mr R submitted a written request to cancel the membership in 2015, which included the line that they "*don't expect any money*".
- I erred in not applying the test I had highlighted in the judgment of *Carney*, rather I said 'I have not seen enough evidence to persuade me that they would have pressed ahead with their purchase regardless', which reverses the burden of proof.

What I've decided – and why

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

Having considered everything again, I still uphold Mrs B and the estate of Mr B's complaint for the reasons set out in the extract of my PD. I will also deal with the matters raised by the Lender in response to my PD. In doing so, I note again that my role as an Ombudsman is not to address every single point that has been raised in response. Instead, it is to decide what is reasonable in the circumstances of this complaint. So, while I have read the Lender's response in full, I will confine my findings to what I think are the salient points.

In my PD, I noted that, to breach Regulation 14(3), the Supplier had to market or sell the Fractional Club membership as an investment, and I used the following definition of 'investment' when considering whether that provision was breached: *"a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit".*

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

"Mr and Mrs R's share in the Allocated Property clearly, in my view, constituted an

investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.

In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold."

For the avoidance of doubt, I recognise that it was possible to market and sell Fractional Club membership without breaching the relevant prohibition in Regulation 14(3). For instance, depending on the circumstances, there is every chance that simply telling a prospective customer very factually that Fractional Club membership included a share in an allocated property and that they could expect to receive a financial return, or some money, back on the sale of that property would not breach Regulation 14(3).

But with that said, there seems to me to be many ways of marketing and selling a timeshare as an investment, without necessarily referring to (or even including) an allocated property. And if the Supplier said and/or did something in relation to an allocated property and/or Fractional Club membership more generally that at least implied to a prospective customer that membership offered them the prospect of a financial gain, that would in my view, breach Regulation 14(3).[3]

With that in mind, therefore, I will first consider the sales and marketing materials more generally, before turning to the evidence Mr and Mrs R have supplied in their complaint.

Sales and marketing materials

As I acknowledged in my PD, the Supplier did try, in the sales documentation, to avoid describing Fractional Club membership as an 'investment' and giving any indication of the likely financial return. For example, I highlighted in the Member's Declaration, it was 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 Supplier] makes no representation as to the future price or value of the Fraction".*

The Lender has pointed out that Mr and Mrs R have signed the Member's Declaration confirming they had read and understood its contents. However, I don't think they signed this document to say they understood that Fractional Club membership was not an investment, as that is not what was said in the above passage. Had the Supplier wished to clarify this statement to mean that, it could have done so. But it did not.

In my PD, I also considered what other disclaimers there were in the paperwork, in particular I quoted passages from the Information Statement. Some of these disclaimers went some way to making the point that the purchase of Fractional Club membership should not be viewed as an investment, but they had to be read along with everything else that was said in the Information Statement, which included the following disclaimer, which I quoted in my PD:

"11. Investment Advice

[3] See paragraphs 73 and 76 of the judgment in Shawbrook & BPF vs FOS.

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".

In my view, the disclaimer was an attempt by the Supplier to ensure that prospective members did not rely on what they were told at the Time of Sale as investment advice, and a declaration that they were not given any assurance as to the potential future value of the Allocated Property. However, the disclaimer does suggest that the 'Vendor' and the 'Manager' have experience as investors and that this information was fed into the sales presentation. It also suggests that prospective members might be wise to consult an investment advisor. In my view, both these suggestions ran the risk of giving prospective Fractional Club members the impression that there was investment potential to the product. Which is why I said in my PD that I thought this disclaimer was only necessary if the Supplier knew it ran the risk of the Fractional Club membership being presented to prospective members as an investment. And if a prospective member was told, or given the impression, during the course of the presentation that the Fractional Club membership was an investment, I do not think this disclaimer would have done much, if anything, to disabuse them of that notion.

However, as I have said previously, deciding what happened in practice is often not as simple as looking at the contemporaneous paperwork, especially when this was produced and signed after potential members, such as Mr and Mrs R, had already been through a lengthy sales presentation. So, that is why I have also placed importance on the training materials I refer to in my PD.

In response to my PD, the Lender says it does not accept the training materials I have relied on were shown to Mr and Mrs R. However, I have not been provided with any other slides or marketing materials that the Supplier would have used. In light of that, I will repeat my findings from my PD that the material in question is (1) reasonably indicative of the training the Supplier's sales staff were likely to have received around the Time of Sale and (2) how the sales staff were likely to have framed any presentation during the sale.

The Lender also says that the relevant training material did not expressly refer to Fractional Club membership as an investment. I agree with that observation, insofar as it does not mention the word 'investment'. But I think that the Lender continues to take a too narrow view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3). As I have suggested before, the Supplier does not have to refer to Fractional Club membership expressly as an investment in order to breach the regulation. Instead, it is important to consider both the explicit and implicit messaging at the Time of Sale to decide what I think was most likely to have happened. And further to this, I want to make clear that I have not simply relied on the training materials to reach the finding in my PD that the Supplier breached Regulation 14(3) at the Time of Sale, but it was a combination of all the available evidence, which included the documents from that time, the recollections and evidence of Mr and Mrs R, the inherent probabilities of the sale, given its circumstances, as well as the training materials.

The Lender says the reference in the training manual to "bricks and mortar" is unobjectionable as this refers to the existence of the Allocated Property.

In my PD, I say:

I think the Supplier's sales representatives were encouraged to make prospective Fractional Club members consider the advantages of owning something and view membership as an opportunity to build equity in an allocated property rather than simply paying for holidays in the usual way. That was likely to have been reinforced throughout the Supplier's sales presentations by the use of phrases such as "bricks and mortar" and notions that prospective members were building equity in something tangible that could make them some money at the end. And as the Fractional Club Training Manual suggests that much would have been made of the possibility of prospective members maximising their returns (e.g., by pointing out that one of the major benefits of a 19-year membership term was that it was an optimum period of time to see out peaks and troughs in the market), I think the language used during the Supplier's sales presentations was likely to have been consistent with the idea that Fractional Club membership was an investment.

So, in the context of what I have said, it is not the reference to the Allocated Property on its own that I found to be consistent with the idea that the Fractional Club membership was sold as an investment – it is the reinforcement that this was something that Mr and Mrs R would own and the notion that, through this ownership, they would build equity in something tangible that could make them some money at the end of the agreement when the Allocated Property was sold.

The Lender says:

"*The Ombudsman emphasises that the management fees are said to ensure "the property is maintained in pristine condition so at the end of the 19 year period, when the property is sold, you can get the maximum return" and that the 19-year period is suggested to be an "optimum period of time to see out peaks and troughs in the market". Again, this is unsurprising: given that the proceeds of selling the Allocated Property will be returned to customers, it is natural that steps are taken to ensure that the return is as high as possible. Nobody would expect the intention to be that the amount returned at the end of the timeshare period would be as low as possible, or anything other than as much as possible. But the significant point is that there is no comparison between the expected level of the financial return as against the initial outlay in purchasing the product, the primary focus of which was to provide holidays".*

The Lender points out that nobody would expect the return to be as *low* as possible, and I agree with this, but that is a very different proposition than what the training material leads potential customers to expect, which is a "*maximum return*". And I think if the intention of the document was to give potential customers the information they needed to provide under the Timeshare Regulations, the Supplier would not have needed to make any comment on the potential size of the return a customer might expect, or on the length of the membership term being influenced by the *"optimum period to cover peaks and troughs in the market".* So, in my view, the training materials *do* imply to potential customers that the membership is an investment. The fact that there was likely no further detail provided, nor a quantification of any financial return beyond this being the "*maximum*", does not detract from the position that the membership was presented as an investment. And again, I think this takes a too narrow view of the prohibition against marketing and selling timeshares as investments.

When taken together with Mr and Mrs R's recollections of the sale, which are not undermined or contradicted by the contents of the training material, I think there was at least the implication that Fractional Club membership was sold to them as an investment, which is enough to find there was a breach of Regulation 14(3) by the Supplier in this instance.

I have considered the findings in *Prankard v Shawbrook Bank Limited* where the County Court found that, after considering the contractual documents and evidence regarding the

training programme operated by the Supplier at the time, the product was not sold as an investment. But as that case was decided on its own facts, while I have read and considered it, it doesn't change my assessment of the evidence given the facts and circumstances of this complaint.

Mr and Mrs R's evidence

The Lender says I have not adequately considered the veracity of Mr and Mrs R's testimony in my PD. It points out that the statement is not signed or dated. It says that it was not provided a copy of the testimony when it requested this from the PR. And it has highlighted what it calls "discrepancies" in the wording of their testimony. It says any reliance on the statement *"should be carefully assessed and where there is evidence of potential interference, the testimony should be dismissed as unsafe".* As such, it asks me to reconsider any reliance on the testimony.

The PR provided Mr and Mrs R's statement when it submitted the complaint to the Financial Ombudsman Service in February 2019. I accept that the Lender says this was not sent to it alongside the Letter of Complaint, but it has been with our service since referral, so I don't see any reason to be concerned by the timing of the receipt of this statement. Further, I am aware this statement is not signed and dated by Mr or Mrs R, and I am aware this was not likely to have been written by Mr R (to whom the statement is attributed) as it is on a document with the PR's own header. So, I don't think this fact has been disguised or concealed by the PR in the way that the Lender suggests it has.

The Lender says:

"The Supplier carefully analysing the veracity of [Mr R's] Client Statement has highlighted a discrepancy in the words in the statement and word count with the c.30 word discrepancy equating to the sold as investment allegation made in the Client Statement"

The Lender says this *"is indicative that this testimony may have been altered after the fact, possibly by [the PR], in an attempt to strengthen the complaint presented to the FOS".*

The Lender provided a copy of the testimony with the following wording highlighted:

"(client to send date details)"

"and that we would get a big lump sum back almost three times what we had paid"

"we would make a profit on the investment we had made".

I don't agree with the Lender's allegation that the words it has highlighted were likely to have been added in later. But I do not find it *inherently* problematic that some words may have been added to the statement in the period between the Letter of Complaint and the date the complaint was presented to our service. This is because there could be a number of reasons why the PR added or removed words, such as to aide structure or readability, or to better reflect what Mr and Mrs R recalled about the sale. In this case, I have seen a different version of the testimony, which is dated 5 January 2018, and appears to have been written prior to the testimony received earlier. I say this as the PR looks to have left some spaces as placeholders, as it was waiting for Mr and Mrs R to confirm some details of the previous timeshare sales. I can also see the later statement includes some additional wording that covers how they felt at the time they signed the paperwork and that they weren't told about the payment of commission. I don't agree with the Lender that this makes the testimony in its entirety "unsafe", and I can understand why the statement might have been amended at that stage in the complaint process if Mr and Mrs R provided the PR with more information.

The Lender says Mr R's testimony contains inconsistencies about holidays taken in Malta, and this means I ought not to place significant weight on them, and that this "*perhaps illustrat[ed] that their desire to exit the timeshare for perceived lack of choice was the real driver of their complaint*".

In considering the weight to place on Mr R's recollections and evidence I have considered the judgment in *Smith v. Secretary of State for Transport* [2020] EWHC 1954 (QB), where it was held at para 40:

"At the start of the hearing, I raised with Counsel the issue of how the Court should assess his oral evidence in light of his communication difficulties. Overnight, Counsel agreed a helpful note setting out relevant case law, in particular the commercial case of Gestmin SPGS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) (Leggatt J as he then was at paragraphs 16-22) placed in context by the Court of Appeal in Kogan v Martin [2019] EWCA Civ 1645 (per Floyd LJ at paragraphs 88-89). In the context of language difficulties, Counsel pointed me to the observations of Stuart-Smith J in Arroyo v Equion Energia Ltd (formerly BP Exploration Co (Colombia) Ltd) [2016] EWHC 1699 (TCC) (paragraphs 250-251). Counsel were agreed that I should approach Mr Smith's evidence with the following in mind:

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

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

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

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

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

f. *Wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, may be neither reliable nor even truthful, the difficulty of discerning where the truth actually lies, what findings he can properly make, is often one of almost excruciating difficulty yet it is a task which*

judges are paid to perform to the best of their ability (Arroyo, citing Re A (a child) [2011] EWCA Civ 12 at para 20).”

So, although this judgment relates to assessing oral evidence, and I have not heard any direct oral evidence, I think it’s also important guidance to consider when undertaking an assessment of written evidence, as I need to do in Mrs R and the estate of Mr R’s complaint.

From this, and from my own experience, I find that inconsistencies in evidence are a normal part of someone trying to remember what happened in the past. So, I am not surprised that there are some inconsistencies between what Mr R’s statement says happened and what other evidence shows. The question to consider, therefore is whether there is a core of acceptable evidence from Mr and Mrs R that the inconsistencies have little to no bearing on, or whether any such inconsistencies are fundamental enough to undermine, or contradict, what Mr R said about what the Supplier did to market and sell Fractional Club membership as an investment. Given that, I don’t think that the matters Mr R raised in his testimony about holidays in Malta indicate that the Supplier is unlikely to have described the investment element of the membership in the way he says it did.

The Lender has provided a contact note from the Supplier, dated 3 September 2015. It reads:

“Note: mr did not want to talk to me. but eventually got him to would not give me any information has been told not to tell us. i said we are not accepting the deed if he doesn’t tell us. asked if he had paid them any money would not say, got very angry with me saying [the Supplier] have taken enough money from him. i very sternly said i am not asking for his money, the reason i asked if he had paid a third party is because it is unnecessary. asked his reasons for surrender, he doesn’t have one basically, he um’ed and ahh’ed about it and then said he always gets bothered by sales I said we can fix that with a DNM flag, he said well no it isn’t just that, its also um ahh management fees keep going up. anyway would not tell me who third party was i said well we aren’t accepting the surrender then he said the company has assured him we will and i said well then that is a lie because we won’t. if we don’t know who it is. he said he is just being polite talking to me he doesn’t want to take to me, i said well if he wants to surrender he has to talk to me because there are procedures in place and he needs to deal with us directly. mr said will go away and think about it and i said we do have cut off dates in places so he needs to consider it asap. he said fine and hung up.”

And following this conversation, the Supplier received a handwritten note from Mr and Mrs R that reads:

“*To whom it may concern, Please accept this letter as confirmation that we no longer wish to be members at [the Supplier]. We don’nt expect any money at all ! ! Please surrender our ownership at [the Supplier] point and remove us from your system.”*

The Lender says these documents appear to support its view that Mr and Mrs R *“were looking to exit their membership as they no longer wanted to be members (for a variety of reasons linked to the use of the membership) and this was their motivation to make their complaint and not because it had been sold as an investment to them*”.

I provided the PR with a copy of these documents and asked for its comments. It says that the membership remained active until Mr and Mrs R failed to make their 2017 management fee payment, so the membership was not terminated as a result of any correspondence received prior to that point.

I have thought about these documents. Firstly, I am surprised that the Lender did not send me this contact note when I first requested it prior to issuing the PD. Secondly, I think the language the Supplier has used in its note (which I acknowledge was an internal system note and not intended to be seen by Mr R) suggests that it did not treat Mr R's concerns and his request to terminate his membership very seriously. Thirdly, and most importantly, I have not seen anything in either document that contradicts or undermines Mr R's statement that the timeshare was sold to him and Mrs R as an investment. It is possible that they also experienced other problems as members, and it is understandable that these problems were expressed during the phone conversation, rather than the specific things he and Mrs R say they were told during the Time of Sale, nearly one year earlier.

I have given extra thought to what the Lender says about Mr and Mrs R saying they didn't expect any money when they attempted to surrender their membership in writing. Here, I think the words used by them suggest they knew they would not be due to receive anything upon surrendering the membership – which is consistent with what Mr R said in his statement that:

> *"we were told that there would be a sale date and that on that date the properties would be sold and that we would make a profit on the investment we had made".*

I don't think the fact that Mr and Mrs R attempted to surrender their membership without giving a reason is an indication that they were not sold the timeshare in breach of the prohibition under Regulation 14(3). And I think their choice of words, that they were not expecting any money, simply reflected that they did not expect anything by way of a refund.

So, I am not persuaded that the Lender has provided anything to suggest Mr and Mrs R have not been consistent in their allegation that the Fractional Club membership was sold to them as an investment. It follows that I still think the Lender participated in an unfair credit relationship with Mr and Mrs R under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint.

Fair Compensation

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

Mr and Mrs R were existing Fractional Club members ('FC Membership 1') and their membership was traded in against the purchase price of Fractional Club membership in question ('FC Membership 2'). Under FC Membership 1, they had 2,070 Fractional Points. And, like FC Membership 2, they had to pay annual management charges as part of FC Membership 1. So, had Mr and Mrs R not purchased FC Membership 2, they would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr and Mrs R from the Time of Sale as part of FC Membership 2 should amount only to the difference between those charges and the annual management charges they would have paid as part of FC Membership 1.

I'm conscious that, under FC Membership 1, Mr and Mrs R were entitled to a share in an allocated property. In its response to my PD, the PR said Mrs R and the estate of Mr R did not wish to have the FC Membership 1 reinstated.

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

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

(2) In addition to (1), the Lender should also refund the difference between the annual management charges paid after the Time of Sale under FC Membership 2 and what Mr and Mrs R's annual management charges would have been under FC Membership 1 had they not purchased FC Membership 2.

(3) The Lender can deduct:

   i. The value of any promotional giveaways that Mr and Mrs R used or took advantage of; and
   ii. The market value of the holidays* Mr and Mrs R took using FC Membership 2 if their annual management charge for the year in which the holidays were taken was more than the annual management charge that they would have paid as ongoing FC Membership 1 members. However, the deduction should be a proportion equal to the difference between those annual management charges. And if any of Mr and Mrs R's FC Membership 1 annual management charges would have been higher than their equivalent FC Membership 2 annual management charge, there shouldn't be a deduction for the market value of any holidays taken using Fractional Points in the years in question as they could have taken those holidays as ongoing FC Membership 1 members in return for the relevant annual management charge.

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

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

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

(6) If the Fractional Club membership is still in place at the time of this decision, as long as Mrs R agrees to hold the benefit of the interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify them

against all ongoing liabilities as a result of the Fractional Club membership.

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

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

My final decision

For the reasons I've explained, I uphold this complaint. I direct Shawbrook Bank Limited to pay fair compensation to Mrs R and the estate of Mr R as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs R and the estate of Mr R to accept or reject my decision before 7 April 2025.

Andrew Anderson
Ombudsman