DRN-5242985

## The complaint

Mr and Mrs U'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.

## What happened

Mr and Mrs U purchased membership of a timeshare (the 'Fractional Membership') from a timeshare provider (the 'Supplier') on 30 December 2013 (the 'Time of Sale').

Prior to that, Mr and Mrs U were existing customers of the Supplier, and, between August 1997 and November 2012, they had purchased 51,500 points in the Supplier's 'European Collection'. These points worked like a currency such that, every year, Mr and Mrs U could use the points to stay at the Supplier's holiday accommodation. That accommodation 'cost' different amounts of points depending on the size of the apartment, its location and the time of year.

At the Time of Sale, they entered into three Purchase Agreements with the Supplier. The first agreement was to buy 22,000 'fractional points', trading in 22,000 of their existing points from their 'non-fractional' European Collection membership towards this. This was at a cost of £16,720, with a conversion price given for their European Collection points of £1 per point. The second agreement was also to buy 22,000 fractional points, trading in another 22,000 of their existing European Collection points towards this. This was also at a cost of £16,720, with a conversion price of £1 per European Collection point. The third agreement was to buy 7,500 fractional points, trading in the remaining 7,500 of their existing European Collection points towards this. This was at a cost of £5,700, with a conversion price of £1 per European Collection point.

So, overall, Mr and Mrs U purchased 51,500 fractional points at a total cost of £39,140 (the 'Purchase Agreements'), trading in their existing 51,500 points from their European Collection membership towards this. This enrolled Mr and Mrs U into Fractional Membership.

Fractional Membership was asset backed – which meant it gave Mr and Mrs U more than just holiday rights. It also included a share in the net sale proceeds of a property named on their Purchase Agreements (the 'Allocated Property') after their membership term ends. The first two purchase agreements named the same Allocated Property. The third purchase agreement named a different Allocated Property.

Mr and Mrs U paid for their Fractional Membership by taking finance of £39,140 from the Lender in both of their names (the 'Credit Agreement').

In August 2017, Mr and Mrs U purchased a further 15,000 European Collection points which they paid for partly by card payment and partly through a loan with another Lender.

Mr and Mrs U – using a professional representative (the 'PR') – wrote to the Lender on 17 September 2018 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. 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.

(1) Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale

Mr and Mrs U say that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. told them that Fractional Membership had a guaranteed end date when that was not true.
2. told them that Fractional Membership was an "investment" when that was not true.

Mr and Mrs U say that they have a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs U.

(2) Section 140A of the CCA: the Lender's participation in an unfair credit relationship

The Letter of Complaint set out several reasons why Mr and Mrs U 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. The terms of the agreement were unfair in themselves as the Lender paid the Supplier commission and this was not disclosed to Mr and Mrs U.
2. Fractional 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').
3. They were pressured into purchasing Fractional Membership by the Supplier.
4. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mr and Mrs U's concerns as a complaint and issued its final response letter on 15 November 2018, rejecting it on every ground.

Mr and Mrs U then referred the complaint to the Financial Ombudsman Service. It 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 Membership as an investment to Mr and Mrs U 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 U 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.

Having considered everything, I issued a provisional decision ('PD'), setting out my thoughts on the complaint. Overall, I agreed with the outcome our Investigator had reached, but I wanted to give both parties the opportunity to consider what I had said, and provide any further evidence and arguments they wished to be considered before I issued my final decision. My PD read as follows:

"***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 Regulations 1999 (the 'UTCCR').*
- *The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations').*
- *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').*

***My provisional findings***

*I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.*

*And having done that, I currently think that this complaint should be upheld because the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Membership to Mr and Mrs U 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 Mr and Mrs U's complaint, it isn't necessary to make formal findings on all of them. This includes the allegation that the Supplier misrepresented the Fractional Membership and the Lender ought to have accepted and paid the claim under Section 75 of the CCA.*

*I say this because, even if that aspect of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs U in the same or a better position than they would be if the redress was limited to misrepresentation.*

*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 the Mr and Mrs U 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 U's Fractional Membership 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 U 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; 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 U and the Lender.*

***<u>The Supplier's breach of Regulation 14(3) of the Timeshare Regulations</u>***

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

*The Lender does not dispute, and I am satisfied, that Mr and Mrs U's Fractional 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 Membership as an investment. This is what the provision said at the Time of Sale:*

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

*But Mr and Mrs U say that the Supplier did exactly that at the Time of Sale – saying the following in a statement drafted in January 2018:*[2]

> *"The representatives advised us that they had a very good offer in what they called the fractional property owners club. The representatives went on to advise that this was an investment in a timeshare property. The representatives went on to advise that we should actually swap our European points into fractional points as in 15 years, they would be doing a complete audit of all the resorts and if we purchased into the fractional owners club, we would be a fractional owner of property that would be sold on a specific day, and we would be entitled to the market price plus 50% in profit in cash. We would then need to sell the property on the date given and we would then be able to either re-invest our cash within [the Supplier] or to exit our timeshare."*

*And, that they were told "we would be making an investment in our future". They also said they purchased based on "believing that we were purchasing a future investment and on the advice of the representatives…".*

*The Letter of Complaint reflects the above comments from Mr and Mrs U.*

*Mr and Mrs U allege, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because they were told by the Supplier that they would get their money back or more during the sale of Fractional 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 U'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 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*

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[2] Here, the statement provided by the PR was not signed by Mr and Mrs U, but it appears to be a record of the evidence they gave to the PR about why they were unhappy with Fractional Club membership. However, Mr and Mrs U signed a complaint form when bringing their complaint to this service, with this statement sent as part of that complaint. So I am satisfied this was their evidence.

*Membership. They just regulated how such products were marketed and sold.*

*To conclude, therefore, that Fractional Membership was marketed or sold to Mr and Mrs U 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 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 Fractional Membership as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs U, 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 Membership was not sold to Mr and Mrs U as an investment.*

*For example, the second page of the Purchase Agreements was titled "Terms and Conditions", the first of which read:*

> *"You should not purchase Your […] Fractional Points as an investment in real estate. The Purchase Price paid by You relates primarily to the provision of memorable holidays for the duration of Your ownership. You are at liberty to dispose of Your […] Fractional Points at any time prior to the Sale Date in accordance with Rule 7 of the Rules of the Owners Club."*

*Further, there was a document titled "Key Information", an extract of which read:*

> *"**Exact nature and content of the right(s):***
>
> *Between six to nine months before the Proposed Sale Date, [the Trustee] will appoint two independent valuers to value the Property and will then take steps to sell the Property at the best achievable market price. You must bear in mind that your […] Fractional Points (and the purchase price paid by you for those points) relates primarily to the acquisition by you of many years of wonderful holidays. We are sure that you will get a great deal of pleasure from your holidays. Your decision to purchase […] Fractional Points should not be viewed by you as a financial investment."*

*Finally, there was another document titled "Customer Compliance Statement/Declaration to Treating Customers Fairly", which included the following:*

> *"5. We understand that the purchase of our […] Fractional Points is an investment in our future holidays, and that it should not be regarded as a property or financial investment. We recognize that the sale price achieved on the sale of the Property in the Owners Club (and to which our […] Fractional Points have been attributed) will depend on market conditions at that time, that property prices can go down as well as up and that there is no guarantee as to the eventual sale price of the Property.*
>
> *6. We understand that the Property referenced on our Purchase Agreement will be sold as soon as possible on or after the Proposed Sale Date. However, we realise that it may not be possible to source a buyer immediately, and that in the event that the sale is affected on or after the Proposed Sale Date, we will be required to pay our Dues each year until the Property is sold."*

*Mr and Mrs U had ticked and signed to say they understood both of these points.*

*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 U's allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that membership of the Fractional Owners Club was expressly described as an "investment" in*

*several different contexts and (2) that membership of the Fractional Owners 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 Owners Club as an investment, i.e., told Mr and Mrs U or led them to believe during the marketing and/or sales process that Fractional Membership 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 Membership***

*There is little information available in relation to this particular Supplier in terms of training or sales materials which might give an indication as to how they sold or marketed the membership to Mr and Mrs U. So, I have considered Regulation 14(3) of the Timeshare Regulations, how that provision is to be interpreted and whether, based on the evidence available, I think Mr and Mrs U's sale breached that provision.*

*When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that '[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).' And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.*

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

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

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

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

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

*So, I'm not persuaded that the prohibition in Regulation 14(3) was confined to, for example, using the word 'investment' when promoting or selling a timeshare contract. I think that the prohibition may capture the promotion of investment features incorporated into a timeshare to persuade consumers to purchase, including leading a consumer to expect a financial gain from the timeshare. After all, Mrs Justice Collins Rice said in Shawbrook & BPF v FOS, at 76 (when discussing an ombudsman's approach to Regulation 14(3)):*

*"[…] He was entitled in other words to be highly sensitive to the* ***overt and covert*** *messaging – that is, the fine calibration of the encouragement given – by the seller in a case like this. There was nothing wrong with an approach which had the absolute prohibition in Reg.14(3) within the ombudsman's field of vision from the outset as he looked at the evidence for the true nature of the transaction that was done here. Indeed he was required as a matter of law to do so." (emphasis my own)*

*I've also thought about how Fractional Membership would have been presented to Mr and Mrs U. Without specific details about their sale or how the Supplier normally sold its products, I've considered the inherent probability of the allegation when assessing whether I find that thing did or did not happen. 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 (at p.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 (at p.57). And in Gestmin SGPS S.A. v. Credit Suisse (UK) Limited [2013] EWHC 3560, Leggatt J suggested (at para.22) that factual findings should be based on "inferences drawn from the documentary evidence and known or* ***probable*** *facts" (my emphasis). Here, I think it is inherently more probable that a timeshare product with an investment element is sold in a way promoting that element, and therefore risking a breach of Reg.14(3), compared with the sale of a product without the possibility of a monetary return.*[3]

*Mr and Mrs U have said they were told by the Supplier that when the property they were an owner of was sold on a specific day, they would then be entitled to the market price plus 50% profit in cash - I have taken this to mean when the Allocated Properties were sold. The Allocated Property was plainly a major part of the product's features and, in this instance, in my view, was a justification for its cost to Mr and Mrs U. It is not a breach of Regulation 14(3) to merely describe the nature of the product and how it worked. But in the circumstances of this complaint, it wouldn't have made much sense if the Supplier included this feature in the product without relying on it to promote the sale, given Mr and Mrs U paid a large sum for no*

[3] This is different to saying that it is more likely than not that a product with an investment element is sold as an investment, simply due to that investment element. For the avoidance of doubt, I make no such finding.

*additional holiday rights and the sale was simply a like-for-like swap, but for the interest in the Allocated Properties and the shorter membership term.*

*The Lender has said that the Supplier included specific disclaimers to show that it didn't present Fractional Membership as an investment – I have set these out above. But, it's ultimately difficult to explain why it was necessary to include such disclaimers if there wasn't a very real risk of the Supplier marketing and selling membership as an investment, given the difficulty of articulating the benefit of fractional ownership in a way that distinguishes it from other timeshares from the viewpoint of prospective members, especially when a customer is not acquiring any additional holiday rights. Mr and Mrs U for example had already held previous, non-fractional timeshares over several years. So, I think it's reasonable to assume there was likely some discussion at the Time of Sale as to why they should purchase this type of membership in particular, compared to the other non-fractional ones they had bought previously. In other words, some discussion of why Mr and Mrs U ought to have changed their membership type in the way that they did, but without purchasing any addition holiday rights.*

*So, in my view, there had to be some other benefit which motivated their purchase which was specific to fractional membership. This could only realistically be the investment element in the form of the Allocated Property and/or the shorter duration the membership offered. I do acknowledge that fractional membership offered a shorter term. But, based on what I've seen, I don't think that was a significant reason for their purchase, which I'll go on to explain further below.*

*The testimony from Mr and Mrs U and the Letter of Complaint is specific in that not only does it say that Mr and Mrs U were told that by purchasing, they would make a profit, but they were given specific figures in relation to this as to how much exactly they could expect to receive. Taking all of this evidence together, I find they've been consistent from the start of this complaint that Fractional Membership was sold to them as an investment.*

*Further, I find it fanciful that the Supplier would not have highlighted the possible returns available to Mr and Mrs U when selling Fractional Membership to them. And as Mr and Mrs U were laying out a considerable sum to join, I think it's clear that they expected to get a significant sum back – after all they weren't buying any additional points and therefore not getting any extra holiday entitlement, so it seems common sense that, unless there was evidence to suggest they bought Fractional Club membership for the shorter membership term, the return was an important factor in the sale. Further, Mr and Mrs U have said from the outset of their complaint that they were led to believe they would make a profit at the end of the agreement. I think that belief fits with what they did at the Time of Sale – make a significant purchase for the same holiday rights plus an interest in the sale proceeds of the Allocated Property. In my view, therefore, it is more likely than not that the Supplier's salesperson positioned Fractional Membership as an investment that may lead to a financial gain (i.e., a profit) in the future, whether explicitly or implicitly – I fail to see for what other reason they would have bought the same number of points and there is no evidence Mr and Mrs U would have paid out over £39,000 and expected to get back less than they paid.*

*So, overall, when I consider Mr and Mrs U's evidence as a whole, and in combination with the circumstances of what happened which in my view, adds credence to the allegation made, I don't find Mr and Mrs U either implausible or hard to believe when they say they were told that by buying fractional points, they would be an 'owner of property' and they would receive 'the market price plus 50% profit in cash'. On the contrary, given what I've seen so far, I think that's likely to be what Mr and Mrs U were led by the Supplier to believe at the relevant time. And for these reasons, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.*

***Was the credit relationship between the Lender and the Consumers rendered unfair?***

*Having found that the Supplier was likely to have breached Regulation 14(3) at the Time of Sale, I now need to consider whether that breach was causative of an unfair credit relationship between Mr and Mrs U 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 U 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 U, 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.*

*On my reading of Mr and Mrs U's evidence, the prospect of a financial gain from Fractional Membership was an important and motivating factor when they decided to go ahead with their purchase.*

*The Lender has highlighted that Mr and Mrs U used the membership and I accept that they were likely interested in holidays. The evidence demonstrates that they quite clearly were, and that is not surprising given the nature of the product at the centre of this complaint. Mr and Mrs U's purchasing history shows that they had increased their points several times in previous years with their non-fractional membership and they went on to buy more points after the Time of Sale. But buying more holiday rights cannot have been a main reason they made the purchase as they didn't get any more rights. Further, I'm unsure why they would not simply have increased their non-fractional points again in the same way as before If they wished to increase their holiday rights. This suggests there had to be some other reason they purchased the fractional membership, as well as the prospect of holidays.*

*The Lender has said that in addition to holidays, they think Mr and Mrs U wanted to purchase the fractional membership due to the length of its term being shorter. They've said Mr and Mrs U were aged 60 at the Time of Sale and therefore couldn't have relinquished their existing membership until the age of 75.*

*I note that there is nothing in Mr and Mrs U's witness statement which suggests they were interested in the shorter membership term, but I recognise that Fractional Membership offered Mr and Mrs U a shorter membership term than the European Collection. However, I'm not persuaded that it was that aspect of Fractional Membership that motivated their move to it rather than their share in the Allocated Property. I'll explain.*

*The Lender has correctly said that Mr and Mrs U were 15 years or so from turning 75 and that they were likely therefore to have been able to surrender their existing European Collection membership under the Supplier's policy on exceptional circumstances[4]. But the important point to note here that is that they would have been able to do so without paying anything for it.*

*Since Mrs U's 75th birthday is in June 2028 and the proposed sale date of the Allocated Properties on their Purchase Agreements is December 2028, it's not accurate to say the Fractional Membership offered them a shorter term than if they relinquished at age 75.*

*But even if that was true, Mr and Mrs U could have simply continued to holiday as European Collection members and then relinquished at age 75 without having to pay over £39,000 to do so. I fail to understand why they would pay so much for a slightly longer or the same membership term when they could have a slightly shorter or the same membership term for free. Further, if having a shorter membership term was important to them, I fail to see why four years later they took out a further membership with the same term as their first one, i.e., one that lasted more than 15 years, but one they could have given up on the same terms when Mrs U turned 75.*

*The Lender has also highlighted in their response to the Investigator's view that while they haven't mentioned it in their testimony, Mr and Mrs U also used the Supplier's Fractional Wish to Rent Programme as part of their membership. They've said the Supplier has confirmed Mr and Mrs U used this on 15 separate occasions, with £199 paid to them on each of these occasions, suggesting they think this is a reason why Mr and Mrs U bought it.*

*I also acknowledge that Mr and Mrs U haven't mentioned this as part of their testimony. But, their use of the Fractional Wish to Rent Programme ultimately provided them with an income and it was part of the membership's investment elements. So again, if they bought their membership for that reason, I'd expect it to be on the basis that they got back more than they paid for it or that a combination of the rental income plus the proceeds of sale from the Allocated Property was more than cost of membership.*

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[4] Set out in the EC Relinquishment Fact Sheet.

*As Mr and Mrs U say (plausibly in my view) that Fractional 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. After all, as I've said before, the reality was that, as Mr and Mrs U already had the holiday rights to which they were entitled under the Purchase Agreements, the principal benefits to them of moving to Fractional Membership were its investment elements i.e., the share in the net sale proceeds of the Allocated Property and the potential financial returns from the Fractional Wish to Rent Programme. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.*

*Mr and Mrs U have not said or suggested, for example, that they would have pressed ahead with the purchase in question had the Supplier not led them to believe that Fractional 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 Fractional Membership, I have not seen enough to persuade me that they would have pressed ahead with their purchase regardless.*

## *Conclusion*

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

## *Fair Compensation*

*Having found that Mr and Mrs U would not have agreed to purchase Fractional Membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable to put them back in the position they would have been in had they not purchased the Fractional Membership (i.e., not entered into the Purchase Agreements), and therefore not entered into the Credit Agreement, provided Mr and Mrs U 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 U were existing European Collection members, and their membership was traded in against the purchase price of Fractional Club membership. Under their European Collection membership, they had 51,500 of European Collection points. And, like Fractional Club membership, they had to pay annual management charges as European Collection members. So, had Mr and Mrs U not purchased Fractional Club membership, they would have always been responsible for paying annual management charges of some sort. And with that being the case, any refund of the annual management charges paid by them from the Time of Sale as part of their Fractional Club membership should amount only to the difference between those charges and the annual management charges they would have paid as ongoing European Collection members.*

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

*(1) The Lender should refund Mr and Mrs U'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 Mr and Mrs U's Fractional Club annual management charges after the Time of Sale and their European Collection annual management charges*

*(3) The Lender can deduct:*

i. *The value of any promotional giveaways that Mr and Mrs U used or took advantage of; and*
ii. *the market value of the holidays* Mr and Mrs U took using their Fractional Points if their annual management charge for the year in which the holiday(s) were taken was more than the annual management charge they would have paid as ongoing European Collection members. However, the deduction should be a proportion equal to the difference between those annual management charges. And if any of Mr and Mrs U's European Collection annual management charges would have been higher than their equivalent Fractional Club annual management charge, there shouldn't be a deduction for the market value of any holiday(s) taken using Fractional Points in the year(s) in question as they could have taken those holiday(s) as ongoing European Collection 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 Mr and Mrs U's credit files in connection with the Credit Agreement reported withing six years of this decision.*

*(6) If Mr and Mrs U's Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their 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 their 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 U took using their Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.*

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

**Responses to my provisional decision**

The PR, on behalf of Mr and Mrs U, agreed with my PD.

The Lender disagreed. It argued that my PD was based on an error in my approach to the prohibition in Regulation 14(3) and my analysis of the evidence referred to in my PD. In particular, they said:

- 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 (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*".
- It was an error for me to conclude that it was appropriate to make inferences on the balance of probabilities about how such a sale would have been conducted, in the absence of contemporaneous evidence about this.
- The documentation provided to Mr and Mrs U by the Supplier made clear that fractional points did not constitute an investment in real estate.
- The documentation in relation to the sale is unobjectionable and shows there was no breach of Regulation 14(3).
- There is no evidence that the sale involved marketing or selling the fractional points as an investment to Mr and Mrs U. The Supplier delivered extensive training to its staff to ensure that their fractional points clubs are not marketed or sold as investments to customers, none of which include language from which an investment promotion could be inferred.
- I should give weight to the judgement reached in *Gallagher v Diamond Resorts (Europe) Limited* (21 September 2021, unreported), which involved a similar sale, where it was held that the sales representative had been trained as described by the witnesses in that case. And, that that training would have included a prohibition on selling membership as an investment in property.
- I didn't adequately consider the veracity of Mr and Mrs U's testimony and therefore gave it undue weight.
- There is no evidence to support the conclusion that fractional points were sold to Mr and Mrs U as an investment other than their testimony. Their statement is not signed or dated and was not submitted to the Lender when the original complaint was made.
- The testimony contains several inconsistencies, specifically:

(i) The claim that Mr and Mrs U's first purchase of 40 points in Grand Vacation Club was on 1 October 1997. The Supplier has said it was in fact on 12 August 1997;

(ii) The claim that they purchased products in 1992, 2002 and 2012 but omit to mention they also purchased points in the Supplier's US collection in 2008 and 2010;

(iii) The allegation that prior to the fractional sale: "*once again, we were approached by the representatives to have a quick chat about our timeshare product…once again, this quick welcome meeting turned into a very long meeting that lasted most of the day*". Mr and Mrs U had been members of the Supplier for over 15 years at this point and had attended many such meetings during this time. It is not unreasonable to posit that they would be aware of what such meeting would entail. The Supplier has said that the assertion that this meeting lasted 'most of the day' is not substantiated by its records that indicate it started at 10am and ended at 12:36pm.

(iv) The comment that at the sales event in 2013, Mr and Mrs U "*purchased 27,950 points for the total cost of £33,520*". The Supplier has confirmed that they entered into purchase agreements for 51,500 fractional points at a total price following trade-in of £39,140.

(v) The allegation that at a subsequent sales event in 2017, they were advised that "*any outstanding European points that we had should be traded in for fractional points…[and] that with fractional points we would make a return on our investment*". Prior to this purchase, Mr and Mrs U only held fractional points, and following the presentation decided to purchase new points in the Supplier's European Collection. The European Collection, a non-fractional product, did not hold the inherent feature of a fractional product, that the customer will receive a return upon the sale of the Allocated Property.

(vi) There is no evidence to support the allegation that any salesperson would suggest a customer would receive 'the market price plus 50% profit in cash'. Any reasonable person on hearing this would conclude this would be preposterous, and would reasonably seek to clarify this comment before making what the Ombudsman concludes was a significant purchase. Whilst we cannot know for sure what was said, it is extremely implausible that this was said, and calls into question the credibility of the testimony.

(vii) The testimony omits to mention Mr and Mrs U's use of the Supplier's Wish to Rent scheme and the Wish to Rent scheme has never been represented as an 'investment element'. It's irrational to conclude that if a customer were to purchase a fractional timeshare because of the Wish to Rent scheme, they could only have done so on the basis that they got back more than they paid for it. Again, there is no evidence to suggest any customer, including Mr and Mrs U, used the Wish to Rent scheme with the intention to make a 'profit'. The feature was something not available under their non-fractional product and upgrading gave them the option to use this feature – the assertion that the only reason customers would want this feature was if it made them a profit 'more than the cost of membership' is not correct.

(viii) It's evident that the client's statement has been made by Mr and Mrs U's representative given the comment that "*We therefore purchased 40 Grand Vacation Club points (client to send paperwork to the office)*".

- I erred in not applying the test I had highlighted in the judgment of *Carney*, rather I said '*I have not seen enough 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 afresh, I still uphold Mr and Mrs U's complaint for broadly the same reasons I gave in my PD as set out above. I will also address the matters the Lender raised in response.

Again, my role as an Ombudsman is not to address every single point that has been made in response. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I've read the Lender's further submissions in full, I will confine my findings to what I find are the key points.

In my PD, I noted that to breach Regulation 14(3), the Supplier had to market or sell Fractional Membership as an investment, and I used the following definition of 'investment'

when considering whether I thought that provision had been 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 in which they were sold. But this, in my view, takes too narrow a view of my PD and overlooks the part of my PD that reads:

> "*Mr and Mrs U'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 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 Membership. They just regulated how such products were marketed and sold.*"

However, for the avoidance of doubt, I continue to recognise that it was possible to market and sell Fractional Membership without breaching the relevant prohibition in Regulation 14(3). For example, simply telling a prospective customer very factually that Fractional Membership included a share in an allocated property and that they could expect to receive some money back on the sale of that property, but less than what they put in, would not breach Regulation 14(3).

But, with that said, there seem 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 Membership more generally that at least implied to a prospective member that membership offered them the prospect of a financial gain, that would, in my view, breach Regulation 14(3).[5]

I will therefore first comment on the Supplier's sales and marketing materials and practices more generally, before turning to the evidence Mr and Mrs U have provided in this particular case.

The Supplier's sales and marketing materials and practices

The Lender has again highlighted in their response to my PD the various disclaimers in the sales paperwork which state that the product should not be seen as an investment. And they've said that Mr and Mrs U confirmed (by signing some of the documentation) that they understood this at the Time of Sale.

I acknowledged in my PD, and I again acknowledge here, that the Supplier did try in the sales documentation to avoid describing Fractional Membership as an 'investment' or giving any indication of the likely financial return. And as the Lender has pointed out, Mr and Mrs U signed the relevant documentation confirming they had read and understood these various disclaimers (set out in my PD).

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[5] See paragraphs 73 and 76 of the judgment in *Shawbrook & BPF v FOS*

However, as I said before, deciding what happened in practice is often not as simple as looking at the contemporaneous paperwork. Especially when such paperwork was produced and signed *after* a potential customer, such as Mr and Mrs U, had already been through a lengthy sales presentation.

Overall, the Lender says they consider that there is inadequate evidence that the Supplier did in fact market the Fractional Membership as an investment.

In my PD, I explained that there was little information in relation to this particular Supplier which might give an indication as to how they sold or marketed the membership to Mr and Mrs U. For example, in relation to some other Suppliers, our Service has been provided with specific sales materials which were used when selling fractional timeshare products to customers. But here, I didn't have specific details as to how the Supplier normally sold its products or specific details about Mr and Mrs U's particular sale.

In response, the Lender has provided some additional evidence in relation to the Supplier's sales processes which I've considered. These include a general statement by the Supplier in respect of the provisional decision, copies of versions of the Supplier's Sales Policy documents, and different witness statements from members of the Supplier's staff with varying roles. While this does provide some information about the Supplier's internal policies and how those particular individuals say staff were trained, it doesn't give me any specific information about Mr and Mrs U's particular sale or assist me in understanding how the product might have been sold or marketed to them at this particular Time of Sale. And while the Supplier's centralised training documents and policies may have emphasised compliance with Regulation 14(3), it's important to consider what happened in each individual case. Further, I note that the Supplier had multiple sites in different countries through which it conducted sales of the Fractional Membership. It's therefore possible that different materials were used in different ways at different sites by different sales teams.

Ultimately though, I don't think the outcome of this complaint turns on this. This is because I think Mr and Mrs U's own testimony is sufficient evidence that, at least on the specific occasion the Supplier sold them Fractional Membership, it went beyond simply describing how the sale of the Allocated Property worked, and strayed into discussion of the financial return Mr and Mrs U would receive, leaving them with the impression they would make a profit. As I noted in my PD, Mr and Mrs U said they were told that by buying fractional points, they would be an '*owner of property'* and they would receive *'the market price plus 50% profit in cash'.* In my PD, I also highlighted how the nature of the purchase, namely that Mr and Mrs U didn't obtain any additional holiday rights, contributed to my findings about how the Supplier had likely marketed the product to Mr and Mrs U, and also their motivations for going ahead with it (which I've addressed further below).

So, I remain of the view, on balance, that the Supplier was therefore in breach of Regulation 14(3) of the Timeshare Regulations when it sold the Fractional Membership to Mr and Mrs U.

I appreciate the Lender has some concerns about Mr and Mrs U's testimony and I've addressed these further below.

Mr and Mrs U's evidence

The Lender has said that Mr and Mrs U's evidence contained material inconsistencies which mean I ought not to place significant weight on it.

Mr and Mrs U provided a witness statement setting out their memories of what happened. I don't agree with the Lender when it says that as the statement appears to have been

prepared by a third party, its contents should either be disregarded or treated with more caution than a statement would normally be. I say that because it is not unusual for statements to be taken down by others, and Mr and Mrs U have been consistent with their recollections throughout. So, while I acknowledge that the PR was involved in Mr and Mrs U making their complaint and recorded what Mr and Mrs U had said about what happened, as I explained in my PD, I'm satisfied from what's been provided that this was drafted in January 2018, sets out Mr and Mrs U's actual memories and is specific to their particular sale.

I'm mindful here of the judgment in the case of *Smith v Secretary of State for Transport* [2020] EWHC 1954 (QB). At paragraph 40 of the judgment, Mrs Justice Thornton helpfully summarised the case law on how a court should approach the assessment of oral evidence. Although in this case I have not heard direct oral evidence, I think this does set out a useful way to look at the evidence Mr and Mrs U have provided. That paragraph reads as follows:

> "*At the start of the hearing, I raised with Counsel the issue of how the Court should assess his oral evidence in light of his communication difficulties. Overnight, Counsel agreed a helpful note setting out relevant case law, in particular the commercial case of Gestmin SPGS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) (Leggatt J as he then was at paragraphs 16-22) placed in context by the Court of Appeal in Kogan v Martin [2019] EWCA Civ 1645 (per Floyd LJ at paragraphs 88-89). In the context of language difficulties, Counsel pointed me to the observations of Stuart-Smith J in Arroyo v Equion Energia Ltd (formerly BP Exploration Co (Colombia) Ltd) [2016] EWHC 1699 (TCC) (paragraphs 250-251). Counsel were agreed that I should approach Mr Smith's evidence with the following in mind:*
>
> a. *In assessing oral evidence based on recollection of events which occurred many years ago, the Court must be alive to the unreliability of human memory. Research has shown that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts (Gestin and Kogan).*
>
> b. *A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence (Kogan).*
>
> c. *The task of the Court is always to go on looking for a kernel of truth even if a witness is in some respects unreliable (Arroyo).*
>
> d. *Exaggeration or even fabrication of parts of a witness' testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony (Arroyo).*

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

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

From this, and 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'm not surprised that there are some inconsistencies between what Mr and Mrs U said happened and what other evidence shows. The question to consider, therefore, is whether there is a core of acceptable evidence from them that the inconsistencies have little to no bearing on, or whether such inconsistencies are fundamental enough to undermine, if not contradict, what they say about what the Supplier said and did to market and sell Fractional Membership as an investment.

So, for example, I do not find it in any way material that Mr and Mrs U said their first purchase with the Supplier was on 1 October 1997, whereas in fact it was on 12 August 1997. Or, that they didn't mention some other purchases they had made with the Supplier in earlier years, of a different membership type. In my view, remembering the exact day and month of an earlier sale in a given year which is not the subject of this complaint, over twenty years before they complained about the sale of a timeshare at an entirely different time is not material to Mr and Mrs U's memories of what happened at the Time of Sale some sixteen years later. Similarly, I don't think it's material that they didn't mention some purchases they had made of an entirely different type of membership at an entirely different time than the one complained about here.

Likewise, I don't think it's material that Mr and Mrs U have said the meeting lasted most of the day when the Supplier's records indicate it only lasted a few hours, or that they slightly mis-stated the exact number of points they bought at the time and at what cost. I think this likely only represents that the presentation felt lengthy to Mr and Mrs U (regardless of the exact amount of time it took) and a slight confusion over the fact that the purchase was split over multiple purchase agreements. Even if there is inconsistency here, that does not mean their evidence on how that membership came to be sold to them should be discounted.

The Supplier also said Mr and Mrs U had made another, separate complaint about a subsequent purchase they had made of another type of timeshare membership (the Supplier's 'European Collection'). They said there were errors in the testimony Mr and Mrs U had provided in relation to that other complaint and inconsistencies between that and the testimony they provided in this case, which calls into question the credibility of what they have said here. They also highlighted that the Investigator in that case didn't uphold the complaint after which the PR withdrew it. But, while I considered this, I don't see that separate complaint about another purchase of an entirely different type of membership at a different time is of particular relevance to this one I'm deciding here.

I have again considered what Mr and Mrs U have said in their evidence. In their witness statement, they said

> *"The representatives advised us that they had a very good offer in what they called the fractional property owners club. The representatives went on to advise that this was an investment in a timeshare property. The representatives went on to advise that we should actually swap our European points into fractional points as in 15 years, they would be doing a complete audit of all the resorts and if we purchased into the fractional owners club, we would be a fractional owner of property that would be sold on a specific day, and we would be entitled to the market price plus 50% in profit in cash. We would then need to sell the property on the date given and we would then be able to either re-invest our cash within [the Supplier] or to exit our timeshare."*

And, that they were told *"we would be making an investment in our future".* They also said they purchased based on *"believing that we were purchasing a future investment and on the advice of the representatives…".*

Mr and Mrs U have set out in their evidence what they say happened at the Time of Sale and I have no reason to disbelieve them. It's clear to me that Mr and Mrs U are saying that the Supplier sold them Fractional Membership as an investment and have described being told that they could make a profit.

This fits with the fact that they did not purchase any additional points, so did not increase their holiday rights, which as I outlined in my PD, points to there being a different motivation behind their purchase which could only realistically be the investment element or the shorter membership term (which I discounted for the reasons explained in my PD).

So, while I acknowledge the Lender's concerns that Mr and Mrs U's recollections may be questionable in some respects (such as the 50% figure they've mentioned), they do say they were told by the Supplier that membership was an investment in property. And, Mr and Mrs U specifically used the word 'profit' when describing how it was sold to them. And, in my view, the use of this word in combination with the circumstances of the sale and the other available evidence, means they expected to make a financial gain rather than simply get some money back at the end of their membership, as a result of how the Supplier sold membership to them. On balance therefore, I find there is a consistent and believable recollection that Fractional Membership was sold as an investment and, when considered alongside the other evidence, I find the Supplier did breach Regulation 14(3) at the Time of Sale.

The Lender has suggested that Mr and Mrs U bought the membership in order to use the 'Wish to Rent' scheme, as this wasn't something available with their previous membership and their purchase at the Time of Sale gave them the option to use this feature. But, by the Lender's own admission, there is no mention of this in their testimony.

The Supplier has also suggested that Mr and Mrs U bought the membership for the shorter membership term. But, I don't accept the point being made here and I don't think either the Lender or Supplier have taken sufficient account of the following paragraphs of my PD where I said:

> "*On my reading of Mr and Mrs U's evidence, the prospect of a financial gain from Fractional Membership was an important and motivating factor when they decided to go ahead with their purchase.*

*The Lender has highlighted that Mr and Mrs U used the membership and I accept that they were likely interested in holidays. The evidence demonstrates that they quite clearly were, and that is not surprising given the nature of the product at the centre of this complaint. Mr and Mrs U's purchasing history shows that they had increased their points several times in previous years with their non-fractional membership and they went on to buy more points after the Time of Sale. But buying more holiday rights cannot have been a main reason they made the purchase as they didn't get any more rights. Further, I'm unsure why they would not simply have increased their non-fractional points again in the same way as before If they wished to increase their holiday rights. This suggests there had to be some other reason they purchased the fractional membership, as well as the prospect of holidays.*

*The Lender has said that in addition to holidays, they think Mr and Mrs U wanted to purchase the fractional membership due to the length of its term being shorter. They've said Mr and Mrs U were aged 60 at the Time of Sale and therefore couldn't have relinquished their existing membership until the age of 75.*

*I note that there is nothing in Mr and Mrs U's witness statement which suggests they were interested in the shorter membership term, but I recognise that Fractional Membership offered Mr and Mrs U a shorter membership term than the European Collection. However, I'm not persuaded that it was that aspect of Fractional Membership that motivated their move to it rather than their share in the Allocated Property. I'll explain.*

*The Lender has correctly said that Mr and Mrs U were 15 years or so from turning 75 and that they were likely therefore to have been able to surrender their existing European Collection membership under the Supplier's policy on exceptional circumstances[6]. But the important point to note here that is that they would have been able to do so without paying anything for it.*

*Since Mrs U's 75th birthday is in June 2028 and the proposed sale date of the Allocated Properties on their Purchase Agreements is December 2028, it's not accurate to say the Fractional Membership offered them a shorter term than if they relinquished at age 75.*

*But even if that was true, Mr and Mrs U could have simply continued to holiday as European Collection members and then relinquished at age 75 without having to pay over £39,000 to do so. I fail to understand why they would pay so much for a slightly longer or the same membership term when they could have a slightly shorter or the same membership term for free. Further, if having a shorter membership term was important to them, I fail to see why four years later they took out a further membership with the same term as their first one, i.e., one that lasted more than 15 years, but one they could have given up on the same terms when Mrs U turned 75.*

*The Lender has also highlighted in their response to the Investigator's view that while they haven't mentioned it in their testimony, Mr and Mrs U also used the Supplier's Fractional Wish to Rent Programme as part of their membership. They've said the Supplier has confirmed Mr and Mrs U used this on 15 separate occasions, with £199 paid to them on each of these occasions, suggesting they think this is a reason why Mr and Mrs U bought it.*

*I also acknowledge that Mr and Mrs U haven't mentioned this as part of their testimony. But, their use of the Fractional Wish to Rent Programme ultimately provided them with an income and it was part of the membership's investment elements. So again, if they bought their membership for that reason, I'd expect it to*

[6] Set out in the EC Relinquishment Fact Sheet.

*be on the basis that they got back more than they paid for it or that a combination of the rental income plus the proceeds of sale from the Allocated Property was more than cost of membership.*

*As Mr and Mrs U say (plausibly in my view) that Fractional 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. After all, as I've said before, the reality was that, as Mr and Mrs U already had the holiday rights to which they were entitled under the Purchase Agreements, the principal benefits to them of moving to Fractional Membership were its investment elements i.e., the share in the net sale proceeds of the Allocated Property and the potential financial returns from the Fractional Wish to Rent Programme. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.*"

I also note that earlier in their submissions the Supplier takes issue with the Letter of Complaint, questioning its credibility. But when addressing this point, the Supplier then seeks to rely on comments from the Letter of Complaint in support of its view that the credit relationship was fair, which to me, is somewhat contradictory.

In conclusion, it remains my view that the evidence suggests that Fractional Membership being marketed to Mr and Mrs U as an investment was a material part of their purchasing decision.

Lastly, I disagree with the Lender's suggestion that I have applied the wrong test or reversed the burden of proof when determining if the credit relationship was unfair. The Lender has observed that the correct way to proceed is to assess if there was sufficient evidence that the Supplier's breach had a material impact on Mr and Mrs U's purchasing decision. But that is what I did in my PD and have done again here (as outlined above).

Other matters

As outlined above, I have read and considered the judgments on *Gallagher v Diamond Resorts (Europe) Limited* and *Brown v Shawbrook Bank Limited* (18 June 2021, unreported) and the associated documents provided. However, those cases were each decided by the judge on their own facts and circumstances, and it does not change my own findings that, on balance, Mr and Mrs U's sale did breach Regulation 14(3).

I've also read and considered the other complaint with this Service (relating to a different consumer) that the Lender has highlighted. But again, each case is decided on its own facts and circumstances so this also does not change my own findings here.

Conclusion

Ultimately, while I thank the Lender (and Supplier) for its response to my PD, I have seen no good reason to depart from the findings and conclusions I reached in it. I therefore remain satisfied that the Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs U under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A. And with that being the case, taking everything into account, it is fair and reasonable that I uphold this complaint.

**Fair Compensation**

Having found that Mr and Mrs U would not have agreed to purchase Fractional 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 still think it would be fair and reasonable to put them back in the position they would have been in had they not purchased the Fractional Membership (i.e., not entered into the Purchase Agreements), and therefore not entered into the Credit Agreement, provided Mr and Mrs U agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

As I said in my PD, Mr and Mrs U were existing European Collection members, and their membership was traded in against the purchase price of Fractional Club membership. Under their European Collection membership, they had 51,500 European Collection points. And, like Fractional Club membership, they had to pay annual management charges as European Collection members. So, had Mr and Mrs U not purchased Fractional Club membership, they would have always been responsible for paying annual management charges of some sort. And with that being the case, any refund of the annual management charges paid by them from the Time of Sale as part of their Fractional Club membership should amount only to the difference between those charges and the annual management charges they would have paid as ongoing European Collection members.

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

(1) The Lender should refund Mr and Mrs U'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 Mr and Mrs U's Fractional Club membership annual management charges paid after the Time of Sale and what their European Collection annual management charges would have been had they not purchased Fractional Club membership

(3) The Lender can deduct:

   i. The value of any promotional giveaways that Mr and Mrs U used or took advantage of; and
   ii. The market value of the holidays* Mr and Mrs U took using their Fractional Points if the Points value of the holiday(s) taken amounted to more than the total number of European Collection Points they would have been entitled to use at the time of the holiday(s) as ongoing European Collection members. However, this deduction should be proportionate and relate only to the additional Fractional Points that were required to take the holiday(s) in question. For example, if Mr and Mrs U took a holiday worth 2,550 Fractional Points and they would have been entitled to use a total of 2,500 European Collection Points at the relevant time, any deduction for the market value of that holiday should relate only to the 50 additional Fractional Points that were required to take it. But if they would have been entitled to use 2,600 European Collection Points, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

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

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

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

(6) If Mr and Mrs U's Fractional Club membership is still in place at the time of this decision, as long as they agree to hold the benefit of their 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 their 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 U took using their Fractional Points, deducting the relevant annual management charges (that correspond to the year(s) in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative in order to reasonably reflect their usage.

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

**My final decision**

I uphold Mr and Mrs U's complaint against Shawbrook Bank Limited and direct it to calculate and pay fair compensation as outlined above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr U and Mrs U to accept or reject my decision before 10 April 2025.

Fiona Mallinson
**Ombudsman**