DRN-5506195

The complaint

Mr and Mrs B'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

In September 2015 Mr and Mrs B purchased a trial membership of a timeshare from a timeshare provider (the 'Supplier') for £3,995. This trial membership entitled them to five weeks of accommodation from the Supplier's portfolio of resorts over the following three years. Mr and Mrs B paid for this membership by taking finance from the Lender. This purchase and finance agreement is included for background purposes only.

Mr and Mrs B traded in their trial membership and purchased full membership of a timeshare (the 'Fractional Club') from the Supplier on 13 April 2016 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,040 fractional points at a final cost of £9,156 (the 'Purchase Agreement'). This was a bi-annual membership which meant Mr and Mrs B could use their points for accommodation every other year.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs B 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 B paid for their Fractional Club membership by taking finance of £12,236 from the Lender in their joint names (the 'Credit Agreement'). This consolidated the outstanding balance of the loan taken to purchase the trial membership.

Mr and Mrs B – using a professional representative (the 'PR') – wrote to the Lender on 6 May 2020 (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.
3. The decision to lend being irresponsible because the Lender did not carry out the right creditworthiness assessment.

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

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

1. Told them that they were purchasing and would own a fraction of a property when that was not true.
2. Told them that Fractional Club membership was an "investment" and highly valuable due

to the properties ever appreciating in price.

3. Told them they could sell the Fractional Club membership whenever they wanted to make a healthy profit.
4. Told them that the Supplier's holiday resorts were exclusive to its members, and that they would have priority booking, when that was not true.

Mr and Mrs B 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 B.

(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 B 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. There were contractual terms contained within the Purchase Agreement which were unfair under the Consumer Rights Act 2015 (the 'CRA').
2. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment, including there being no consideration of Mr and Mrs B's income and expenditure.
3. The Supplier gave Mr and Mrs B no choice of finance companies.

The Lender did not provide Mr and Mrs B with a substantive response to their complaint, so on 21 July 2020 the PR referred it to the Financial Ombudsman Service.

On 28 April 2021 the Lender sent Mr and Mrs B its final response to their complaint, rejecting it on every ground.

Mr and Mrs B did not agree with this outcome, so their complaint was assessed by an Investigator at this Service 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 B 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 B 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 that had been submitted, I agreed with the outcome reached by the Investigator, but I had expanded somewhat on the reasons for doing so. As a result, I issued a provisional decision (the 'PD') to all parties In the PD I set out that I thought the Supplier had sold and/or marketed the Fractional Club to Mr and Mrs B as an investment in breach of Regulation 14(3) of the Timeshare Regulations. And I thought the impact of that breach on their purchasing decision was such that it rendered their associated credit relationship with the Lender unfair to them for the purposes of Section 140A of the CCA. I then went on to say how I thought the Lender should calculate and pay fair compensation to Mr and Mrs B.

Mr and Mrs B had nothing to add in response to my PD. The Lender responded at length, disagreeing with my provisional findings. It said, in summary:

- The PD was premised on a material error of law in its approach to the prohibition under Regulation 14(3) of the Timeshare Regulations. And it erred in its application of that prohibition to the underlying documentation in support of the Fractional Club sale.
- The error(s) above undermined the approach to Mr and Mrs B's witness testimony; and
- The PD was premised on a material error of law in its approach to the legal test to determine the existence of an unfair relationship.
- The conclusions reached in the PD were based on witness testimony that contained factual inaccuracies and it thought the Ombudsman hadn't taken all of these into consideration.

The Lender then went on to set out how it thought the PD erred in its approaches above. While I don't intend to repeat its submissions here in detail, I will summarise them:

- There is nothing inherent in the Fractional Club which contravenes Regulation 14(3).
- The wording of the PD is inconsistent with the definition of an "*investment"* as set out in ('*Shawbrook & BPF v FOS*')[1].
- The customer being told that some money would be 'returned' upon sale of the Allocated Property does not breach Regulation 14(3).
- Neither the testimony nor the contemporaneous materials referred to by the Ombudsman reference the word 'investment', so it is irrational in law to say the witness evidence described it as such.
- The Supplier only gave the consumers information about the sale of the Allocated Property, merely describing its features.
- Selling an investment requires the prospect of a financial gain/profit, and the corresponding motive on the part of the consumer. Referring to the prospect of a residual return does not satisfy this test.

The Lender continued by making submissions regarding the Fractional Club documentation and the Supplier's sales processes:

- Mr and Mrs B did not receive or view the sales presentation documents referred to by the Ombudsman.
- The signed disclaimers referenced show there was at no stage any representation as to the future price or value of the fractional share, and the 'advice disclaimer' referenced would lead the consumer to understand that the product was not being sold to them as an investment.
- The training manual referenced made no mention of the presence of the Allocated Property being an investment, nor that the purpose or benefit of the product was the opportunity to make a profit – the material indicated that there would be a "*return"* of money after 19 years.
- The 'prospect of a financial return' does not make something an 'investment' as the latter requires the intention of acquiring more than the initial outlay, and the training

[1] Set out below in the Legal and Regulatory Context section

material emphasised customers' expectation of receiving only a small part of their initial outlay.

- Referring to the Allocated Property as 'ownership of bricks and mortar' is unobjectionable.
- There was no comparison between the expected level of financial return against the initial outlay in purchasing the product, the primary focus of which was to provide holidays.
- Any fair analysis of the training and contractual materials would conclude that the customer was told that they would receive "*some"* of their money back and this may only be a *"small part of your initial outlay."*
- *Prankard v Shawbrook Bank Limited* considered documents and evidence regarding the training programme operated by the Supplier at the time and concluded that the product was not sold as an investment.
- The question the Ombudsman should have considered is whether there is sufficiently clear, compelling evidence that the timeshare product was marketed and sold as an investment (i.e., for intended financial profit or gain as against the initial outlay). The reasonable answer is that the sales documentation provides no reason to consider there was any such marketing or sale.

The Lender then assessed the witness statement from Mrs B, and provided copies of other decisions from other Ombudsmen that it said had correctly assessed the veracity of the witness testimony in those cases. It said, in summary:

- The witness testimony is given limited importance given that the Ombudsman concluded that a breach of Regulation 14(3) can be inferred from the materials relating to the sale. However, the Ombudsman has referenced that he does not find the allegations made in that testimony implausible or hard to believe.
- The witness testimony is only from Mrs B, with nothing from Mr B. Despite acknowledging that he believed the testimony was prepared by the PR, the Ombudsman is still prepared to rely heavily on the testimony, and despite the factual inaccuracies and inconsistencies contained within it.
- The Ombudsman has failed to recognise the extent of the errors and inconsistencies which, when seen in totality, make the testimony unreliable. Such as:
    - The reference to Mr and Mrs B being unable to exercise the cancellation during the cooling-off period was vague and lacks no specific qualification. This is an example of generic arguments made by representatives with no relevance to the specific circumstances.
    - The testimony describing the sales person as both *"very pushy and pressuring"* and a *"friendly person"* is vague and makes very little sense.
    - The benefits (numbered 1-9)[2] from the purchase that Mrs B states were presented by the Supplier, are generic, and give rise to questions as to whether or not they are actually Mrs B's words. The testimony has been manufactured by the PR.
- Sales notes provided by the Supplier from around the time of the sale throw considerable doubt as to the veracity of the testimony. The notes show that Mr and Mrs B were happy with their purchase.

[2] 1-6 see page 10 of this decision

- The sales notes, which contradict the witness testimony, were taken nearer the time of the sale and reflect the actual position.
- The Ombudsman's assessment of the evidence errs in the following respects:
    - It is incorrect to conclude that the main reason Mr and Mrs B purchased the Allocated Property was based on an *"appealing investment opportunity".* The testimony only makes a brief reference to it being sold as an investment. The real reason for the purchase is that they liked *"taking 4-5 star holidays with their family".*
    - Their motivations relating to the holidays were emphasised throughout the testimony.
    - The primary, or sole reason for the purchase of the Fractional Club was they wanted access to a number of exclusive and luxurious holidays.
- The material and factual inconsistencies in the testimony give good reason to doubt its credibility;
    - The dates given by Mrs B for their purchase of the trial membership and Fractional Club were wrong.
    - The trial membership was not paid for by credit card as stated by Mrs B.
    - Mrs B claims they were not happy with their trial membership, but the sales notes show that they were *"happy with all".*
    - The suggestion that they were pressured into signing, and were not allowed to discuss it privately is incorrect, as they didn't sign the loan agreement until 2 days after.
    - They were not *"approached"* by a salesman. They were invited to an obligatory presentation on a day that suited them.
    - There is inconsistency around whether Mrs B said the trial membership was affordable or not.
    - The use of the word *Azure* when incorrectly naming the Supplier indicates the testimony is a template used by the PR.
- Both Mr and Mrs B are professional people, and their personal and professional circumstances suggest that they were experienced individuals who were aware of their financial position and knew that they were not acquiring *"bricks and mortar".*
- In light of the inaccuracies, it is not credible that Mr and Mrs B were assured that they would make *"some money at the end"*, nor is it credible that the sale of the Fractional Club membership was in pursuit of such an investment objective, as opposed to their holiday needs.

And finally, the Lender made submissions regarding the legal test applied in the PD when assessing if the relationship is unfair:

- The test to be applied, as stated in *Carney v NM Rothschild and Sons Ltd,* was whether there was a "material impact on the debtor when deciding whether or not to enter the agreement".
- The Ombudsman has erred in the PD and applied a different test – reversing the burden of proof. It is necessary to assess whether there is sufficient evidence of a material impact on their decision to enter the agreement.
- Mr and Mrs B's circumstances and their motivations for the purchase meant the actual sale process did not have a material impact on their decision to purchase.

Therefore, the credit relationship was fair.

It concluded that there is no clear, compelling evidence that the Fractional Club was sold to Mr and Mrs B with the intention of financial gain, or alternatively, not in a manner that was of importance, as against their purpose of upgrading their points for holiday entitlement.

As the deadline for responses to my PD has now passed, the complaint has come back to me to reconsider. Before I come to my findings, I'll set out what I still consider to be the relevant 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 CRA.
- 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*').

I have also taken into account:

- *Gallagher v Diamond Resorts (Europe) Limited* (9 February 2021, County Court at Preston).
- *Prankard v Shawbrook Bank Limited* (8 October 2021, County Court at Cardiff).

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').

What I've decided – and why

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

And having done that, and having read and considered all of the reasons the Lender gave for why it disagreed with my PD, I am satisfied that this complaint should be upheld. I think that because it is more likely than not that the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr and Mrs B as an investment. And, in the circumstances of this complaint, this breach rendered the credit relationship between them and the Lender unfair to them for the purposes of Section 140A of the CCA.

However, and as both parties are aware, 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 B's complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that the Supplier misrepresented the Fractional Club membership to Mr and Mrs B, and all of the other alleged reasons there was an unfair debtor-creditor relationship, save for the allegation that the membership was sold as an investment. This is because, even if those aspects of the complaint ought to succeed, the redress I'm proposing puts Mr and Mrs B in the same or better position than they would be if the redress was limited to those matters.

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 B 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 B’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."[3]

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 B and the Lender, along with all of the circumstances of the complaint. When coming to my conclusion, and in carrying out my analysis, I have looked at:

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

I have then considered the impact of these on the fairness of the credit relationship between Mr and Mrs B and the Lender. And having done so, and having considered everything that has been submitted in response to my PD, I think the credit relationship was likely to have been rendered unfair to Mr and Mrs B for the purposes of Section 140A.

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 B'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:

[3] 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 B say that the Supplier did exactly that at the Time of Sale – with Mrs B saying the following in a statement signed and dated 4 May 2020 which set out her and Mr B's recollections of the Time of Sale:

> *"At the meeting we were told that we should upgrade our trial membership to full membership within the Fractional Owners Club. Being Fractional Owners would mean that we owned property that was an investment, and in the meantime, until* [the Supplier] *sold the property, we could use it as a holiday home. We believed what* [the Supplier] *was telling us and we were interested in the investment side of it."*

Mrs B then went on to list the benefits she says the Supplier told them they would receive if they became Fractional Club members:

1. *"We would own a "Fraction" of Property at a* [Supplier] *resort. We were told that this was an exclusive opportunity to own a slice of luxury. It was a great investment for* [sic] *them to make as it attracted a large resale value due to the desirability of the Club.*
2. *Owning Fractions meant that* [sic] *they owned property within* [the Supplier's] *portfolio of resorts. This was an investment and a highly valuable asset to have due to the property appreciating in price.*
3. *As Fractional Owners, we were told that they [sic] would be able to sell our Fractional Ownership whenever we wanted to and be able to make a healthy profit from the proceeds.*
4. *The Fractional Ownership Club was distinctly different from a timeshare product. Unlike a timeshare, Fractional Ownership meant that we would own a share in a property. We were not only told that it was an investment, but it was probably one of the best investments that we could invest in.*
5. *In any event, if we did not sell our Fractions during the term of the Ownership, the Fractions would be sold in 15 years' time and the profits from the sale of the Property would be shared amongst its members.*
6. *As well as the investment into Fractions, we would also acquire points that were effectively used as currency to exchange for holidays all over the world. Being a Fractional member, we could also sell the points that* [sic] *they had if we did not wish to use the points for holidays…"*

And this allegation is repeated in the Letter of Complaint to the Lender.

Mr and Mrs B allege, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because:

(1) There were two aspects to their Fractional Club membership: holiday rights and a profit on the sale of the Allocated Property.

(2) They were told by the Supplier that they would get their money back or more during the sale of their Fractional Club membership.

(3) They were told by the Supplier that Fractional Club membership was the type of investment that would only increase in value.

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 B'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, like I said in the PD, 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, and as the Lender correctly pointed out in response to the PD, 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 B 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.

I acknowledge, as I did in the PD, that 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 B, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs B as an investment.

For example, in the Member's Declaration document it states:

> "*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.*"

And in the Information Statement, it states:

> "*Fractional Rights have been designed to be used and enjoyed and not bought with the expectation or necessity of future financial gain.*" And: "*The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for the direct purposes of a trade in nor as an investment in real estate.* [The Supplier] *makes no representation as to the future price or value of the Allocated Property or any Fractional Rights.*"

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

> "*The Vendor, any sales or marketing agent and the Manager and their related businesses (a) are not licensed investment advisers authorised by the Financial Conduct 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 advisers 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 response to my PD, the Lender says these disclaimers show there was at no stage any representation as to the future price or value of the fractional share, and the 'advice disclaimer' that is referenced above would lead the consumer to understand that the product was *not* being sold to them as an investment. I agree that the disclaimer's aim seems to be to ensure purchasers didn't rely on what they were told as investment advice, or a warranty as to the future value of the Allocated Property. So, I agree with the Lender, in that the disclaimer, on its own, cannot be construed as a representation that the Fractional Club is an investment. But I still regard its contents as more relevant to the sale of an investment than a holiday product, because it says those making the timeshare sale obtained information "*from their own experience as investors*" and recommends purchasers seek advice from "*investment advisors*" about their "*investment needs*". But in any event, the disclaimer doesn't seem to have been focussed on by Mr and Mrs B at the Time of Sale, so doesn't advance either side's case anyway.

However, as I said in the PD, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. Here, in response to the PD, the Lender has misquoted what I said. In the PD I said the following:

> *"And there are a number of strands to Mr and Mrs B'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 by the Supplier as an "investment" and (2) they were told that membership of the Fractional Club could make them a financial gain and/or would retain or increase in value."*

Whereas the Lender has quoted me as saying there are a:

> *"number of strands to Mr and Mrs B'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 by the Supplier as an "investment"* ***in several different contexts*** *and (2) they were told that membership of the Fractional Club could make them a financial gain and/or would retain or increase in value." (bold my emphasis).*

The Lender has also said that it does not accept membership of Fractional Club was described to Mr and Mrs B as an investment because the Information Statement signed by Mr and Mrs B states the sale did not involve an *"investment in real estate"* and the contemporaneous materials and Mrs B's testimony do not reference the word *"investment".*

It is unclear why the Lender has misquoted the PD in this way, but to be clear, in the PD I said that Mr and Mrs B made the allegation that membership of the Fractional Club was described by the Supplier as an *"investment".* And I remain of that opinion. Referring back to the testimony submitted in this case (irrespective of whether the Lender thinks it should be relied upon or not) Mrs B has used the term *"investment"* when describing what she says they were told by the Supplier on numerous occasions. So, I cannot see how it was wrong or irrational for me to describe in the PD that the witness evidence included the allegation that the Supplier *"expressly described* [the membership] *as an investment".*

So, for the avoidance of doubt following my PD, 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 B 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, and having considered everything that the Lender has said in response to my PD, 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 Mr and Mrs B.

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

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

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

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

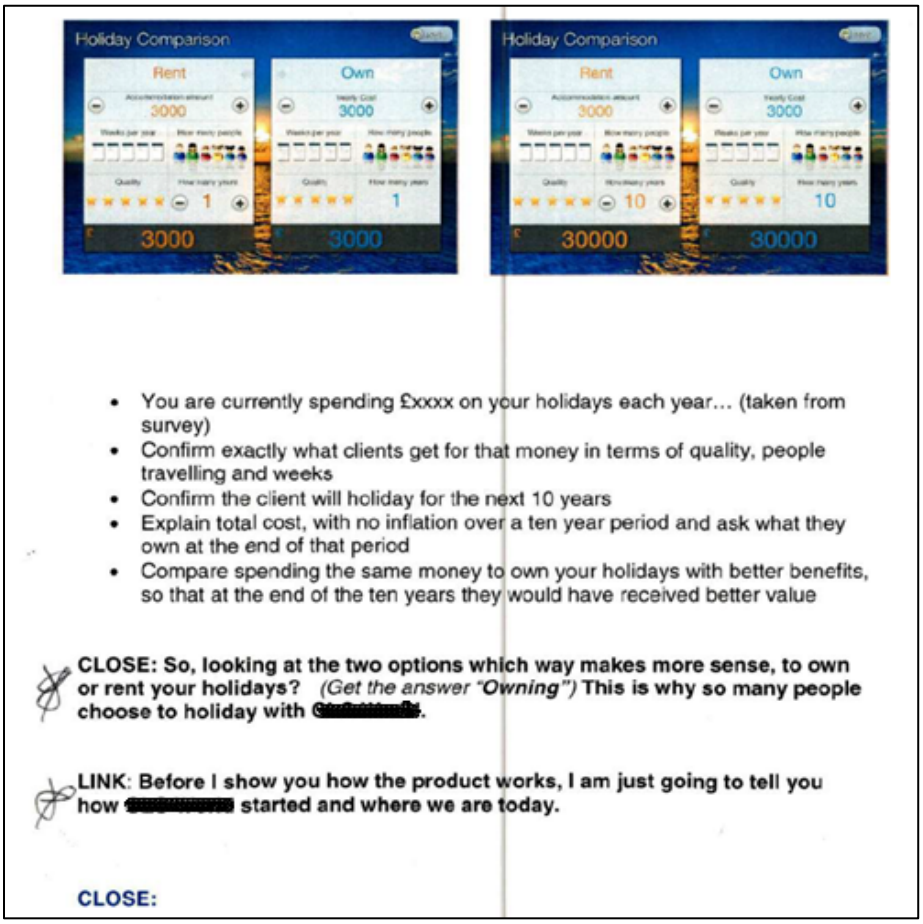
LINK: Now let me show you the relevance this has when it comes to your holidays because what you are currently doing is ...

CLOSE:

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

I acknowledge the point made by the Lender, 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:

And this resonates with what Mrs B said in her statement. She said they had compared what they normally spent on holidays, and what the Fractional Club would cost them. And she said they were initially put off as Fractional Club seemed more expensive than what they would normally pay. It seems there must have been something which made a more expensive option ultimately attractive to them. And I think that was likely to be what would have been presented to them next.

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 holiday and accommodation on offer to members, it went onto "resort management", at which point page 61 said this:

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

[…]

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

(My emphasis added)

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

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

[…]

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

I acknowledged in my PD, and I do again here, 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 B) 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 the type of holidays that the Supplier was presenting to them on the open market was likely to have suggested to them that the financial return was in fact an overall profit.

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.

The Lender argues, that given that a prospective Fractional Club member could expect a financial return at the end of their membership term, it isn't surprising that attempts should be made by the Supplier to ensure that the amount in question is as high as it could be by maintaining the quality and condition of the property. It said that nobody would expect the amount returned at the end of the membership term to be as low as possible, or anything other than as much as possible. But the significant point, in the Lender's view, is that there was no comparison between the expected level of financial return and the initial outlay when purchasing membership.

And I acknowledge that, as I did in the PD. However, if I were to only concern myself with express efforts to quantify to Mr and Mrs B the financial value of the proprietary interest they were offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that *'[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).'*[4] 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.

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

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 S*hawbrook & 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."*

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.

Overall, therefore, as the slides and training material 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 Mr and Mrs B 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 Mrs B says in her testimony that this is what happened. In response to the PD the Lender has given several reasons why Mrs B's testimony is unsafe and should not be relied upon. These include the inconsistencies, errors and that it thinks it was prepared by the PR. I have taken all of that into account, as I did so in the PD.

As I've said, a statement signed by Mrs B, and dated 4 May 2020 has been submitted by the PR as part of its submissions. This date is prior to the Letter of Complaint being sent to the Lender, and the statement was probably prepared as part of the PR's case preparation. Indeed, in parts of the Letter of Complaint it uses very similar wording to the statement, which leads me to think that the statement was used to inform the Letter of Complaint.

But the statement was, in my view, clearly prepared and written by the PR. Indeed, in some places Mrs B refers to herself in the third person. So, I am mindful of the risk that Mrs B may have been guided through the process, and the associated risk that what has been written may not be her own specific recollections. But it does contain personal information about the Time of Sale that only Mr and/or Mrs B would have known, such as their family make-up, so I have no doubt that Mrs B had a significant input into its contents, so I am satisfied that it is a record of Mr and Mrs B's recollections of the Time of Sale.

As I said in the PD, when considering how much weight I can place on Mrs B's statement, I am assisted by the judgement in the case of *Smith v Secretary of State for Transport [2020] EWHC 1954 (QB).*

At paragraph 40 of the judgment, Mrs Justice Thornton helpfully summarised the case law on how a court should approach the assessment of oral evidence. Although in this case I have not heard direct oral evidence, I think this does set out a useful way to look at the evidence Mrs G has provided. Paragraph 40 reads as follows:

> *"At the start of the hearing, I raised with Counsel the issue of how the Court should assess his oral evidence in light of his communication difficulties. Overnight, Counsel agreed a helpful note setting out relevant case law, in particular the commercial case of Gestmin SPGS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) (Leggatt J as he then was at paragraphs 16-22) placed in context by the Court of Appeal in Kogan v Martin [2019] EWCA Civ 1645 (per Floyd LJ at paragraphs 88-89). In the context of language difficulties, Counsel pointed me to the observations of Stuart- Smith J in Arroyo v Equion Energia Ltd (formerly BP Exploration Co (Colombia) Ltd) [2016] EWHC 1699 (TCC) (paragraphs 250-251). Counsel were agreed that I should approach 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 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'm not surprised that there are some inconsistencies between what Mrs B said happened and what other evidence shows. I remain of the opinion, that the question to consider therefore, is whether there is a core of acceptable evidence from Mrs B such that the inconsistencies have little to no bearing on whether her testimony can be relied on, or whether such inconsistencies are fundamental enough to undermine, if not contradict, what she says about what the Supplier said and did to market and sell Fractional Club membership as an investment.

As I've said, it does appear that the statement was written down by the PR, as that can be the only explanation for some parts being recorded in the third person. But having a statement prepared and written by a professional third party is not unusual, and does not, in itself, mean I cannot place any weight on it. And given the personal information included, it does appear that the statement is largely what Mrs B says she remembers from the Time of Sale.

As I said in the PD, I don't for example, find it in any way material that Mrs B has mistakenly said their trial membership was for five years, when in fact it is for three. Misremembering the duration, or as is likely here, mistaking the duration, for the number of weeks' holidays they could take with it (five) of a trial membership that they held for only seven months and used only once is not, in my view, material to whether the subsequent full membership was sold as an investment or not. And the same goes for how Mrs B remembers the trial membership was paid for. She has said in the statement that it was paid for on a credit card, when the evidence shows it was paid for by a finance agreement with the Lender. Whilst this is clearly a mistake, I don't think it fundamentally undermines the crux of the statement, which sets out how the Supplier sold and/or marketed the Fractional Club to them at the Time of Sale as an investment.

The Lender has also pointed to errors in Mrs B's recollection of the dates they bought the trial and full membership. But again, I don't think this fundamentally undermines what she says she recalls about the sales process itself.

I have considered all of the other inconsistencies that the Lender has cited, but I am not persuaded that even if taken together, they fundamentally undermine the core of her evidence. They are minor details about both the trial membership and Fractional Club sales processes that the Lender seems to suggest cast doubt on the whole testimony. For example, I do not think it material that Mrs B says they were *"approached"* by a salesman, whereas the Lender says they were *"invited"* to an obligatory presentation. And although I acknowledge that Mrs B has, on one occasion, incorrectly called the Supplier *"Azure"* when talking about the Fractional Club, and the Lender cites this as evidence that the statement

was written by the PR, I think it is equally as likely that Mrs B has simply made an error here, as *"Azure"* was the name of the trial membership she and Mr B had bought.

So overall, while I again stress that I am mindful of the errors and inconsistencies and the risk around placing weight on the testimony, I am satisfied that I can place weight on Mrs B's testimony when considering what most likely happened at the Time of Sale.

And with that being the case, I don't find Mrs B either implausible or hard to believe when she says:

> *"As Fractional Owners, we were told that they would be able to sell our Fractional Ownership whenever we wanted to and be able to make a healthy profit from the proceeds…*
>
> *The Fractional Ownership Club was distinctly different from a timeshare product. Unlike a timeshare, Fractional Ownership meant that we would own a share in a property. We were not only told that it was an investment, but it was probably one of the best investments that we could invest in...*
>
> *In any event, if we did not sell our Fractions during the term of the Ownership, the Fractions would be sold in 15 years' time and the profits from the sale of the Property would be shared amongst its members."*

And;

> *"At the meeting we were told that we should upgrade our trial membership to full membership within the Fractional Owners Club. Being Fractional Owners would mean that we owned property that was an investment…*
>
> *… we believe that it was a very hard selling presentation and they showed us one of their best and most luxurious units for the trial period to frame our minds into thinking that it is what we would get if we purchased a fractional membership, plus all the added benefits of owning an 'investment'".*

On the contrary, given what I know about the training material used to prepare its sales representatives, and how Fractional Club membership was likely presented to Mr and Mrs B, and given that I am satisfied that I can place weight on Mrs B's testimony, I think that's likely to be what Mr and Mrs B 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 B 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 B and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3)[5] led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

On my initial reading of Mrs B's testimony, I thought that the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. And I remain of that opinion now. After all, it seems that they were initially reluctant to make the purchase as it seemed expensive compared to the holidays they normally took, so there must have been a motivation in addition to the prospect of holidays. And Mrs B has set this out in her statement:

> *"…. we believe that it was a very hard selling presentation and they showed us one of their best and most luxurious units for the trial period to frame our minds into thinking that it is what we would get if we purchased a fractional membership, plus all the added benefits of owning an 'investment'".*

This demonstrates that, as the Lender points out, they were quite clearly interested in holidays, which is not surprising given the nature of the product at the centre of this complaint. But Mrs B says (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 – it was marketed to them as an investment that offered the prospect of a financial gain.

So, 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 trial membership and the more 'standard' type of timeshare available to them.

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[5] which, having taken place during its antecedent negotiations with Mr and Mrs B, 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

Mr and Mrs B have not said or suggested, for example, that they would have pressed ahead with the purchase in question had the Supplier not led them to believe that Fractional Club membership was an appealing investment opportunity. Indeed, Mrs B's testimony actually suggests that they would *not* have bought the membership had it not been for the '*added benefits of owning an "investment"".* And as they faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I'm not persuaded that they would have pressed ahead with their purchase regardless.

I therefore think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made, so it follows that the associated credit relationship under the Credit Agreement with the Lender was rendered unfair to Mr and Mrs B.

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 B 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.

Putting things right

The Lender, in its response to my PD, made no comment regarding how I thought it should calculate and pay fair compensation to Mr and Mrs B. So, having considered everything afresh, I see no reason to depart from what I set out in my PD which was as follows:

Having found that Mr and Mrs B would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable to put them back in the position they would have been in had they not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr and Mrs B both 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 B were trial members before purchasing Fractional Club membership. As I understand it, trial membership involved the purchase of a fixed number of week-long holidays that could be taken with the Supplier over a set period in return for a fixed price. The purpose of a trial membership was to give prospective members of the Supplier's longer-term products a short-term experience of what it would be like to be a member of, for example, the Fractional Club. According to an extract from the Supplier's business plan, roughly half of trial members went on to become timeshare members.

If, after purchasing trial membership, a consumer went on to purchase membership of one of the Supplier's longer-term products, their trial membership was usually cancelled and traded in against the purchase price of their timeshare – which was what happened at the Time of Sale. Mr and Mrs B's trial membership was, therefore, a precursor to their Fractional Club membership. With that being the case, the trade-in value acted, in essence, as a deposit on this occasion and I think this ought to be reflected in my redress when remedying the unfairness I have found. And it seems that Mr and Mrs B were on a complimentary holiday when they traded-in their trial membership, meaning they therefore didn't use their trial membership to take any holidays.

So, given all of the above, here's what I think needs to be done to compensate Mr and Mrs B – whether or not a court would award such compensation:

(1) The Lender should refund Mr and Mrs B'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:

i. The annual management charges Mr and Mrs B paid as a result of Fractional Club membership.

ii. The difference between the purchase price of the trial membership (£3,995) and the amount consolidated into the loan that was arranged when they purchased Fractional Club membership (£3,080). I make this £915.

(3) The Lender can deduct:

i. The value of any promotional giveaways that Mr and Mrs B used or took advantage of that were connected to the Fractional Club membership; and

ii. The market value of the holidays* Mr and Mrs B took using their Fractional Points.

(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 B's credit files in connection with the Credit Agreement reported within six years of this decision.

(6) If Mr and Mrs B'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 B 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. The Lender has not said, having been asked in the PD, that it proposes to make any deductions for holidays taken, nor has it given any details of the holidays taken nor the points that were used. So my determination is that there should be no deduction in excess of the annual management charge for the year any holiday(s) were taken.

**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 this complaint and direct Shawbrook Bank Limited to pay fair compensation as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B and Mrs B to accept or reject my decision before 9 June 2025.

Chris Riggs
Ombudsman