DRN-5528738

The complaint

Mr and Mrs F'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. They also think the Lender provided finance irresponsibly.

What happened

Mr and Mrs F purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 27 February 2019 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1300 fractional points at a cost of £14,823 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mr and Mrs F 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 F paid for their Fractional Club membership by taking finance of £14,823 from the Lender in their joint names. (the 'Credit Agreement').

Mr and Mrs F – using a professional representative (the 'PR') – wrote to the Lender on 14 August 2019 (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 (1) the Lender did not carry out the right creditworthiness assessment and (2) the money lent to them under the Credit Agreement was unaffordable for them.

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

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

1. Told them that Fractional Club membership had a guaranteed end date when that was not true.
2. The Supplier would buy the Fractional Club membership when that was not true.
3. Told them that Fractional Club membership was an "investment" when it couldn't be marketed as such as this was contrary to the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010.
4. Told them that the Supplier's holiday resorts were exclusive to its members when that was not true, which meant there was no real prospect they would obtain a return on their investment.

Mr and Mrs F 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 F.

(1) Section 75 of the CCA: the Supplier's breach of contract

Mr and Mrs F also say that they found it difficult to book the holidays they wanted, when they wanted.

As a result of the above, it appears that Mr and Mrs F are suggesting they have a breach of contract claim against the Supplier, 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 F.

(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 F say that the credit relationship between them and the Lender was unfair to them under Section 140A of the CCA. In summary, they include the following:

1. Fractional Club membership was marketed and sold to them as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. The contractual terms of the Fractional Club membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR') and the Consumer Protection (Amendments) Regulations 2014 and [1]Consumer Protection from Unfair Trading Regulations 2008. (the CPUT Regulations).
3. They were pressured into purchasing Fractional Club membership by the Supplier.
4. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection (Amendments) Regulations 2014 and Consumer Protection from Unfair Trading Regulations 2008
5. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
6. The Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs.

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

Mr and Mrs F 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 Club membership as an investment to Mr and Mrs F 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 F was rendered unfair to them for the purposes of section 140A of the CCA.

[1] The Consumer Rights Act 2015 is the relevant legislation at the time of this sale.

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

I issued a provisional decision (PD) explaining why I was of the opinion that Mr and Mrs F's complaint should be upheld.

The PR agreed with my PD, but the Lender did not. In summary it said:

- My PD was based on an error of law in my approach to the prohibition in Reg 14(3) of the Timeshare Regulations, which it says undermined my approach to Mr and Mrs F's witness testimony, which it also says included factual inaccuracies that it says I hadn't taken into account.
- My 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 Lender set out what it considered to be the correct legal approach in respect of the sale of the Allocated property in the context of regulation 14(3). In particular, the Lender says:

- The wording in my PD is inconsistent with the premise that there is no prohibition to the sale of fractional timeshares, only a prohibition on the way they were sold, and the definition of 'investment' that I used. It argues that I took the position that "the mere existence of the "prospect of a financial return" constituted an "investment". In particular, the PD falls into that error by conflating two different meanings of the word 'return': (i) a 'return on investment', which is normally understood to mean the measure of profit (the return) on the original investment; and (ii) a customer being told that some money will be 'returned' upon sale, which carries no connotation of investment or profit.".

- Having reviewed the contemporaneous materials, and Mr and Mrs F's witness testimony, referred to in my PD, it didn't accept they referenced the word 'investment', and it didn't accept that Fractional Club membership was described as an investment.

- Telling a customer that they would get a financial return from the sale of the Allocated Property would not breach Reg 14(3).

- Mr and Mrs F confirmed, at the Time of Sale, that they understood the relevant disclaimers that Fractional Club membership was not an investment.

- The documentation in relation to the sale was on its face unobjectionable and showed no breach of Reg 14(3) and it didn't at any stage refer to the presence of the allocated property as an investment. Mr and Mrs F didn't receive or view the sales presentation documents before the sale.

- I had applied a test of whether there was a "prospect of a financial return" and treated the sales documentation as a breach of Reg 14(3) which it believed was wrong. And it went on to highlight my analysis of other parts of the training material in the context of a "return" meaning an investment, which it disagreed with.

- My analysis of Mr and Mrs F's witness testimony was given limited importance in the PD and my assessment of it was wrong. Shawbrook argues that the evidence suggests that Mr and Mrs F purchase of the Fractional Club membership was for the primary purpose of taking holidays rather than in the expectation or hope of a

financial gain.

- It thought I ought to consider and apply weight to the judgment a District Judge reached when considering a similar sale, where it was held there was no breach of Regulation 14(3) (Prankard v Shawbrook Bank Limited, 8 October 2021).

- It thought I had erred in my assessment of the witness evidence by finding that the main reason for purchasing the allocated property was "based on receiving a return of capital…..", which was incorrect and that the real reason was that they wanted a one-week timeshare and particular holidays in South Africa and Thailand…."

- Mr and Mrs F had never engaged with the supplier to realise on their investment when they wanted out, which was because it was never sold as an investment. The relinquishment was based on "lack of availability, additional costs, not exclusive" with no reference to the alleged investment. And it said there weren't the expected details given the proximity of the sale, that would be expected, on the alleged investment and extreme pressure Mr and Mrs F say they were subjected to.

- I ought to take into account decisions reached by other Ombudsmen in relation to the sale of similar memberships where the complaints were not upheld.

- I erred in applying the reverse burden of proof. The correct starting point should be based on the judgement set out in the case of Carney. It didn't consider that Mr and Mrs F's motivations for the sale which related to the types of holidays they wanted, meant the sale of the timeshare didn't have a material impact on them purchasing the Fractional Club membership.

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 Consumer Rights Act 2015 (CRA).
- 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').

What I've decided – and why

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

Having considered everything again, and the submissions provided in response to my PD, I still uphold Mr and Mrs F's complaint for the reasons set out in my PD, which I have set out again below. I'll address the issues the Lender raised in its response. In doing so, I reiterate that my role as an Ombudsman is not to address every single point that has been made by the parties. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. I have read the Lender's response in full, but I'm going to limit my findings to what I consider to be the relevant points.

Also, while I recognise that there are a number of aspects to Mr and Mrs F's complaint, it isn't necessary to make formal findings on all of them. This includes for example, the allegations that:

- The Supplier misrepresented the Fractional Club membership and the Lender ought to have accepted and paid the claim under Section 75 of the CCA.

- The decision to lend being irresponsible because (1) the Lender did not carry out the right creditworthiness assessment and (2) the money lent to them under the Credit Agreement was unaffordable for them.

I say this because, even if those aspects of the complaint ought to succeed, the redress I'm directing, puts Mr and Mrs F in the same or a better position than they would be if the redress was limited to those parts of the complaint.

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 F 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 F'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."[2]

So, the Supplier is deemed to be the 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 F and the Lender along with all of the circumstances of the complaint and I think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

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

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

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

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs F'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:

"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 F say that the Supplier did exactly that at the Time of Sale – saying the following during the course of this complaint:

"We were told that the fractional ownership was an investment and after 19 years the property in Tenerife will have increased in value and our 2.42% should give us a good return in addition to access to the worldwide holiday club."

"The Fractional Ownership was sold to us as an investment which would generate a good return at the end of the contract period when it is sold, as we were told that the property prices would increase based on history and over the 19 years there would be a reasonably good return on our investment. This would obviously negate some of the up front costs of purchasing the fraction."

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

(1) They were told by the Supplier that they would in essence, get their money back or more during the sale of Fractional Club membership.
(2) They were told by the Supplier that Fractional Club membership was the type of investment that would 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 F's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr and Mrs F 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 Mr and Mrs F or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs F, 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 F as an investment. For example:

- The information statement at paragraph 11 explained that the vendor, and any sales or marketing agent and their related businesses, were not licensed investment advisers authorised by the Financial Conduct Authority to provide investment or financial advice. And any information provided was not intended as a source of investment advice.

- Also, The Member's Declaration document signed by Mr and Mrs F, explained that the purchase of the Fraction was 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 Fractional Rights which are personal rights and not interests in real estate (all as explained in the information statement).

In response to our Investigator's view, the Lender has highlighted these disclaimers as being important factors to consider when deciding what happened at the Time of Sale. However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And that is particularly so when the contractual paperwork was only drawn up and shown to customers *after* they had decided to go ahead with a purchase, so what they were told before then is crucial. Further there are a number of strands to Mr and Mrs F's allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that membership of the Fractional Club was expressly described as an *"investment*" in several different contexts and (2) that membership of the Fractional Club could make them a financial gain and/or would retain or increase in value.

So, I have considered:

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

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

How the Supplier marketed and sold the Fractional Club membership

During the course of the Financial Ombudsman Service's work on complaints about the sale of timeshares, the Supplier provided information on how it sold membership of timeshares like it did to Mr and Mrs F – which includes a document called the "Fractional Property Owner's Club Fly Buy Manual 2019" (the '2019 Fractional Training Manual').

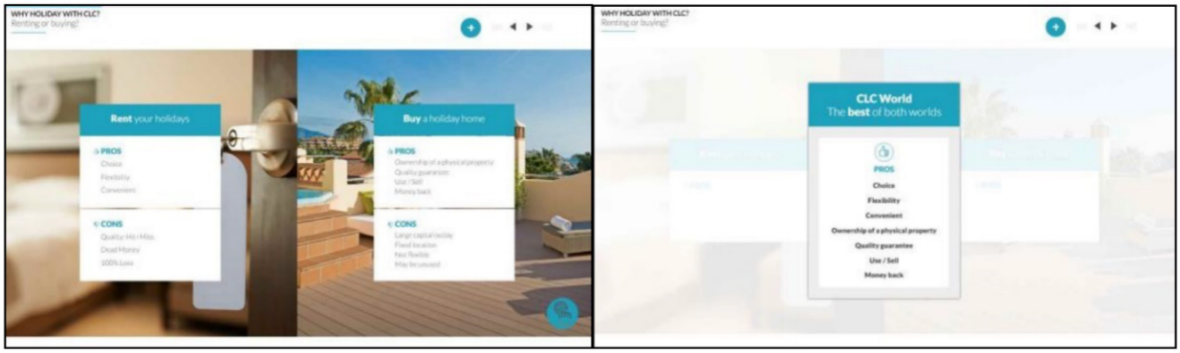
As I understand it, the 2019 Fractional Training Manual was used from January 2019 (up to November 2019 when the product stopped being sold by the Supplier) during the sale of the Supplier's second version of the Fractional Property Owners Club (which I will continue to refer to as simply the Fractional Club) – which was the version Mr and Mrs F appear to have purchased.

It is not entirely clear whether Mr and Mrs F would have been shown the slides included in the Manual. But they seem to me to be reasonably indicative of:

(1) the training the Supplier's sales representatives would have got before selling Mr and Mrs F Fractional Club membership; and

(2) how the sales representatives would have framed the sale of Fractional Club membership to Mr and Mrs F.

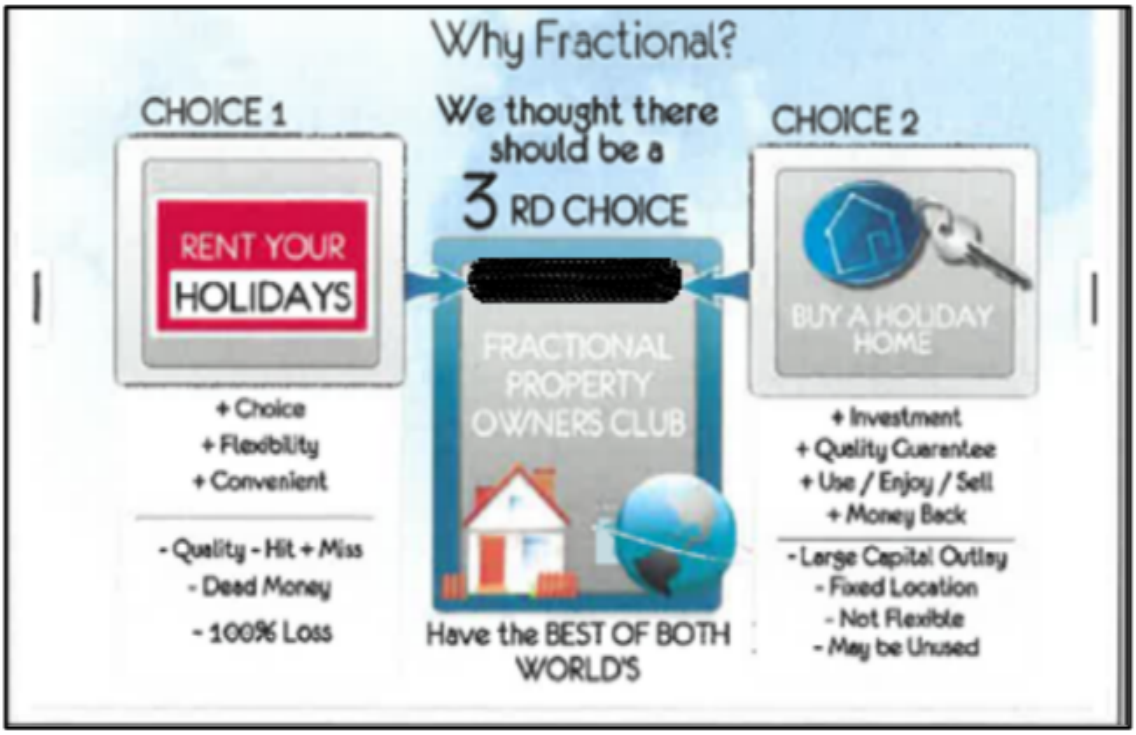
Having looked through the 2019 Manual, my attention is drawn first to page 16 (of 68) – which includes two slides called "Why holiday with [the Supplier]? Renting or buying?".



They were the first slides in the Manual that seems to me to set out any information about Fractional Club membership, albeit without expressly referring to the Fractional Club, because they suggest that sales representatives were likely to have made the point to Mr and Mrs F that holidaying with the Supplier combined the best of (1) – paying for traditional holiday accommodation and (2) – buying a holiday home, including, amongst other things, ownership of a physical property and money back – which were benefits that were only front and centre of Fractional Club membership.

From the off, therefore, it seems likely that sales representatives would have demonstrated that there were financial advantages to Fractional Club membership rather than being a member of a 'standard' timeshare. And those advantages were linked to the concept and idea of property ownership.

Indeed, the slides above presented a very similar prospect to that presented in a slide used in one of the Supplier's earlier training manuals that was used to help it sell the first version of Fractional Property Owners Club:



Both sets of slides indicate to me that sales representatives would have taken prospective members through three holidaying options along with their positives and negatives:

(1) “Rent Your Holidays”
(2) “Buy a Holiday Home”
(3) Fractional membership - the “Best of Both Worlds”

I acknowledge that the slides incorporated into the 2019 Fractional Training Manual don’t include express reference to the ‘investment’ benefit of Fractional Club membership. But they allude to much the same concept, namely that Fractional Club membership combined the best aspects of taking ‘normal’ holidays and purchasing a holiday home.

One of those advantages referred to in the slides on page 16 of the 2019 Fractional Training Manual is the “ownership of a physical 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 any mortgage secured against it, this particular advantage of Fractional Club membership was portrayed in terms that played on the opportunity ownership gave prospective members of the Fractional Club to accumulate wealth in a similar way, especially combined with the phrase “money back”.

When the 2019 Manual moved on to describe how membership of the Fractional Club worked between pages 25 and 32, one of the major benefits of Fractional Club membership was described on page 32 as:

“A major benefit is that after 19 years of fantastic holidays, the property in which you own a fraction is sold and you will receive your share of the sale proceeds according to the number of fractions owned.”

And on page 32 of the 2019 Manual there were notes that encouraged sales representatives to summarise this benefit in the following way:

“So really 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?”

What’s more, from looking at the Manual, I think the Supplier’s sales representatives were encouraged to make prospective Fractional Club members (like Mr and Mrs F) consider the advantages of owning something and view membership as a way of generating a return, rather than simply paying for holidays in the usual way. That was likely to have been reinforced throughout the Supplier’s sales presentations by describing membership as a form of property ownership referring to the prospect of a “return”. And with that being the case, 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.

I acknowledge that there may not have been a comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mr and Mrs F the financial value of the proprietary interest they were offered, I think that would involve taking to 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)." [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 99 and 100 of Shawbrook & BPF v FOS when, Mrs Justice Collins Rice said the following:

"[…] I endorse the observation made by Mr Jaffey KC, Counsel for BPF, that, whatever the position in principle, **it is apparently a major challenge in practice for timeshare companies to market fractional ownership timeshares consistently with Regulation 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."

Given what I've already said about the Supplier's training material and the way in which I think it was likely to have framed the sale of Fractional Club membership to prospective members (including Mr and Mrs F), I think it is more likely than not that the Supplier did, at the very least, imply that future financial returns (in the sense of possible profits) from a Fractional Club membership were a good reason to purchase it.

So, overall, I think the Supplier's sales representative was likely to have led Mr and Mrs F at the Time of Sale to believe that Fractional Club membership was an investment that may lead to a financial gain (i.e., a profit) in the future. And with that being the case, I don't find them either implausible or hard to believe when they say they were told:

"The Fractional Ownership was sold to us as an investment which would generate a good

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[3] 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)"*.

return at the end of the contract period when it is sold, as we were told that the property prices would increase based on history and over the 19 years there would be a reasonably good return on our investment. This would obviously negate some of the up front costs of purchasing the fraction."

And, as I've said above, I can't see what that could reasonably and realistically have meant apart from an expectation of financial gain (i.e., a profit) in the context of the sale of an asset backed timeshare given everything else I know about the sale and Mr and Mrs F's reasons for
making the purchase. On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mr and Mrs F were led by the Supplier to believe at the relevant times. 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 F 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 F 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 F, 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 F's testimony, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. And I don't agree with the Lender's arguments that investment hasn't been raised as an issue in the referral to this service. I say that because the PR referred to the Fractional Club membership being represented as an investment to Mr and Mrs F in its letter of claim to the Lender. And that document formed part of its submissions to this service. Also, Mr and Mrs F said the following in their witness statement:

"We were told that the fractional ownership was an investment and after 19 years the property in Tenerife will have increased in value and our 2.42% should give us a good return in addition to access to the worldwide holiday club."

"The Fractional Ownership was sold to us as an investment which would generate a good return at the end of the contract period when it is sold, as we were told that the property prices would increase based on history and over the 19 years there would be a reasonably good return on our investment. This would obviously negate some of the up front costs of purchasing the fraction."

It's understandable that Mr and Mrs F were also keen to negate some of the upfront costs of purchasing the fraction. But I'm satisfied from what they have said, that not only was the Fractional Club membership positioned to them as an investment, but it was an important feature for them. I say this because it seems to me from what they have said, they were influenced by the prospect of receiving a return on the capital they were investing to make the purchase. And, although they did not use the word 'profit', to me their evidence that they were told property values would increase and their thinking they would make a '*reasonably good return on our investment'* implies that.

I've also noted that Mr and Mrs F complained within six months of the purchase of the Fractional Club membership. So, for me, I think that's a persuasive factor in the weight that I apply to their testimony, as I think it's likely that given that their recollections about the sale were provided in close proximity to the events they were complaining about, it's unlikely their memories would have faded with the passage of time. And given the prohibition in Regulation 14(3) on marketing the Fractional Membership as an investment, I don't think it's surprising that there was no reference to an investment in the Supplier's notes of the sale.

I have also considered Mr and Mrs F's evidence as a whole to think about what weight I can place on it. There are inconsistencies in their evidence, but there is nothing that makes me doubt the main substance of what they say about the Supplier positioning Fractional Club membership as an investment. For example, Mr and Mrs F have said the Supplier told them that it would buy back their share, but that is something that is specifically excluded in the members declaration. However, they explain (at para 17 in their statement) that the Supplier initially offered them a membership that an existing member was selling, so I understand why they may have come to the conclusion that the Supplier would buy back memberships. On balance, I think their evidence is credible and believable.

All of this doesn't mean they were not interested in holidays. Their own testimony demonstrates that they quite clearly were. And they have referenced the long-haul holidays and skiing that they were interested in. So, I don't doubt that the holidays offered by the fractional membership were also important to them.

But as I've explained, Mr and Mrs F say (plausibly in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale, as something that offered them more than just holiday rights, on the balance of probabilities, I think taking into account what they have said that I've summarised above, their purchase was strongly motivated by their share in the Allocated Property, and the possibility of a profit as that share was one of the defining features of membership that marked it apart from the more 'standard' type of timeshare available to them. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

Mr and Mrs F 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. And as they faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments, which they have raised concerns about in their testimony; 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.

The Lender's responses to my PD

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

The Lender says my PD was inconsistent with the notion that there was no prohibition on the sale of fractional timeshares per se, only a prohibition on the way they were sold. But this, in my view, takes to restrictive a view of my PD and doesn't reflect all of what I said. It overlooks that part of my PD that reads:

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

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

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

have had a material impact on their decision to take it out, the Supplier would have needed to have marketed or sold it as a way of Mr and Mrs F putting down money in the hope or expectation of financial gain or profit and for them to have purchased it with that hope or expectation.

But with that said, there seems to me to be many ways of marketing and selling a timeshare as an investment, without necessarily referring to (or even including) an allocated property. And if the Supplier said and/or did something in relation to an allocated property and/or Fractional Club membership more generally, that at least implied to a prospective member that membership offered them the prospect of a financial gain, that would, in my view, breach Regulation 14(3).4. And as I explained in my PD, that is what I think happened in Mr and Mrs F's case.

However, I've considered what the Lender has said in relation to the sales and marketing materials.

Sales and marketing materials

I did acknowledge in my PD, that the Supplier did try, in the sales documentation, to avoid describing Fractional Club membership as an 'investment' and giving any indication of the likely financial return. For example, the Member's Declaration explained that the purchase of the Fraction was 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 Fractional Rights which are personal rights and not interests in real estate (all as explained in the information statement).

As the Lender has pointed out, Mr and Mrs F signed the Member's Declaration confirming that they had read and understood its contents. I do not think however that they signed the document to say they understood that Fractional Club membership was not an investment, as that is not what the Members Declaration said at point 5. So, I have considered what other disclaimers there were in the paperwork. There is on file a 'Standard Information Form provided by the Lender. In that document it says:

"…Fractional rights have been designed to be used and enjoyed and not bought with the expectation or necessity of future financial gain." (page 2)

"…The Vendor, Manager and the Trustee are unable to give any guarantees on the ultimate sales price as this depends on many factors including the state of the property market and the supply and demand at the time of sale." (page 3)

These disclaimers go some way to making the point that the purchase of Fractional Club membership should not be viewed as an investment (as opposed to explicitly stating that it was not an investment or that it was not being sold as such). But they had to be read along with the other things in the Information Form, which included the following disclaimer:

11. **Investment advice**

"The Vendor, any sales or marketing agent and the Manager and their related businesses (a) are not licensed investment advisors authorized by the Financial 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 is not intended for use as a source of investment advice and (c) all purchasers are advised to obtain competent advice from legal, accounting and investment advisors to determine their own specific investment needs; (d) no warranty is given as to any future values or returns in respect of an Allocated Property." (page 8)

This disclaimer is, in my view, an attempt to ensure that prospective members do not take and rely on what they were told by the Supplier as investment advice and a declaration that no assurance was given as to the future value of the Allocated Property. However the disclaimer does suggest that (1) the “Vendor’s” and “Manager’s” experience as investors had fed into the information provided during the sales presentations and (2) prospective members might be wise to consult an investment advisor. And, in my view, both of those suggestions, particularly the latter, ran the risk of giving a prospective Fractional Club member the impression that there was investment potential to what was being sold. Further, if during the course of the sale a prospective member was given the impression that Fractional Club membership was an investment, I do not think this disclaimer would have done much to disabuse them of that idea.

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 F, had already been through a lengthy sales presentation. So that is why I consider the training materials referred to in my PD to be important.

In response to my PD, the Lender says that it does not accept that the training material I relied on, was shown to Mr and Mrs F. I agree that was likely as it was material used to train salespeople and not an example of a presentation that would have been shown to customers. However, I have not been provided with any slides or other marketing material that the Supplier says would have been shown to them. In light of that, I repeat my finding from my PD, that the material in question is (1) reasonably indicative of the training the Supplier’s sales staff received around the Time of Sale and (2) how the sales staff were likely to have framed any presentation during the sale.

The Lender also says that the relevant training material did not expressly refer to Fractional Club membership as an investment. And I agree with that observation. But the Lender continues to take to narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3). As I have already said, the Supplier did not have to refer to Fractional Club membership expressly as an investment to breach Regulation 14(3). Instead, it is important to consider both the explicit and implicit messaging at the Time of Sale to decide what I think was most likely to have happened.

Further, I also want to make clear that it was not simply the training materials that led to the finding in my PD that Regulation 14(3) was breached by the Supplier at the Time of Sale, but rather it was a combination of all of the evidence available, which included the documents from that time, Mr and Mrs F’s evidence as well as the training material to which I have referred.

With respect to the training material, the Lender says that the documentation in relation to the sale was unobjectionable and showed no breach of Reg 14(3). It said it didn’t at any stage refer to the presence of the allocated property as an investment. And it invited me to reconsider my conclusions that it participated in and perpetuated an unfair credit relationship with Mr and Mrs F under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A.

The Lender has also argued that I made a misstep in assessing whether there has been a breach of Reg 14(3). It says the question that needs answering is whether there is sufficiently clear, compelling evidence that the timeshare product was marketed or sold as an investment.

However, as I explained in my PD, I think it is too narrow an approach to take to only find that there was a breach of Regulation 14(3) if the likely return from that sale of the Allocated Property was expressly quantified by the Supplier. As I explained in my PD, the training material to which I referred, indicates that the Supplier's sales representatives were encouraged to make prospective Fractional Club members (like Mr and Mrs F) consider the advantages of owning something and view membership as a way of generating a return, rather than simply paying for holidays in the usual way. That was likely to have been reinforced throughout the Supplier's sales presentations by describing membership as a form of property ownership referring to the prospect of a "return". And with that being the case, 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.

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

Mr and Mrs F's evidence

The Lender says that Mr and Mrs F's evidence is given limited importance in the PD and that my assessment of it is wrong. Mr and Mrs F have provided a witness statement setting out their recollections of the sale of the Fractional Club membership.

In considering the weight to place on Mr and Mrs F's recollections set out in their witness statement, I have considered 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 case does set out a useful way to look at the evidence Mr and Mrs F have 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 am not surprised that there are some inconsistencies between what Mr and Mrs F 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 Club membership as an investment.

It is clear to me that Mr and Mrs F are saying that the Supplier sold them Fractional Club membership as an investment, even if they cannot correctly recall the precise manner in which they would realise any return. Even though Mr and Mrs F have not used the word 'profit', I think it is clear that this is what was meant when they said:

"We were told that the fractional ownership was an investment and after 19 years the property in Tenerife will have increased in value and our 2.42% should give us a good return in addition to access to the worldwide holiday club."

"The Fractional Ownership was sold to us as an investment which would generate a good return at the end of the contract period when it is sold, as we were told that the property prices would increase based on history and over the 19 years there would be a reasonably good return on our investment. This would obviously negate some of the up front costs of purchasing the fraction."

In my opinion, the use of the word 'investment' in these contexts means that Mr and Mrs F expected to make a financial gain rather than simply get some money back at the end of their membership. On balance, I find there is a consistent and believable recollection that Fractional Club 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.

As I acknowledged in my PD, holidays offered by the Fractional Club Membership were also important to Mr and Mrs F. Given the nature of Fractional Club membership, I would be surprised if they had shown little or no interest in the prospect of taking holidays through the Supplier. But, for the reasons I have explained in the PD, I remain of the opinion that their purchase of the Fractional Club Membership was strongly motivated by their share in the Allocated Property, and the possibility of a profit. Therefore, the breach of Regulation 14(3) had a material impact on their purchasing decision.

Finally, The Lender has said that the evidence suggests Mr and Mrs F didn't consider the Fractional Club membership to be an investment as they didn't engage with the supplier to establish whether or not it could/would purchase the fractions back. However, in this case Mr and Mrs F complained about the sale approximately six months after purchasing the Fractional Club membership. And the letter of claim from the PR, sets out why they believed the Fractional Club membership had been mis-sold. So, in the context of a complaint about mis-selling that had been made very shortly after they had purchased the Fractional Club membership, I'm not surprised that they asked for compensation by way of cancelling the contract and requesting a return of the fees and payments they had made under the contract.

In conclusion, it is my view that the evidence suggests that (1) Fractional Club membership being presented to Mr and Mrs F as an investment was a material part of their purchasing decision and (2) I am not persuaded that they would have continued with their purchase had it not been presented as an investment.

Other matters

I have read and considered the judgment on Prankard v The Lender Bank Limited. However, that case was decided by the judge on its own facts and circumstances (I note it concerned a sale several years before the one I am looking at), and it does not change my own findings that, on balance, Mr and Mrs F's sale did breach Regulation 14(3) .

I have also read the other decisions of ombudsmen that the Lender has highlighted. But again, those cases were decided on their own facts and circumstances. And decisions issued by my ombudsman colleagues do not set any precedent that I have to follow. Like my colleagues, I consider individual cases on their own facts and circumstances.

Conclusion

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

Fair Compensation

Having found that Mr and Mrs F 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 F agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

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

(1) The Lender should refund Mr and Mrs F'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 annual management charges Mr and Mrs F paid as a result of Fractional Club membership.

(3) The Lender can deduct:

   i. The value of any promotional giveaways that Mr and Mrs F used or took advantage of; and
   ii. The market value of the holidays* (if any) Mr and Mrs F took using their Fractional Points.

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

(5) 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.

(6) If applicable, the Lender should remove any adverse information recorded on Mr and Mrs F's credit files in connection with the Credit Agreement.

(7) If Mr and Mrs F'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 F may have taken 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 Mr and Mrs F a certificate showing how much tax it's taken off if they ask for one.

My final decision

For the reasons I've set out above, my decision is to uphold Mr and Mrs F's complaint about Shawbrook Bank Limited. It needs to calculate and pay any redress due to Mr and Mrs F using the methodology I have set out above. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F and Mrs F to accept or reject my decision before 30 May 2025.

Simon Dibble
Ombudsman