DRN-5531192

The complaint

Mr F's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) deciding against paying claims under Section 75 of the Consumer Credit Act 1974 (as amended) (the 'CCA'), (2) the contract being unenforceable, (3) breach of fiduciary duty and (4) being party to an unfair credit relationship with him under Section 140A of the CCA.

What happened

Previous timeshare membership

Mr F had previous timeshare memberships with the Supplier beginning in the 1990's.

On 23 September 2012, Mr F purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier'). He paid £10,889 using a loan (the '2012 Loan') from another lender ('Loan Provider H'). This gave Mr F 2,988 annual Fractional Points to use on holidays with the Supplier and its affiliates.

Fractional Club membership was asset backed – which meant it gave Mr F more than just holiday rights. It also included a share in the net sale proceeds of a property after his membership term ends. The property linked to Mr F's Fractional Club membership was shown on the purchase agreement associated with the sale.

This purchase is the subject of a separate complaint against Loan Provider H, which the Financial Ombudsman Service is considering. I will refer to the Fractional Club membership purchased in 2012 as 'FC Membership 1'.

The 2012 Loan was paid off by Mr F in 2013.

2015 purchase – the subject of this complaint

Mr F upgraded his membership of the Fractional Club with the Supplier on 14 January 2015 (the 'Time of Sale'). I will refer to the upgraded membership purchased in 2015 as 'FC Membership 2'.

Mr F entered into an agreement with the Supplier (the 'Purchase Agreement') to buy 3,080 Fractional Points at a purchase price of £49,197. In doing so Mr F traded in and surrendered FC Membership 1. This means he increased his fractional points from 2,988 to 3,080 – an increase of about 3%. FC Membership 1 was given a trade-in value by the Supplier of £43,402, leaving Mr F with £5,795 to pay. Mr F paid this by taking finance of £5,795 from the Lender (the 'Credit Agreement').

Mr F's complaint to the Lender

Mr F – using a professional representative (the 'PR') – wrote to the Lender on 10 January 2019 (the 'Letter of Complaint') to complain about:

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

(2) The contract being unenforceable due to breaches of the Unfair Terms in Consumer Contract Regulations 1999 ('UTCCR')

(3) Breach of fiduciary duty by the Lender.

(4) The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.

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

Mr F says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. Told him the only way to exit his existing timeshare membership was to purchase Fractional Club membership when that wasn't true.

2. Told him that Fractional Club membership had a guaranteed end date when that was not true.

3. Told him that Fractional Club membership was a "great investment opportunity" that was "guaranteed to make a profit" when that was not true because there is no guarantee the Allocated Property will be sold.

4. Told him that the Supplier's holiday resorts were exclusive to its members when that was not true.

Mr F says that he has 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, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr F.

(2) The contract is unenforceable due to breaches of the UTCCR

Mr F says that he has a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, he has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr F. But there is no breach of contract set out in the Letter of Complaint.

Rather, the reasons given for there being a breach of contract claim are that the contract terms dealing with the management charges and sale of the Allocated Property are unfair under the UTCCR.

(3) Breach of fiduciary Duty by the lender

Mr F says the Lender was in breach of its fiduciary duty because it paid an undisclosed commission to the Supplier without Mr F's informed consent.

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

The Letter of Complaint set out several reasons why Mr F says that the credit relationship

between him and the Lender was unfair to him under Section 140A of the CCA. In summary, they include the following:

1. The Lender paid an undisclosed commission to the Supplier, creating a conflict of interest of which Mr F was not informed. Had he been aware of the commission being paid he would have thought twice about entering the contract.

2. Misrepresentations or misleading statements by the Supplier:

    a. At the time of sale that:

        i. It was the only way to exit Mr F's existing timeshare membership.

        ii. Mr F would be gaining access to an exclusive club.

    b. And ongoing:

        i. If they did not purchase Fractional Club ownership Mr F and his descendants would be subject to ongoing financial obligations for a considerable period (through the existing timeshare membership)

3. Fractional Club membership is not worth what Mr F paid for it.

4. Mr F's financial means were limited, and he could only afford the purchase using the loan. The Lender did not properly assess Mr F's ability to afford the loan.

5. Breaches of the Finance & Leasing Association Code.

6. The Supplier pressured Mr F into entering into the Purchase Agreement and Credit Agreement.

The Lender dealt with Mr F's concerns as a complaint and issued its final response letter on 26 February 2019, rejecting it on every ground.

Mr F's complaint to the Financial Ombudsman Service

On 4 April 2019 Mr F 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 ultimately thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr F at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of that breach on his purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr F was rendered unfair to him 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. In summary, the Lender's main reasons for disagreeing were:

- Mr F's witness statement is unsigned and undated and was provided in December 2023. In relation to this:

- Mr F says he was told the Supplier would buy back the Fractional Club membership points after a few years, but it has never offered this option – which is clear from the contractual documents.

- Mr F has described the sales presentation as being disguised, in that he was expecting an update meeting about his membership, not a sales presentation. But since 1998 when he first purchased timeshare membership with the Supplier, he had been invited to fourteen presentations, refusing five invitations, not purchasing on six presentations he attended, and only making three purchases. So, from his own experience, he would've known the nature of the meetings he was attending.

- Mr F says alcohol was available at the sales presentations, but the Supplier says alcohol would only be offered after completion of a purchase.

- Mr F says he was always made to decide to purchase on the day and there was insufficient time for him to read through the contract carefully, but sales notes from the Time of Sale indicate that Mr F was left alone to consider the purchase and upon the Supplier's representative returning Mr F was happy to go ahead.

- Mr F says he was introduced to finance companies every time he purchased timeshares with the Supplier, but from his purchase history with the Supplier he did not always use finance when he made a purchase.

- The Supplier's sales notes from the Time of Sale indicate the main reason Mr F purchased the Fractional Club membership was because doing so meant he would no longer have to pay booking fees when booking holidays.

- The purchase meant that Mr F gained more holiday rights than he already owned, meaning he could holiday more often, for longer, or in better quality or larger accommodation.

- The sales documents say the primary purpose of the Fractional Club membership is for the purpose of holidays and not as an investment.

My provisional decision

I issued a Provisional Decision explaining that I was planning to uphold this complaint, and what I thought should happen to put things right. This gave Mr F and the Lender an opportunity to respond before I made my final decision. A copy of my provisional findings is included below and forms part of my final decision.

The PR replied on behalf of Mr F to say that he accepted in principle my Provisional Decision.

The Lender responded to say it disagreed with my provisional decision. It explained its reasons in detail, including the following points:

1. The Provisional Decision is premised on a material error of law in its approach to the prohibition under Regulation 14(3) of the Timeshare Regulations, and (further or alternatively) it errs in its application of that prohibition to the documents relevant to the sale.

a. It is inevitable that Mr F would've been told that he would receive a return on the sale of the Allocated Property, since that was a feature of Fractional Club membership. There is nothing wrong with this and it does not breach the prohibition in Regulation 14(3).

b. The Ombudsman has not stuck to the stated definition of investment. Instead taking the position that the mere existence of the prospect of a financial return constituted an investment and conflating the meaning of *"return on investment"* (a profit) and *"some money being returned"* (no suggestion of a profit).

c. The Lender denies Fractional Club membership was described to Mr F as an investment, given:

    i. The sales documents including the Information Statement make clear it is not an investment.

    ii. Mr F's witness statement does not reference the word investment. The Ombudsman's finding that Mr F alleges that membership of the Fractional Club was expressly described as an investment is erroneous and irrational as a matter of law.

    iii. Selling as an investment requires both the finding of a representation by the seller that the reason, or significant reason, for a customer to purchase the product was the prospect of financial gain or profit, together with a corresponding financial gain or profit motive on the part of the customer.

d. The sales presentation documents analysed in the Provisional Decision were not seen by Mr F at the Time of Sale.

e. Mr F signed documents including disclaimers as set out in the Provisional Decision, which were included to ensure customers understood the primary purpose of their purchase and to ensure compliance with Regulation 14(3).

f. A generic "advice disclaimer" in the documents made clear the vendor and related parties were "*not licenced investment advisors"*, that *"all purchasers are advised to obtain competent advice from legal, accounting and investment advisors to determine their own specific investment needs"*, and that *"no warranty is given as to any future values or returns in respect of an Allocated Property."*

g. The 2013/2014 Induction Training, ESA and Fractional Club Training Manual at no stage refer to the presence of the Allocated Property as an investment, nor that the purpose or benefit of the product was the opportunity to make a financial gain or profit on the initial outlay. On the contrary it indicated there would be a return of money after 19 years and *"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?"*

h. There is no suggestion or confirmation within the training materials that the return would be above the initial outlay. It carried no connotation of an "investment" or "profit".

i. References in the training materials to *"ownership of bricks and mortar"* is unobjectionable.

j. It is natural that steps are taken to ensure the return is as high as possible. But there is no comparison in the training materials between the expected level of the financial return as against the initial outlay in purchasing the product. The training materials only suggest that the customer would receive *some* of their money back. Which does not constitute an investment.

k. The Ombudsman says of the sales materials that the Supplier was promoting the notion that *"the prospective members were building equity in something tangible that could make them some money at the end".* But the training materials do not say *"make some money"*.

l. Any fair analysis of the training and contractual materials would conclude that the customer was told that their only investment was in holidays, and that *"some money"* would be returned, which may be a *"small part of your initial outlay"*.

m. In the County Court case of *Prankard v Shawbrook Bank Limited*, the judge considered evidence including about the Supplier's training programme and concluded the product had not been sold as an investment.

n. In the Provisional Decision the Ombudsman has made a material misstep in assessing whether there has been a breach of Regulation 14(3). The question instead should be, *"is there sufficiently clear, compelling evidence that the timeshare product was marketed or sold as an investment (i.e. for intended financial profit or gain as against the initial outlay)"*. That is not the question that has been asked or answered in the Provisional Decision. If it had been properly asked, the only reasonable answer would be that the underlying sales documentation provides no reason to consider there was any such marketing or sale as an investment. The Ombudsman has therefore misinterpreted Regulation 14(3) in conjunction with the contemporaneous documents and the Ombudsman's assessment of the same is incorrect.

2. The above errors, in turn, undermine the Ombudsman's approach to the witness testimony supporting Mr F's complaint.

a. The witness testimony is undated and unsigned and not supported by a statement of truth, so should not be relied on as being the testimony of Mr F.

b. There is insufficient reason to rely on the witness testimony given it is unsigned, undated, and contains errors and inconsistencies, making it unreliable. It is extremely brief, especially in respect of the allegation Fractional Club membership was sold as an investment.

c. Any reasonable person would want to know what the return would be on their investment. If Fractional Club membership was sold as an investment, Mr F would remember the projected value of his investment or what the likely return would be. But none of this information is included.

d. The Ombudsman has not provided any reasons why the PR was unable to provide the metadata or why the witness testimony was not provided with the Letter of Complaint or sooner than four years later.

e. The witness testimony was provided after the decision was issued in the case of *Shawbrook & BPF v FOS*. The Ombudsman discounts the risk of this given similarities with the allegations in the Letter of Complaint. But those similarities are inevitable when the witness testimony was written after the Letter of Complaint.

f. The Letter of Complaint was based on a template and is not specific to Mr F's circumstances. The reference to investment in the Letter of Complaint is vague and extremely brief. The Ombudsman's reasons for discounting the risk in accepting the witness testimony are insufficient and implausible.

g. Comments provided by Mr F in response to the Ombudsman are obviously going to reflect what was in the witness testimony. This suggests Mr F's views have been manufactured by the PR.

h. Mr F's allegations about Fractional Club membership being sold as an investment lack detail, which suggests this was not his real motivation for the purchase. Mr F's motivations were maximising his holiday experience, concerns about the long-term nature of his existing membership, not wanting his timeshare to pass to his beneficiaries, wanting exclusivity, improved holidays and availability. This is shown in the Letter of Complaint, witness testimony and the Supplier's notes made at the Time of Sale, and in line with his long history of timeshare ownership.

i. Mr F's real motivations included no longer paying booking fees and reduced management fees.

j. In 2010, Mr F was in the process of purchasing a freehold property in Turkey for around £94,000. Mr F, along with his brother, cancelled this purchase within their statutory rescission period. This information is integral to understanding Mr F's experience and understanding of timeshare products and indicates that Mr F knew the difference between property ownership and a holiday membership.

k. There are material inconsistencies between the witness testimony, Letter of Complaint and actual events:

    i. The Letter of Complaint says Mr F was under duress during the sale, but the Supplier's notes from the time say Mr F was *"left in the office to consider the offer"* and was *"happy to sign on return"*. Mr F's recollections contradict what happened on the day. There was no obligation to make the purchase.

    ii. Mr F says he wasn't fully aware he was letting himself in for a presentation. But he'd attended nine presentations between 2010 and 2018, and declined five further invitations, so would've known what he was letting himself in for. This has a greater impact on the veracity and reliability of the witness testimony that the Ombudsman has afforded it. Mr F and the PR have clearly tried to show he was tricked into attending the presentation, which is incorrect.

    iii. The witness testimony says the sale took place in Malaga, but it took place in Tenerife.

iv. Mr F was provided with a 14-day cooling off period giving him time to read through the contract. He has provided no reasons why he did not cancel the purchase within that period if he was pressured or under duress.

v. At the very least, the Ombudsman has to take the inaccuracies in Mr F's witness testimony into account when assessing its overall reliability, especially witness testimony which is unsigned and undated.

l. Any reliance on Mr F's testimony is unsafe. The Lender provided some examples of decisions by other Ombudsmen where it says the witness testimony was carefully analysed.

3. The Provisional Decision is premised on a material error of law in its approach to the legal test to determine the existence of an unfair relationship.

a. The Ombudsman appears to start from the position that prospect of a financial gain existed, but this was not insignificant enough for it not to render the relationship unfair. That is the wrong starting point and reverses the burden of proof. The starting point is to assess whether there is sufficient evidence of a material impact on the decision to enter the agreement. In the absence of this, the Ombudsman ought not to find an unfair relationship nor uphold the complaint.

b. Mr F's circumstances – he was a timeshare member for a long period of time, he had purchased on three occasions, he expressed happiness with the purchase, and his motivations for the purchase – mean that the actual sale of the timeshare did not have a material impact on Mr F's decision to enter into the purchase.

I discuss my further findings below in the section titled, *"What I've decided – and why"*.

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

- Case law on Section 140A of the CCA – including, in particular:
    - The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') (which remains the leading case in this area).
    - *Scotland v British Credit Trust [2014] EWCA Civ 790 ('Scotland and Reast')*
    - *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*').
    - The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*').
    - *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('*Carney*').
    - *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('*Kerrigan*').
    - *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').

Good industry practice – the RDO Code

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

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, including considering the additional comments made in response to my Provisional Decision, I still think that this complaint should be upheld. This is because I think the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr F as an investment, which, in the circumstances of this complaint, rendered the credit relationship between him and the Lender unfair to him for the purposes of Section 140A of the CCA (because in my opinion it was material to his decision to purchase FC Membership 2).

However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, while I recognise that there are a number of aspects to Mr F complaint, it isn't necessary to make formal findings on all of them. This includes the allegations that:

- Misrepresentations by the Supplier at the Time of Sale.
- The contract is unenforceable due to breaches of the UTCCR.
- Breach of fiduciary duty by the Lender.

This is because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr F in the same or a better position than he would be if the redress was limited to those aspects.

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.

Below is a copy of my provisional findings, which form part of my final decision.

START OF COPY OF PROVISIONAL FINDINGS

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

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between the Mr 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 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."*[1]

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

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in *Patel* (which was recently approved by the Supreme Court in the case of *Smith),* that determining whether or not the relationship complained of was unfair had to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"* – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it isn't a right afforded to a debtor simply because of a breach of a legal or equitable

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

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 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.

2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier.

3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale.

4. The inherent probabilities of the sale given its circumstances.

I have then considered the impact of these on the fairness of the credit relationship between Mr 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 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."*

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 F's share in the Allocated Property clearly, in my view, constituted an investment as it offered him the prospect of a financial return – whether or not, like all investments, that was more than what he 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 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 him as an investment, i.e. told him or led him to believe that Fractional Club membership offered him the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

Mr F has not made a specific allegation that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale. But this is a relevant consideration given that he alleges his relationship with the Lender was unfair on him. He has said the following during this complaint:

- In the Letter of Complaint, the PR said:
    - *"The [Supplier] insisted to [Mr F] that the fractional points would be a fantastic investment as they would own a fraction of the property."*
    - *"This was very appealing to [Mr F] as they believed that they would be joint owners of the property, so it appeared to [Mr F] that the product was more of an investment, rather than an interest to secure holidays."*
    - *"This notion was reinforced, when the Resort assured [Mr F] that when the agreement expired, the property would be sold, and all proceeds would be divided between members who had invested."*
    - *"The Resort assured [Mr F] that the sale of the property was guaranteed to take place after 15 years and that they would at minimum receive their initial investment back."*
    - *"[Mr F was] advised that the purchases were a great investment opportunity and that they were guaranteed to make a profit from the purchase."*
- Mr F's witness statement:
    - *"In 2015 I was invited to attend an information update session and I was persuaded to upgrade within the Fractional Ownership system… The benefits [c]ited were as before [In relation to the 2012 sale: … had an end date and is not passed on to my children, the investment side of the product was pushed … I would get a good return for my money… the maintenance fees would be reduced] but the investment side was very persuasive."*
    - *"I was advised there was a thriving Timeshare resale market and given verbal examples of what I might expect my returns to be. I was even advised that [the Supplier] could be very interested in buying back after a few years."*

In addition to the above, I asked Mr F for some further comments about why he

entered into the Purchase Agreement, which he provided on 10 December 2024. In my opinion, what he said in response clarifies that, because of what the Supplier told him, he held out the hope of making a profit on what he paid for the upgrade of Fractional Club membership at the Time of Sale:

- *"In 2015 I was invited to attend an Information Update Session as the [the Supplier] staff said there had been many changes since 2012 and in the way [the Supplier] operated Fractional Ownership. I realise now this was a hook to present a sales opportunity. The sales team pushed the purchase of property in Turkey to be managed by [the Supplier], after rejecting this they went on to push the investments benefits side of Fractional Ownership as before and described newer sites with higher value properties making the case that the [resort where the Allocated Property was located] would be more profitable.*

  I was advised there was a thriving Timeshare resale market and given verbal examples of what I might expect my returns to be. I was also told that [the Supplier] could be interested in buying back after a few years as they expected values to rise. I upgraded my membership to take advantage of what I thought were real opportunities for my original investments to grow."

I say this because Mr F has indicated that his reason for entering into the Purchase Agreement was that he was told by the Supplier that the Allocated Property was likely to be more profitable than the existing property that he owned a fraction of under FC Membership 2.

This suggests that the Supplier breached Regulation 14(3) at the Time of Sale because Mr F was told by the Supplier that he would get a good return on his investment and make a profit.

I think in the context of Fractional Club membership being described to Mr F as an investment, to then tell Mr F that he would get a good return for his money points to a potential profit on the purchase price, rather than him simply getting something back (but no more than he paid for it). That is an important distinction given the definition of investment that I am using. So, in light of Mr F having made this allegation, I then must consider how plausible and persuasive that is, bearing in mind all the circumstances and evidence in this complaint.

There is evidence 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 F, the financial value of his 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 F as an investment, including the following:

- The member's declaration initialled and signed by Mr and Mrs R included the following points (number 5 of 15):

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

- The 12-page information statement included the following on page 2:

- Fractional rights have been designed to be used and enjoyed and not bought with the expectation or necessity of future financial gain.

- And the following on page 8:

  - Primary Purpose: The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for direct purposes of a trade in nor as an investment in real estate. [the Supplier] makes no representation as to the future price or value of the Allocated Property or any Fractional rights.

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And there are several strands to Mr 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*" and (2) that membership of the Fractional Club could make him a financial gain or profit.

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 F or led him to believe during the marketing and/or sales process that membership of the Fractional Club was an investment and/or offered him the prospect of a financial gain (i.e., a profit); and, in turn

(2) whether the Supplier's actions constitute a breach of Regulation 14(3).

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

How the Supplier marketed and sold the Fractional Club membership

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

1. A document called the 2013/2014 Sales Induction Training (the '2013/2014 Induction Training').

2. Screenshots of an Electronic Sales Aid (the 'ESA').

3. A document called the "FPOC2 Fly Buy Induction Training Manual" (the 'Fractional Club Training Manual').

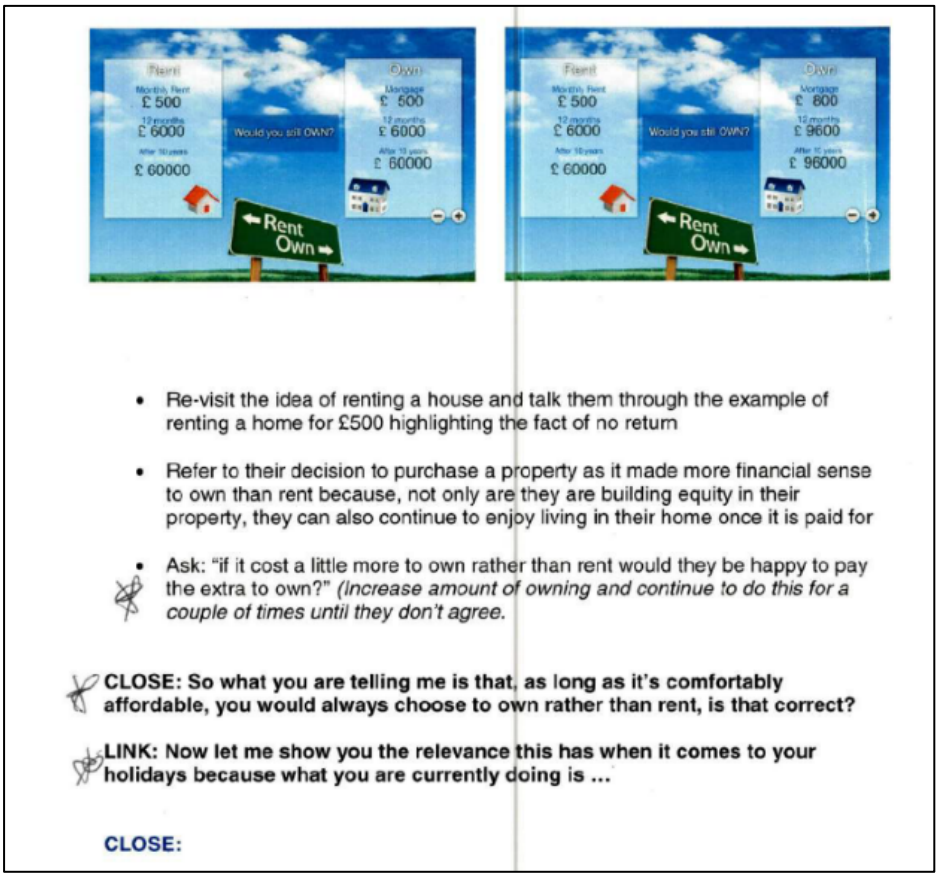
Neither the 2013/2014 Induction Training nor the ESA I've seen included notes of any kind. However, the Fractional Club Training Manual includes very similar slides to those used in the ESA. And according to the Supplier, the Fractional Club Training Manual (or something similar) was used by it to train 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 F.

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 ...

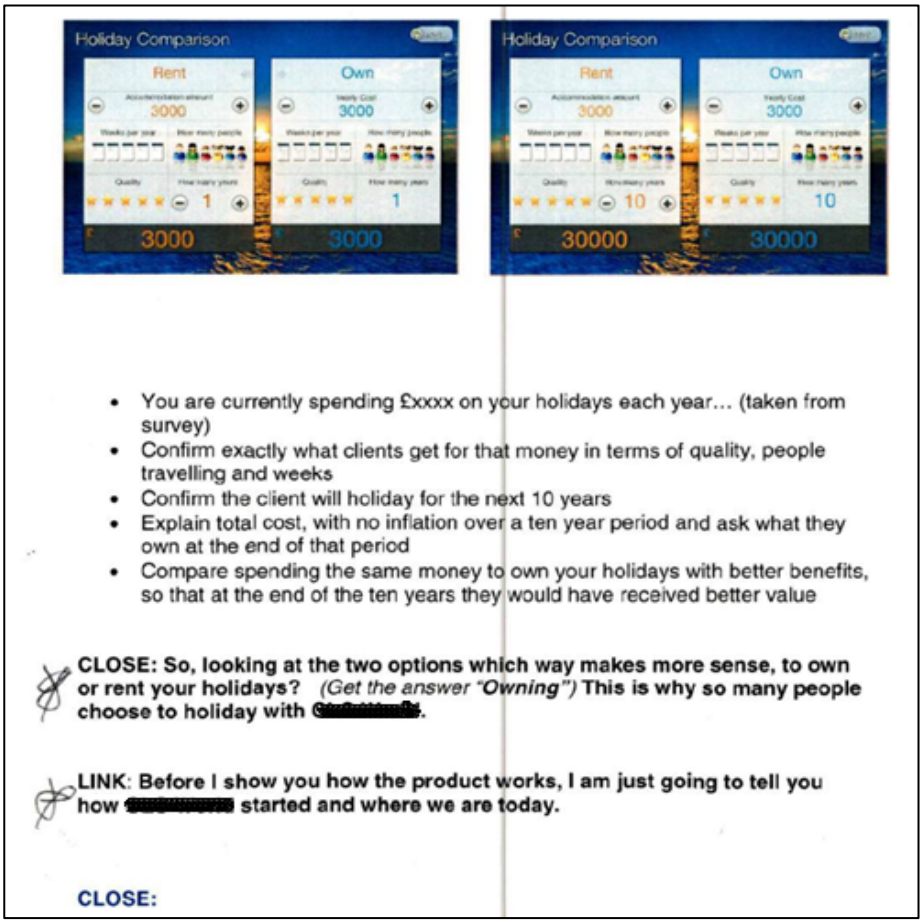
CLOSE:

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 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:



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

> *“FPOC = small piece of […] World apartment which equals* ***ownership of bricks and mortar***
>
> *[…]*
>
> *Major benefit is the property is sold in nineteen years* ***(optimum period to cover peaks and troughs in the market)*** *when sold you will get your share of the proceeds of the sale*

SUMMARISE LAST SLIDE:

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

[…]

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

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

(My emphasis added)

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

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

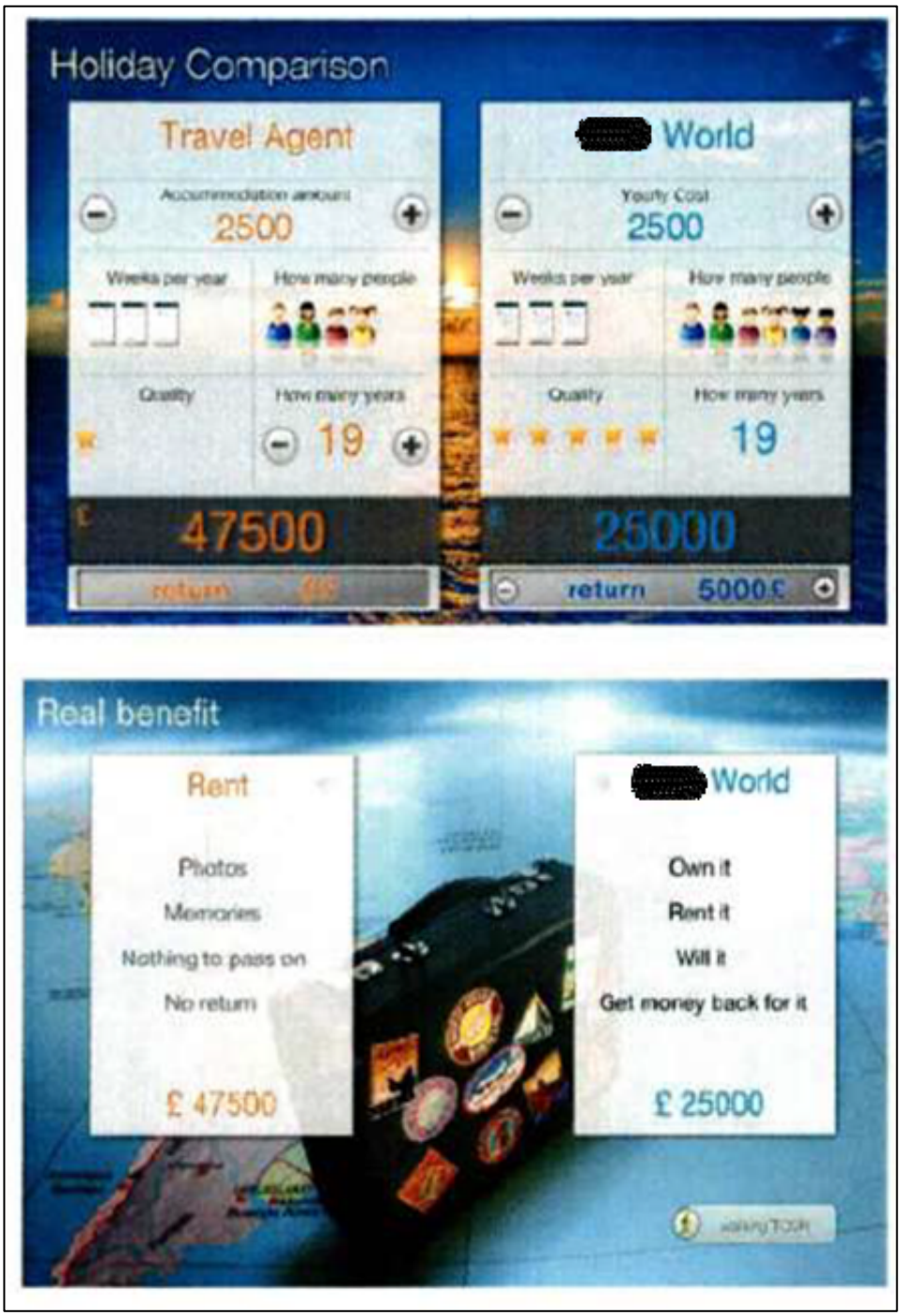
[…]

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

(My emphasis added)

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

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



[…]

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

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

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

(1) The right to receive holiday rights for 19 years whose market value significantly exceeds the costs to a Fractional Club member; plus

(2) A significant financial return at the end of the membership term.

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

I also acknowledge that there was no comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mr F the financial value of the proprietary interest he was 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)).'*[2] 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 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*

[2] 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

proceeds of a postponed sale of a property owned by a timeshare company – one they have no right to stay in meanwhile – is persistently elusive."

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

[My emphasis added]

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

Overall, therefore, as the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members, they indicate that the Supplier's sales representative was likely to have led Mr F to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e., a profit) in the future. And with that being the case, I don't find it either implausible or hard to believe when Mr F says he was told that the Fractional Club membership was an investment on which he would get a good return (that is, a financial gain or profit). Overall, I think that's likely to be what Mr F was 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 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 F and the Lender that was unfair to him 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 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) led him to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

As explained above, Mr F says that he entered into the Purchase Agreement on the basis that the Supplier had told him that the Allocated Property was likely to lead to a greater profit than what he'd get with his existing Fractional Club membership. So, he was hoping to benefit from growing his investment. I must consider whether, in the circumstances of this complaint, what Mr F has said is sufficiently plausible and persuasive for me to conclude that:

1. The supplier did breach Regulation 14(3) during the sale, and

2. That was an important reason why Mr F entered into the Purchase Agreement and Credit Agreement.

How much weight should I give to Mr F's recollection of what happened at the Time of Sale?

The Lender has made several points to suggest that Mr F's recollection of what happened at the Time of Sale was inconsistent or unreliable, such that it should not be given significant weight in reaching my decision.

I accept the witness statement was unsigned and it was not initially clear when it was written – given it was first provided to the Financial Ombudsman Service in December 2023. The PR has also been unable to provide conclusive evidence (such as digital metadata) showing when the witness statement was written. But I think it was most likely written around the same time as the Letter of Complaint. I say this because:

- Many of the points in the Letter of Complaint also appear in the witness statement and you would expect that Mr F's recollections and statement would inform the contents of the Letter of Complaint.

- The PR has confirmed the witness statement was prepared around the time the Letter of Complaint was written.

- Mr F's recent comments about what happened are consistent with what is said in the witness statement – particularly around how FC Membership 2 was described to him as an investment (as defined above).

The witness statement does have details specific to Mr F, including for example that he was first introduced to the Supplier's timeshares by his brother-in-law and was impressed by its resorts. Mr F's later comments, provided to us directly rather than via the PR, also contained the same details, which suggests that Mr F wrote the witness statement, or that it was written based on what he told the PR prior to the Letter of Complaint being sent to the Lender.

There are some things in the witness statement, such as Mr F being told the Supplier would buy back the Fractional Points after a few years, and that alcohol was available during the sales presentation, that the Lender says don't match up with the Supplier's processes. However, that does not necessarily mean that Mr F's recollection is unreliable. It could be that the Supplier's processes were not properly followed, so that he was given inaccurate information or given the wrong impression about selling on or selling back the Fractional Points.

On the point about the provision of alcohol, the Lender says that many customer complaints have made similar points and suggests the Letter of Complaint (and witness statement) is generic rather than based on Mr F's recollections. But I think the point could also be made that if many customers remember the same thing, it may be because that is what they all experienced. While making this point, Mr F says he declined the offer of alcohol, so this is not a case where the point has been made to suggest that Mr F's judgement may have been impaired at the Time of Sale through being inebriated. And again, I think this detail points to the recollections

being Mr F's own rather than anything else. In any case, this appears to be a minor point, and even if Mr F misremembered this detail, that does not necessarily mean everything he recalls is wrong or should be discounted as evidence.

On the point about Mr F saying the sales presentations were disguised as update meetings about membership, rather than sales presentations, I accept that he probably knew what he was getting into having attended several such meetings before. But that doesn't mean the Supplier was open about the likelihood of it trying to sell further memberships or upgrades to Mr F prior to the meeting. Again, many consumers have made similar complaints about how the Supplier positioned these meetings. And in this case the sale in 2015 did involve a different version of Fractional Club membership to what Mr F already held, so it is plausible that the Supplier would've suggested the meeting to initially discuss those differences to see whether Mr F was interested in upgrading. Presumably if he had no interest at that stage the Supplier's representatives would've ended the meeting.

Mr F's recollection of his membership history does not significantly differ to what the Lender has told us. And he has said that when purchasing Fractional Club membership in 2012 and 2015 it was described as an investment and that this aspect of the offer was attractive to him. I think this indicates that Mr F has been consistent in his recollections of how the Supplier positioned Fractional Club membership when selling it to him.

The Lender says that Mr F is mistaken when he says he was always introduced to finance companies by the Supplier during sales meeting. The Lender says this is wrong because Mr F made some timeshare purchases over the years without using finance. But I don't think that necessarily means he is mistaken. It may be that he was offered finance but declined it. In any case, even if Mr F was mistaken about this, that is not so fundamental as to call into question everything else he recalls.

Overall, I think that Mr F's recollections provided to us in the witness statement and his later comments do reflect his own recollections from the Time of Sale. And that these, given the wider circumstances and all the other evidence in this case, are both plausible and persuasive in terms of what happened at the Time of Sale and his reasons for entering into the Purchase Agreement.

I'm mindful that the witness statement and Mr F's later comments were both provided to us after the judgement in *Shawbrook & BPF v FOS*. So, there is some risk (if the witness statement was only recorded after that time) that Mr Fs recollections are tainted by the PR's knowledge that a breach of Regulation 14(3) might lead to a complaint like this being upheld.

But in this case, I am of a mind to accept what Mr F has said as being his true recollections, which I should give significant evidential weight to. This is because:

- The recollections in the witness statement about the Fractional Club being described by the Supplier as an investment match the allegation first made in the Letter of Complaint, which was dated 10 January 2019, some years before the judgement in Shawbrook & BPF v FOS. The Letter of complaint clarified that Mr F was told he would make a profit when the Allocated Property was sold.

- The Letter of Complaint does not make the specific argument about a breach of Regulation 14(3) but nevertheless points to a breach by virtue of the

allegations within the letter about the actions of the Supplier at the Time of Sale.

- The allegation and Mr F's recollections of the Supplier selling Fractional Club membership as an investment are consistent across the Letter of Complaint, the witness statement, and Mr F's later comments to us.

- The surrounding circumstances of the sale, which I discuss further in the section below, suggest that Mr F's recollections on this point are very plausible.

Other reasons for entering the Purchase Agreement

The Lender has pointed to the Supplier's notes from around the Time of Sale, which suggest the main reason Mr F made the purchase was due to the reduced booking fees. When providing a copy of the Supplier's notes to us, the Lender also provided further comments on what Mr F had said in his later comments to us, including the following:

- Mr F used the additional points purchased to book holidays, meaning he got a higher standard of holidays following the upgrade. While he only got 92 additional points, this would've been sufficient to book a higher standard of accommodation or a better resort than was possible without those points. The Supplier provided examples ranging from 40 points enabling a week in what it says is a higher specification resort.

- As well as saving on booking fees (which were not payable after the upgrade) Mr F was keen to benefit from lower management charges – a saving of €354 in 2015, which over the 17-year membership would amount to a saving of at least €6,018. This would mean that overall Mr F would save more than the purchase price before taking into account money included in the agreement towards management charges (€339.54) and a £600 travel saving bonus.

I am not persuaded that an increase in Fractional points was an important factor in Mr F's decision to purchase FC Membership 2. The increase appears minimal. And although the Supplier says it could make a difference to the quality of accommodation or resort that Mr F could book and has provided some examples which it says illustrates this, it does not seem very plausible to me that this would've been an important factor in Mr F's decision to purchase. There is nothing to indicate that Mr F was unhappy with the quality of accommodation he was able to use with his existing membership, and nothing to indicate that Mr F was given examples of what difference this might make at the Time of Sale. Without such examples it seems unlikely that Mr F would've assumed such a small increase in points would lead to any significant benefit in terms of what he could book.

I do not think I can draw any conclusions from Mr F apparently using all his annual points to book holidays. Afterall, it would seem strange for Mr F to not us the Fractional points once he had paid for them. It seems more likely to me that the additional points were just a function of the Allocated Property and the fractions he was purchasing in it being worth a slightly greater number of points than he got with FC Membership 1. And with that in mind I think there must have been another reason or reasons for him making the purchase – especially given the price he paid.

That brings me on to booking fees and management charges. I accept that it is likely that there would've been a discussion about booking fees and management charges at the time of sale, in that following the upgrade Mr F would not have to pay booking fees, and that he would've been told what his first-year management charge would be – given it is shown on the Member's Declaration, which he signed, as being €2,476.00 for 2015.

Having said this, the witness statement specifically says that Mr F was not given any long-term projection of the management charges, that he did not have a clear idea of what Fractional Club membership would cost over time, and that booking fees were not important in his decision to enter into the Purchase Agreement.

Overall, I am not persuaded that removing booking fees and lower management charges are likely to have been of such importance to Mr F that it was the main reason for the purchase, or that Mr F would've gone ahead with the purchase if the Supplier hadn't also sold the upgrade on the benefit of owning a fraction of a more valuable Allocated Property – and the possibility of an increased profit when it was sold.

My understanding is that prior to the upgrade, Mr F was paying booking fees of 15 pence per fractional point used. His existing membership included 2,988 annual fractional points. So, his potential saving each year would've been a maximum of £448.20 at that time. The notes made at the Time of Sale suggest that this was a factor in Mr F's decision to upgrade. They do not mention that Mr F was upgrading due to lower management charges or that a saving on management charges was of importance to his decision to enter into the Purchase Agreement – nor that he was given any information about what the saving would be in the first year or over the membership term.

Mr F himself has said that he doesn't recall paying booking fees except for bookings with affiliate resorts. I can see that he is mistaken in this, because he was paying booking fees to stay in the Supplier's resorts before the upgrade. But then he stopped paying booking fees following the upgrade, and that was almost a decade prior to Mr F making this comment. So, it is perhaps understandable that he no longer remembers this. He also said booking fees were not an important factor in his decision to enter into the Purchase Agreement, which again may explain why he does not recall this part of the sales presentation/discussion.

Given the note made by the Supplier at the Time of Sale, it seems likely that booking fees were discussed. And that Mr F no longer paying these was an attractive prospect to him at the time. But that does not mean it was the only reason he decided to enter into the purchase. It seems unlikely that the Supplier would've recorded that Mr F was entering into the purchase wholly or in part because he saw it as an investment even if he was – given the prohibition on the Supplier marketing or selling Fractional Club membership as an investment.

It seems likely to me that if booking fees were a consideration for Mr F at the Time of Sale, they were most likely only one factor in his decision to enter into the purchase. The other being increasing his investment and therefore the potential profit he might make from Fractional Club membership – which he says was the main reason for the purchase. The Supplier valued FC Membership 2 at the Time of Sale at £49,197, as shown on its Pricing Summary setting out the purchase price and trade-in value of FC Membership 1. This means his payment of £5,795 was about a 13% increase on top of the trade-in value (£43,402) given to his existing membership. Given he was only increasing his Fractional points by about 3%, I think it is plausible when Mr F

says that what he was paying for was mainly a share in a more valuable apartment than he owned fractions of under FC Membership 1.

I've seen nothing beyond the Lender's comments that the savings on management charges were important to Mr F's decision to enter into the Purchase Agreement. The witness statement suggests that Mr F was given no projections about what his management charges would be over the term of membership, which calls into question whether the management charge savings over the long term were discussed with him at the Time of Sale in the context of a saving being a benefit of the upgrade. For example, this was not mentioned as a factor in Mr F's decision in the Supplier's notes, despite the booking fees being mentioned. So, I don't think I can reasonably conclude that reduced management fees were an important factor in Mr F's decision to purchase.

So, given the circumstances of the sale, I think it is likely that Mr F decided to enter into the Purchase Agreement in part because of reduced booking, but mainly because he saw it as an investment that would increase the potential profit he could make at the end of his membership term.

Summary – was the credit relationship unfair?

Overall, I am satisfied that the prospect of a financial gain from Fractional Club membership was an important and motivating factor when Mr F decided to go ahead with his purchase. That doesn't mean he had no interest in the other benefits of upgrading. But I am not persuaded that those other benefits were the main reason he entered into the Purchase Agreement, given all the circumstances of this complaint.

Mr F says (plausibly in my view) that Fractional Club membership was marketed and sold to him at the Time of Sale as an investment, and that the chance of making a bigger profit from owning a fraction of a more valuable property was very attractive to him. And in all the circumstances of this complaint I also find what he has said is persuasive as well.

This means I have concluded that Mr F's purchase of FC Membership 2 was motivated by his share in the Allocated Property and the possibility of a bigger profit when the Allocated Property was sold (compared to the property allocated to FC Membership 1). And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision he ultimately made.

I am not persuaded that Mr F would have pressed ahead with the purchase in question had the Supplier not led him to believe that Fractional Club membership was a better investment opportunity. And as Mr F faced the prospect of borrowing and repaying a substantial sum of money while subjecting himself to long-term financial commitments, had he not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I am not persuaded that he would have pressed ahead with his purchase regardless.

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr 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.

My further findings following responses to my provisional decision

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

In my Provisional Decision, I noted that, to breach Reg.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 Provisional Decision 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 too narrow a view of my Provisional Decision and overlooks that part of my Provisional Decision that reads:

> *"Mr 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 Reg.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 Reg.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 Reg.14(3).

But with that said, there seem to me to be many ways of marketing and selling a timeshare as an investment, without necessarily referring to (or even including) an allocated property. And if the Supplier said and/or did something in relation to an allocated property and/or Fractional 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 Reg.14(3).

With that in mind, therefore, I will first consider the sales and marketing materials more generally, before turning to the evidence Mr F has supplied in this case.

Sales and marketing materials

As I acknowledged in my Provisional Decision, 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, in the Member's Declaration, it said:

> *"5. We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for the direct purpose of a trade in and that CLC makes no representation as to the future price or value of the Fraction."*

As The Lender has pointed out, Mr F signed the Member's Declaration confirming that that had read and understood its contents. I do not think however that he signed the document to say he 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 an Information Statement. 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. But they had to be read along with the other things in the Information Statement, which included the following disclaimer:

> *"11. Investment advice*
>
> *The Vendor, any sales or marketing agent and the Manager and their related businesses (a) are not licensed investment advisors authorized by the Financial Services Authority to provide investment or financial advice; (b) all information has been obtained solely from their own experiences as investors and is provided as general information only and as such 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.

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 F, had already been through a lengthy sales presentation. So that is why the training materials referred to in my Provisional Decision are important.

In response to my Provisional Decision, The Lender says that it does not accept that the training materials was shown to Mr F at the Time of Sale. However, I have not been provided with any slides or other marketing material that the Supplier says would have been shown to Mr F at the Time of Sale. In light of that, I repeat my finding from my Provisional Decision 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 sale staff were likely to have framed any presentation during the sale.

The Lender also says that the training material did not expressly refer to Fractional Club membership as an investment. And I agree with that observation. But I think The Lender takes too narrow a view of the prohibition against marketing and selling timeshares as an investment in Reg.14(3). In my opinion, the Supplier did not have to expressly refer to Fractional Club membership as an investment to breach Reg.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 Provisional Decision that Reg.14(3) was breached by the Supplier at the Time of Sale, but rather it was a combination of all of evidence available, which included the documents from that time, Mr 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 parts I highlighted in my Provisional Decision were unobjectionable and that it was unsurprising that there was emphasis on the 19-year period as:

> *"given that the proceeds of selling the Allocated Property will be returned to customers, it is natural that steps are taken to ensure that the return is as high as possible. Nobody would expect the intention to be that the amount returned at the end of the timeshare period would be as low as possible, or anything other than as much as possible. But the significant point is that there is no comparison between the expected level of the financial return as against the initial outlay in purchasing the product, the primary focus of which was to provide holidays."*

However, as I explained in my Provisional Decision, I think it is too narrow an approach to take to only find that there was a breach of Reg.14(3) if the likely return from that sale of the Allocated Property was expressly quantified by the Supplier.

The training material to which I referred to in my Provisional Decision indicates that the Supplier was likely to have implied to a prospective purchaser that they were buying an interest in 'bricks and mortar', with an emphasis on there being a financial return based on the ownership of a tangible asset, the value of which was maximised thanks to the length of

the nineteen-year membership term. When taken together with Mr 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 I think is enough to find there was a breach of Reg.14(3) by the Supplier when considering all the evidence in this case.

The Lender has pointed to the case of *Prankard v Shawbrook Bank Ltd* where the judge ruled Fractional Club membership had not been sold as an investment. Looking at the judgement, it seems that the testimony of Mr and Mrs Prankard was key in the decision made in that individual case. The judge was not persuaded when considering their testimony, alongside the other evidence, that Mr and Mrs Prankard's timeshare was sold as an investment. In Mr F's complaint, I have considered his recollections of what happened at the Time of Sale alongside all the other evidence in this individual complaint and reached what I consider to be a fair and reasonable decision to uphold the complaint.

Mr F's evidence

The Lender says that Mr F's witness statement is unsigned, undated, and contains material inconsistencies or inaccuracies that mean I ought not to place significant weight on it.

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

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).

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).

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).

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 F said happened and what other evidence shows. The question to consider, therefore, is whether there is a core of acceptable evidence from Mr F 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.

I acknowledged in my Provisional Decision that the witness testimony was unsigned and undated and that there were some potential inconsistencies or inaccuracies compared to other evidence. But I explained my reasons for nevertheless taking the witness statement into consideration and why I found parts of it persuasive in relation to what is likely to have happened at the Time of Sale. I appreciate that the Lender disagrees with my reasoning and conclusions, but it is for me to make a decision based on what is in my opinion fair and reasonable in all the circumstances of this complaint.

The PR has indicated that the witness statement was posted to it by Mr F alongside other documents and was received by the PR on 5 December 2018. To get the metadata for the original typed witness statement, this would require the original digital file. The PR confirmed that Mr F could not locate this. While this is disappointing, I do not find this an implausible explanation given the time that has passed since that file was created. Had the original file been sent to the PR by email, for example, I may have expected this information to be available and read more into this to reach a different conclusion about how much weight I could place on Mr F’s witness statement. But that is not the case.

The Lender says that Mr F does not reference the word investment in the witness statement. But this is clearly incorrect. In relation to the Time of Sale, Mr F says:

- *“The benefits [c]ited were as before but the investment side was very persuasive.”*

The Lender says that I was wrong to make a finding that Mr F alleged that membership of the Fractional Club was expressly described as an investment. Even if I was wrong to make that finding, Mr F’s statement calls back to what he said about the sale of FC Membership 1, when he said that the benefits cited at the Time of Sale were the same as in 2012. These benefits included the following:

- *"The investment side of the product was pushed and I was assured that the property would be sold after a period of 19 years and that I would get a good return for my money."*

So, I think that Mr F has clearly stated that Fractional Club was described to him as an investment at the Time of Sale. Whether that was expressly by using the word "investment" or only implied does not, in my opinion, make a difference. Because, in my view, both would be a breach of the prohibition in Regulation 14(3).

The Lender says that if Fractional Club membership was sold as an investment, then Mr F would've wanted to know and would remember what the likely return would be. Mr F says he was *"given verbal examples of what I might expect my returns to be"*, but he has not specified what he was told. I do not think that significantly undermines what he has said about the *"investment side of the product"* being pushed during the sale. If Mr F was given such examples, this would support his allegation of FC Membership 2 being marketed or sold to him as an investment. The Information Statement somewhat undermines this part of Mr F's recollections, and the Lender says the Supplier would not have provided such examples. But it is not impossible that the salesperson would've done this, despite the Supplier's intentions that they would not do so. And even if the salesperson did not do so, that would not necessarily lead to the conclusion that Mr F was wrong to recall that FC Membership 2 was sold to him as an investment.

I also note that the Lender has said that Mr F was mistaken in his witness statement about where the sale of FC membership 2 took place. But I can see he attended a significant number of sales presentations involving timeshares over the years. So, I do not think it significantly undermines the rest of his recollections if he has misremembered where this particular sale took place.

The Lender seems to suggest that Mr F's views may have been manufactured by the PR. But given the evidence I have seen in this case I am not persuaded this is what happened. I think it is more likely that Mr F has provided his honest recollections of what happened at the Time of Sale. The PR is a regulated Claims Management Company, so if the Lender has evidence of such actions by the PR it can inform the relevant regulator.

I acknowledged in my provisional decision that Mr F had more than one motivation for entering into the Purchase Agreement. But I concluded that the Supplier's breach of Regulation 14(3) was material to his decision.

I appreciate the Lender disagrees with my conclusions in this finely balanced complaint. But overall, I am not persuaded to change my conclusions from those set out in my provisional decision and above. So, I have decided to uphold this complaint.

Fair Compensation

Having found that Mr 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 him back in the position he would have been in had he not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr F agrees to assign to the Lender his Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr F was an existing Fractional Club member ('FC Membership 1'), and his membership was traded in against the purchase price of Fractional Club membership in question ('FC Membership 2'). Under FC Membership 1, he had 2,988 Fractional Points. And, like FC Membership 2, he had to pay annual management charges as part of FC Membership 1. So, had Mr F not purchased FC Membership 2, he would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr F from the Time of Sale as part of FC Membership 2 should amount only to the difference between those charges and the annual management charges he would have paid as part of FC Membership 1. In this case the Lender says Mr F paid less in annual management charges under FC Membership2. That being the case, then to put Mr F in the position he would've been in if he hadn't entered into the Purchase Agreement, the Lender can deduct the amount he saved from the settlement – see (2) below.

I'm conscious that, under FC Membership 1, Mr F was entitled to a share in an allocated property. It isn't clear if, considering that fact, he wants FC Membership 1 reinstated nor, in turn, whether that can be achieved to the satisfaction of both parties to it. If he wants FC Membership 1 reinstated, he can let me know in response to this provisional decision.

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

(1) The Lender should refund Mr 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 (or deduct from the settlement if he paid less under FC Membership 2) the difference between the annual management charges paid after the Time of Sale under FC Membership 2 and what Mr F's annual management charges would have been under FC Membership 1 had he not purchased FC Membership 2.

(3) The Lender can deduct:

i. The value of any promotional giveaways and travel saving bonuses that Mr F used or took advantage of; and

ii. The market value of the holidays* Mr F took using FC Membership 2 *if* the Points value of the holidays taken amounted to more than the total number of Fractional Points he would have been entitled to use at the time of the holidays as an ongoing FC Membership 1 member. However, this deduction should be proportionate and relate only to the additional Fractional Points that were required to take the holidays in question.

For example, if Mr F took a holiday worth 2,550 Fractional Points after the Time of Sale and he would have been entitled to use a total of 2,500 Fractional Points under FC Membership 1 at the relevant time, any deduction for the market value of that holiday should relate only to the 50 additional Fractional Points that were required to take it. But if he would have been entitled to use 2,600 Fractional Points under FC Membership 1, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

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

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

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

(6) If Mr F Fractional Club membership is still in place at the time of this decision, as long as he agrees to hold the benefit of his interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify him against all ongoing liabilities as a result of his 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 F took using his Fractional Points, deducting the relevant annual management charges (that correspond to the years in which one or more holidays were taken) payable under the Purchase Agreement seems to me to be a practical and proportionate alternative to reasonably reflect his usage.

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

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 13 June 2025.

Phillip Lai-Fang
Ombudsman