DRN-5531805

The complaint

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

Background to the complaint

Mr and Mrs H's previous timeshare purchases

In 2001, Mr and Mrs H purchased a timeshare, which gave them 50 annual points to spend on holidays. These points were later converted into 5,000 annual European Collection Points after the original timeshare provider was taken over by another company (the 'Supplier').

Mr and Mrs H increased their annual European Collection points through further purchases in 2004, 2007, 2008 and 2009. By then they had 30,000 annual European Collection points to spend on holidays with the Supplier and its affiliates.

The purchase which is the subject of this complaint

On 22 March 2013 (the 'Time of Sale'), Mr and Mrs H agreed to buy 35,000 fractional points, trading in their 30,000 European Collection points for 30,000 fractional points and purchasing an additional 5,000 fractional points (an increase of about 17% in their holiday purchasing power) to become members of the Supplier's Fractional Property Owners Club (the 'Fractional Club').

The transaction was valued at £58,800, and was paid for as follows:

- Trade-in value of 30,000 European Collection points at £1 per point - £30,000
- A loan (the 'Credit Agreement') with the Lender in Mr H's name - £28,800

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

Mr H paid off the Credit Agreement on 14 April 2015.

The complaint

Mr H – using a professional representative (the 'PR') – wrote to the Supplier on 22 February 2019 stating that they wished to give up their Fractional Club membership due to Mrs H's health and a change in their financial circumstances.

Then, on 4 March 2019, Mr H – using the PR – wrote to the Lender (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 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.

Because the Credit Agreement was solely in Mr H's name, only he has the right to complain about his relationship with the Lender. So, from this point in this decision I will mostly refer to Mr H. But this should be taken to mean Mr and Mrs H where appropriate, for example when I am referring to their joint membership of the Fractional Club or their existing European Collection membership which they traded in as part payment for the Purchase Agreement.

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

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

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

2. Told him that Fractional Club membership was an "investment" when that was not true.

Mr H 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 H.

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

The Letter of Complaint set out several reasons why Mr H 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 Supplier's misrepresentations at the time of sale, as set out above.

2. Fractional Club membership was marketed and sold to him as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').

3. The Lender paid commission to the Supplier without telling Mr H about this.

4. Mr H was pressured into purchasing Fractional Club membership by the Supplier.

5. The Lender did not comply with the Finance & Leasing Association's Code of Conduct, including by not carrying out a proper assessment of whether Mr H could afford the loan.

The Lender dealt with Mr H's concerns as a complaint and issued its final response letter on 29 March 2019, rejecting it on every ground.

Referral to the Financial Ombudsman Service

Mr H then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, upheld the complaint on its merits.

The Investigator thought that the Supplier had marketed and sold Fractional Club

membership as an investment to Mr H 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 H 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.

Provisional Decision

I issued a Provisional Decision on 1 April 2025, explaining that I was planning to uphold the complaint. I explained my reasons in detail and gave the Lender and Mr H (and the PR) an opportunity to respond with anything else they wanted me to take into account when making my final decision.

The PR responded to say that Mr H agreed with my provisional decision.

The Lender responded, providing its own comments and those of the Supplier alongside a significant amount of information that it said illustrated the Supplier's policies and procedures relating to the sale of Fractional Club membership at the Time of Sale. This included evidence provided in some County Court cases and a complaint from another customer that was previously considered by the Financial Ombudsman Service.

In summary, the Lender said that in Mr H's case the lack of evidence of Fractional Club membership being sold as an investment (as opposed to the prospect of financial return) means that there is no breach to impact upon the fairness of the relationship.

The Lender expanded on this, including by making 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 in its reliance on the underlying documentation in support of the Fractional Sale. In the provisional decision's framing of the relevant test and the approach to the underlying documentation, the Lender believes that the Ombudsman has made a material misstep in assessing whether there has been a breach of Regulation 14(3). The question the Ombudsman should ask is: is there sufficiently clear, compelling evidence that the timeshare product was marketed or sold as an investment (i.e. for intended financial gain or profit as against the initial outlay)? If this question had been properly asked, the only reasonable answer would be that the underlying sales documentation and training material provides no reason to consider there was any such marketing or sale.

   The correct legal approach:

   a. It is a feature of Fractional Club membership that the customer will receive a return at the end of their membership term, being their share of the net sale proceeds of the Allocated Property, and that they will be told about this along with the other features of the product. This does not breach Regulation 14(3).

   b. The provisional decision sets out the definition of investment but departs from this by conflating the meaning of a "return on investment" (a profit) with the "some money being returned" (no connotation of investment or profit).

c. The Ombudsman errs in concluding that, in the absence of contemporaneous evidence about the Fractional Sale, it is appropriate to make inferences on the balance of probabilities about how such a sale would have been conducted. The inferences made contradict the Ombudsman's acknowledgement that there is nothing inherent in Fractional Club membership that contravenes Regulation 14(3).

d. Rather than considering that contemporaneous evidence alongside the other information provided by the Lender and the Supplier and weighing it against the customer's subsequent testimony, the Ombudsman dismisses the disclaimers (which were included in contractual documents signed by Mr and Mr H) by simply saying "weighing up what happened in practise is, in my view, rarely as simple as looking at the contemporaneous paperwork."

e. Whilst the Ombudsman acknowledges the extensive submissions made by the Supplier about how it sold fractional memberships, the Ombudsman does not appear to have adequately considered this evidence and makes generic inferences about how the product was sold. The Ombudsman is not entitled to rely on generic features of fractional products and conclude that a specific customer must have been sold a specific product as an investment.

f. Customers being informed that (a) there is a specific Allocated Property and (b) there will be an amount returned at the end of the timeshare period is not selling the product as an investment. It is merely accurately describing a feature that the Court has held is not inherently objectionable. Failure to clarify that there would be a financial interest in the Allocated Property would likely infringe other parts of the Timeshare Regulations.

g. 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/profit, together with a corresponding financial gain/profit motive on the part of the customer. Referring to the prospect of a residual return on net sale proceeds does not satisfy that test.

The sale documents:

a. The documentation in relation to the sale is unobjectionable and shows no breach of Regulation 14(3).

b. There were relevant disclaimers in the sales documents to emphasise that the product should not be seen as an investment. Mr and Mr H confirmed that they understood this at the time of the sale (by signing the documents). The statements in those disclaimers were respected in that there was at no stage during the sale any representation as to the future price or value of the fractional share. In *Shawbrook & BPF v FOS* these types of disclaimers are referred to in the context of evidencing compliance with Regulation 14(3).

c. There is no evidence that the Fractional Sale involved marketing or selling the Fractional Points as an investment to Mr and Mr H. As indicated in evidence provided by this Supplier to the Financial Ombudsman Service in responses to complaints which are materially similar to Mr H's, the Supplier delivered extensive training to its staff to ensure that their fractional points clubs are not marketed or sold as investments to customers, none of which include

language from which an investment promotion could be inferred. The evidence includes a witness statement submitted by the Director of Sales Operations for the Supplier.

d. The Ombudsman should give some weight to the County Court judgement in Gallagher v Diamond Resorts (Europe) Limited (County Court, 24 September 2021) where the judge said in relation to the Supplier's training that, *"Whilst [the Supplier] was unable to produce the training materials that were likely to have been used to train [the specific sales representative concerned]… the Court is satisfied that he was trained as described by the witnesses. Moreover, that the training would have included a prohibition upon selling [Fractional Owners Club] as an investment in property."*

The Supplier's training material:

a. The Ombudsman fails to engage with or give sufficient weight to the information provided by the Supplier, including witness statements, relating to its training materials. In the course of the Financial Ombudsman Service's handling of such complaints, the Supplier has provided detailed submissions that it delivered extensive training to its staff to ensure that their fractional products are not marketed or sold as investments to customers.

b. The Ombudsman gives no reasons for dismissing this evidence other than appearing to rely on the unsigned Client Statement purportedly prepared over six years after the Fractional Sale and also refers to other material that the Supplier has since said was not used to sell and market fractional products. He does not engage with the fact the position set out in the Supplier's witness statements is asserted as having occurred in every sale, including the Fractional Sale. It is also unclear why the Ombudsman was so willing to conclude the sales representative would have disregarded the way they had been trained to market this product as an investment.

c. The Ombudsman fails to engage with or give sufficient weight to the information provided by the Supplier, including witness statements, relating to its training materials. The Lender invited the Ombudsman to consider the Supplier's response to the provisional decision in respect of the training given to its sales representatives.

2. The above errors undermine the Ombudsman's approach to the witness testimony supporting Mr H's complaint.

Witness testimony:

a. The veracity of Mr and Mr H's witness testimony is not considered adequately in the PD, meaning that it is given undue weight. Its interpretation is also tainted by the Ombudsman's conclusion that the breach of Regulation 14(3) can be, in effect, inferred from the materials relating to the sale and the nature of the product.

b. There is no evidence to support the conclusion that the Fractional Club membership was sold to Mr and Mr H as an investment other than their Client Statement dated 22 February 2019. It is difficult to reconcile why this was not provided with the Letter of Complaint, and why the Lender only received it with the Investigator's assessment in January 2024.

c. If prepared when purportedly dated, Mr and Mr H's Client Statement would have been made over six years after the Fractional Sale. The Ombudsman ought to have assessed whether the evidence is clear, consistent and contemporaneous.

d. Mr and Mr H's Client Statement is brief, consisting of less than one page of text with limited testimony on specifics about the Fractional Sale, and is contradicted by testimony consistently provided by the Supplier in similar complaints that sales representatives are specifically trained to ensure fractional products are not described as investments. For the Ombudsman to conclude Mr and Mr H's recollections are more reliable than the witness testimonies provided by the Supplier about its sales practices is irrational in the context of their detailed knowledge of the product design, features and training materials.

e. The Supplier's analysis of the veracity of Mr and Mr H's witness testimony supports the position that any interpretation that the Fractional Club membership was sold and marketed as an investment based on Mr and Mr H's testimony is unsafe.

f. The Ombudsman does not comment on material inconsistencies of facts that Mr and Mr H should reasonably have known when making the statement, including usage of their Fractional Points.

g. In the Client Statement, Mr and Mr H allege no holidays were booked, and that they *"struggled to book our chosen holidays even with fractional points due to lack of availability."* The Supplier has provided details of holidays taken and said that there is no record to suggest that Mr H experienced difficulties securing his desired bookings. On the contrary, he has secured at least one holiday, and in almost all instances multiple holidays, every year from 2007 up to 2018 (when he stopped paying management fees), and prior to 2018, there have only been two occasions when any points went unused at the end of the year (in 2005 and 2012). For the testimony to say Mr H has booked no holidays cannot simply be dismissed as a small inconsistency, it's significantly untrue and throws considerable doubt on the authenticity of the testimony.

h. Mr H also claims that he *"converted our 23000 European Points to 5000 fractional points…"* In fact, they had traded-in 30,000 points in the European Collection towards the purchase of 35,000 points in in Fractional Club. Given the number of holidays taken, the number of points held, in view of the role of points in acquiring holidays, this is something that Mr H should reasonably have known.

i. Such material inconsistencies cast doubt on Mr H's recollections and as noted above, the usage of their Fractional Points is something that he should reasonably have known. If such material inconsistencies are present in the Client Statement, it is not unreasonable for the Ombudsman to consider the veracity of the *'sold as an investment'* allegation made in the statement rather than relying on it unchallenged given the weight of evidence to support the contrary position.

j. The Lender agrees that increased holiday rights were a material motivation for Mr H to purchase the Fractional Club membership. However, the scope of

the rights afforded by the European Collection was more limited than those under the Fractional Club membership. As Mr H was not simply purchasing more points, to conclude that he 'should' have just increased his European Collection points is incorrect and inappropriate.

k. The Ombudsman asserts *"in practice the shorter membership would've made no difference to Mr H as he could've given up his European Collection membership after 15 years once he reached the age of 75 (if not sooner)."* The Lender and the Supplier say this is not a reasonable basis on which to make an inference that Mr H would not have purchased Fractional for the shorter membership term.

l. The Ombudsman has overlooked that this package of rights could only have been obtained through the purchase of Fractional Club membership. This package of rights sat alongside the prospect of a return upon the sale of the Allocated Property (which is different to an investment). It was the ability for Mr H to obtain this full package of rights (including the prospect of the return) that had the material impact on them purchasing the Fractional Club membership. And this package of rights had a value attached to it, including the intrinsic value of the prospect of a return upon the sale of the Allocated Property. This is why Mr and Mr H purchased Fractional Club membership. It was not because the Fractional Club membership was sold as an investment.

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

a. The correct test is whether there was a *"material impact on the debtor when deciding whether or not to enter the agreement".* But the Ombudsman applied a different test, stating that, *"had [Mr H] not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I think it is unlikely that he would have pressed ahead with his purchase regardless.".*

b. This appears to reverse the burden of proof. The Ombudsman appears to start from the position that it is for the Supplier to demonstrate why 'prospect of a financial gain' had an immaterial impact on the debtor's decision to enter into the Fractional Sale. That is the wrong starting point.

c. The correct starting point is to assess whether there is sufficient evidence of a material impact of the breach on the decision to enter the agreement. In the absence of this, the Ombudsman ought not to find an unfair relationship or uphold the complaint.

d. In this case, we consider that the lack of evidence of sale as an investment (as opposed to the prospect of financial return) means that there is no breach to impact upon the fairness of the relationship.

In summary, the Supplier provided the following:

1. With a view to illustrating its sales processes at the Time of Sale was in compliance with the requirements of Regulation 14(3) of the Timeshare Regulations, the supplier provided copies of judgements/decisions, witness statements and other evidence relating to two County Court Cases, *Brown v Shawbrook Bank Limited* (18 June 2020, County Court at Wrexham) and *Gallagher v Diamond Resorts (Europe) Limited*

(9 February 2021, County Court at Preston), and a previous complaint at the Financial Ombudsman Service in the name of Mr and Mrs A.

a. This included witness statements and accompanying evidence from:

    i. 'SC' – an in-house solicitor with the Supplier from 2000 until 2022, who was heavily involved in the compliance documentation for the sale of Fractional Club membership – dated 27 February 2020, 1 September 2020, and 13 April 2021. The Supplier says this is important when assessing the approach taken by [The Supplier] to its compliance responsibilities and how that fed down to the sales process and procedures.

    ii. 'RW' – the Supplier's European Sales and Marketing Operations Director, who has been with the Supplier since 2008, involved in a managerial and supervisory role relating to the sales and marketing of the Supplier's timeshare products – dated 31 August 2020 and 13 April 2021. The Supplier says this provides details of the discussions which usually took place between the sales and Quality Assurance team and the customers, as well as the training of employees.

    iii. 'P'P – a sales representative – dated 13 April 2021

    iv. 'NB' – Sales Director – dated 27 February 2020

    v. 'GH' – Third Party sales manager (exclusive to the Supplier's products), who was also the Sales Manager for the sale to Mr H – dated 27 August 2020. This included the following:

        I. *"When Fractional Ownership was being sold, members were told that it involved them being allocated an interest in a specific apartment, which would be held by a professional trustee for a 15-year period. After that time, the trustee had a duty to sell the apartment and the member would receive a fractional share of the net proceeds of the sale of the property. Fractional ownership also allowed members access to a rental scheme operated by [The Supplier], whereby [The Supplier] would actively market any unused points so that the member could receive rent for any weeks of unused holiday allocation. Under the rental scheme, the fractional member would additionally receive 5 percent from any [The Supplier] purchase made by the person renting."*

        II. In relation to the location where Mr H entered into the Purchase Agreement:

            "Specific training was received on the verification of fractional points purchases as there were key contract terms that we had to refer to, which differed from European Collection. For example the contract makes reference to the relevant property so we were trained to ensure members were aware that the product should not be purchased as an investment. If the contract verification was undertaken by the Sales Manager the

member would experience the same process that would be delivered by the Quality Assurance team member."

III. In relation to the allegation that the product was sold as an investment in the case of Mr and Mrs A:

"Fractional Ownership was never referred to as an investment by me or my team and we had specific training and policies relating to this. [The Supplier] made it very clear that to misrepresent Fractional Ownership to a member or refer to it as a financial investment would result in disciplinary action up to and including dismissal. [The Supplier] also had a contractual right to claw back commissions paid to a sales team member in such circumstances. Both my team and I made a conscious effort to ensure that members never got the impression that they were investing in anything that would make them a profit.'

"For many years, and well before [The Supplier] started to sell Fractional Ownership, timeshare has been blighted by unscrupulous companies selling timeshare on the basis that it could be sold for a profit and would represent a good investment. That is primarily why additional laws were required to prevent those companies from making those representations. I, and all of my [The Supplier] team members, were very well aware of this and I have never said to any member that they would be able to sell their points (whether fractional or European Collection) for a profit in a short period of time."

"During an update meeting, I have never provided members with any values or projections regarding the residual value of the relevant property. We did not have that information available. [The Investigator] refers to a set of slides (which are appended to the View and which I have been provided with a copy of). I would like to make clear that these slides were never used as part of a membership update. I have never seen them before and have never shown those slides to any member."

"The paperwork provided to members makes it crystal clear that Fractional Ownership should not be sold or purchased as an investment, and sales team members would never try to present it as such. The paperwork was always reviewed in more detail during the Quality Assurance process (whether by me or a Quality Assurance representative), where it was repeated and emphasised that the purchase was not to be treated as an investment."

IV. And more generally:

"Fractional Ownership was never referred to as an investment by me or my team and we had specific training and policies relating to this…Both myself and my team made a conscious

effort to ensure that clients never got the impression that they were investing in anything that would make them a profit."

V. And in relation to the Quality Assurance team member completing the verification process with the customer:

"The paperwork provided to clients makes it crystal clear that Fractional Ownership should not be sold or purchased as an investment, and sales team members would never try to present it as such. I knew that the paperwork was reviewed in more detail during the Quality Assurance process, where it was repeated and emphasized that the purchase was not to treated as an investment. Before the client sat with the quality assurance team member to verify the contractual documents, I was required to inform the quality assurance representative of the main reasons for purchasing. The quality assurance team member would then verify these with the clients. If the client had been persuaded to purchase for investment purposes or even eluded that they thought it was a good investment based on their own beliefs the quality assurance team member would also have advised the client that it was not an investment and would have pointed this out in the various clauses of the contractual documents."

2. Sales and Training Manual.

    a. The Supplier points to a part of the training that posed the questions, *"Why do you think it is important never to present the Fractional ownership club as an investment?"*

3. Policy and Procedure documents relating to the sale of timeshare, which each team member had to read and sign to acknowledge their agreement to comply with the policy.

4. Standard Operating Procedure signed by the salesperson ('TD'), who sold Fractional Club membership to Mr H, and the Sales Manager ('GH'), which the Supplier says illustrates that both knew they were prohibited from marketing or selling Fractional Club membership as an investment and that doing so would lead to disciplinary action including dismissal.

And the Supplier made the following points:

1. The Supplier specifically trained its team members to be well aware of the prohibition on selling timeshare as an investment and to ensure they did not tell (or imply by discussing at all) the returns a customer might receive on sale of the Allocated Property.

    a. The Judge in Brown said, *"The evidence provided and the evidence I heard (which was unshaken, in my judgment) was that [The Supplier] as a company take their responsibilities in relation to documentation, selling, quality assurance and compliance very seriously."*

    b. The Judge in Gallagher said, *"Whilst [The Supplier] was unable to produce the training materials that were likely to have been used to train Ms Gomez in addition to the above, the Court is satisfied that he was trained as described*

by the witnesses. Moreover, that the training would have included a prohibition upon selling [Fractional Owners Club] as an investment. In the circumstances, it is unlikely that Ms Gomez would have described [Fractional Owners Club] as an investment in property."

2. The Supplier has provided evidence directly from the Sales Manager responsible for Mr H's Fractional purchase that he and his team never referred to the Fractional product as an investment; that they made a conscious effort to ensure the clients never got the impression that they were investing in anything that would make them a profit and that the Quality Assurance team member would repeat and emphasise that the product was not to be treated as an investment. And this should be weighed against the difficulties with the evidence prepared by the PR on behalf of Mr H.

3. On the reliability of Mr H's Client Statement, the Supplier said:

    a. The time elapsed between the Time of Sale and the Client Statement (about 6 years) would clearly have a negative impact on his recollection of what was said at the Time of Sale. The contemporaneous documents should be preferred.

    b. The PR purportedly prepared the Client Statement after a phone call with Mr H. But it has provided no information about what questions were asked and no indication that the statement is in Mr H's own words, and the Supplier suspects it is not, and that the PR may have influenced Mr H's testimony.

    c. Mr H first attempted to relinquish his Fractional Club membership on 25 Noivember 2018. At that time, he made no mention of having expected any financial gain or profit nor any reference to it being sold as an investment. At that time, he was open to a partial relinquishment and keeping 10,000 fractional points. However, he did not provide the necessary evidence of a change in circumstances, so the Supplier took no further action and Mr H then engaged the PR. The Supplier says that if Fractional Club membership had been sold to Mr H as an investment at the Time of Sale, then he would've asked what would happen to the investment and expected return at this time.

    d. There were inaccuracies in the Client Statement in that:

        i. The Supplier could not guarantee that the Allocated Property would be sold on a set date.

        ii. Mr H had been misinformed by the PR that the Allocated Property would not be sold. His allegation in this regard also indicates that the substance of the complaint was not that Mr H was told he could make a profit.

    e. The Letter of Complaint said that Mr H alleged he was told that when the Allocated Property was sold, he would *"receive return of the cost of the product.*" This was sent on the same day as the Client Statement and is more likely to be the correct interpretation of the investment allegations – that is, that Mr H would receive a return of the cost of the product rather than a financial gain or profit.

4. The additional 5,000 annual fractional points Mr H purchased would significantly increase his access to booking holidays, including opening up hundreds of options

for securing a holiday which would not be available to someone with 30,000 points. The average cost of 7-night stay across the Supplier's portfolio is around 5,500 points, with the lowest cost for a 7-night stray 1,500 points.

5. It appears most likely that Mr H purchased the Fractional product for the shorter membership term, additional annual points usage and the prospect of getting something back at the end of the 15-year term, all of which are perfectly rational reasons and do not indicate that the Supplier mis-sold the timeshare. The fact that Mr H was 15 years away from turning 75 is not a reasonable basis for an inference that he would not have purchased Fractional Club membership for the shorter membership term.

I have considered these points, obtained further information from Mr H and responded to the Lender explaining that I was still planning to uphold this complaint. I shared that correspondence with the PR as well.

The Lender responded with a few further points, which I deal with below.

The legal and regulatory context

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

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

- The CCA (including Section 75 and Sections 140A-140C).
- The law on misrepresentation.
- The Timeshare Regulations.
- The Unfair Terms in Consumer Contract Regulations 1999 ('UTCCR').
- The Consumer Protection from Unfair Trading Regulations 2008 ('CPUT').
- 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.

I've decided to uphold this complaint because, in my opinion, the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling Fractional Club membership to Mr H 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.

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 several aspects to Mr H's complaint, it isn't necessary to make formal findings on all of them. This includes the allegation that the Supplier misrepresented the Fractional Club membership, and the Lender ought to have accepted and paid the claim under Section 75 of the CCA. This is because, even if that aspect of the complaint ought to succeed, the redress I'm currently proposing puts Mr H in the same or a better position than he would be if the redress was limited to misrepresentation.

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

Below is a copy of the findings from my Provisional Decision, which form part of my final decision.

START OF COPY OF MY 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 Mr H 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 H's membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

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

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

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

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

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

> *"[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair."*[1]

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

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

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

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

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

I have considered the entirety of the credit relationship between Mr H 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.

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

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 H 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 H's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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

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

But Mr H says that the Supplier did exactly that at the Time of Sale – saying the following in a client statement dated 22 February 2019:

> *"According to the representatives' fractional points were an investment in the Fractional Owners Property Club. The property would require to be sold on a set date in the future and we would have a return on our monies… On the advice of the representatives and believing we were investing in a property, we [entered into the Purchase Agreement] …"*

The Letter of Complaint mirrored this in saying:

> *"Our clients were advised that fractional points were an investment in property that would require to be sold on a set date in the future. Once sold our clients would have a return on their investment… This was sold as an investment to our clients."*

Mr H alleges, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because he was told by the Supplier that:

(1) Fractional Club membership was an investment.

(2) He would get a return on his money.

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 H'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 H 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 (a profit) given the facts and circumstances of *this* complaint.

I think that Mr H's description of what happened – that he was told Fractional Club membership was an *"investment"* and he would get a *"return on our monies"* – reflects the fact that, as far as he recalls, the Supplier marketed Fractional Club membership as an investment i.e., something that offered him the prospect of a financial gain. I say this because expressly describing membership as an investment implies, by its very nature, the possibility of a profit. And, in that context, it wasn't unreasonable of him to infer, from the idea (presented to him by the Supplier) that there would be a return on his money, that the Supplier was holding out more than a mere hope of a profit. Indeed, based on what I've seen so far, I don't think it's reasonable to interpret Mr H's recollections in a way that suggests anything other than that.

I acknowledge that there is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying 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 H as an investment as follows:

- *Purchase Agreement Terms and Conditions*
  [Supplier] Fractional Points, Reservations and Rentals
  1 You should not purchase Your [Supplier] Fractional Points as an investment in real estate. The Purchase Price paid by You relates primarily to the provision of memorable holidays for the duration of Your ownership. You are at liberty to dispose of Your [Supplier] Fractional Points at any time prior to the Sale Date in accordance with Rule 7 of the Rules of the Owners Club.

- *Key Information document Page 2 paragraph 4*
  Between six to nine months before the Proposed Sale Date, FNTC will appoint two independent valuers to value the Property and will then take steps to sell the Property at the best achievable market price. You must bear in mind that your [The Supplier] Fractional Points (and the purchase price paid by you for those points) relates primarily to the acquisition by you of many years of wonderful holidays. We are sure that you will get a great deal of pleasure from your holidays. Your decision to purchase [The Supplier's] Fractional Points should not be viewed by you as a financial investment.

- *Customer Compliance Statement/Declaration to Treating Customers Fairly*
  5 We understand that the purchase of our [The Supplier's] Fractional Points is an investment in our future holidays, and that it should not be regarded as a property or financial investment. We recognize that the sale price achieved on the sale of the Property in the Owners Club (and to which our [The Supplier's] Fractional Points have been attributed) will depend on market conditions at that time.

However, weighing up what happened in practice is, in my view, rarely as simple as looking

at the contemporaneous paperwork. And Mr H's allegation that the Supplier breached Regulation 14(3) at the Time of Sale said (1) that membership of the Fractional Club was expressly described as an *"investment*" and (2) that membership of the Fractional Club would 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, that is told Mr H 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 questions is 'yes'.

How the Supplier marketed and sold the Fractional Club membership

We have been provided with a number of documents relating to how the Supplier sold and marketed Fractional Club membership. They include:

- 'Fractional Sales Logic – 2013' document – provided a comparison between fractional ownership and owning a holiday home including advice to sales agents about what they should tell consumers including the phrase 'real estate' and 'the fractions should be compared to the purchase of a second home'.

- 'Fractions FAQ – Early Training' document – answered FAQs about fractional ownership compared to the Supplier's European Collection, including the question '*what are the benefits of Fractional Ownership?*' and in the answer: '*the chance of a return on the money they have spent on membership*'.

- Fractional Ownership Comparison – a document comparing the pluses and minuses of four channels for purchasing holidays: rental/tour operator, timeshares, Freehold ownership, and Fractional Ownership.

- A set of slides produced on 14 September 2012 with the intention of using them as a training tool for the Supplier's sales staff and as a sales aide when selling Fractional Club membership to potential purchasers ('the September 2012 Slides') according to an email from the Supplier's Vice President of Legal Services and European General Counsel ('SC').

- A 98-page document called "Sales Representative Training Manual Europe". While the document itself is undated, it was said by the Supplier to be some basic training given to new sales representatives in 2013 (the '2013 Training Manual').

Although the Supplier initially provided these documents to us to help us understand how it sold Fractional Club membership, it has since told us that it was mistaken in doing so as they were not used and did not inform how the Supplier sold and marketed Fractional Club membership to potential members. As such, the Lender and Supplier says we should not rely on them when deciding complaints relating to the sale of Fractional Club membership. Given this and bearing in mind that I think the other evidence is sufficient to justify this complaint being upheld, I have not made findings on these documents and whether they tell us anything useful about how the Supplier marketed and sold Fractional Club membership at the Time of Sale.

The circumstances of the sale

Mr H was already a member of the Supplier's European Collection at the Time of Sale – holding 30,000 European Collection points. He paid, on average, £1.17 for each of those points. And if Mr H simply wanted to increase his holiday rights, it is difficult for me to understand why he would have paid £28,000 (plus trading in his European Collection points valued at £23,000) in return for 35,000 Fractional Points (only 5,000 of which were additional to what he already had). That only gave him a relatively modest increase in holiday rights. And it would have been much less expensive for him to simply purchase more European Collection points.

So, unless the Supplier relied (explicitly or implicitly) on other benefits of Fractional Club Membership to promote its sale, like its investment elements, it is difficult to understand why Mr H made his decision to purchase.

The purchase of an additional 5,000 Fractional Points did not, for example, significantly increase his holiday purchasing power. And it didn't bring other benefits from an increase in his membership tier (the threshold for the next tier being 50,000 points).

Fractional Club membership offered Mr H a shorter membership term of about 15 years compared to European Club membership, which could continue much longer. But Mr F was 60 years old at the time of sale. And he would've been able to give up his European Collection membership once he (or Mrs H) reached the age of 75 (or sooner if they became unable to travel due to ill health). So, in practice, he could've given up his European Collection membership after 15 years at the latest – but without the prospect of any return on what he paid for it. So, I'm not persuaded that Mr H's purchase was motivated by the shorter membership term, especially when he doesn't say it was.

It seems more likely than not that, given the circumstances of the sale *in question*, the Allocated Property was a major factor in the Supplier's marketing of membership to Mr H. And as I can't currently see why other aspects of the purchase would have persuaded Mr H to enter into the Purchase Agreement at the price he paid for it had the Supplier not held out the prospect of a profit from it as Mr H says it did, based on everything I've seen so far, I think it is more likely than not that the Supplier sold and marketed Fractional Club membership to Mr H as an investment in breach of 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 H 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 H 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 H, 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 Agreements and the Credit Agreement is an important consideration.

On my reading of Mr H's recollection of what happened, the prospect of a financial gain from Fractional Club membership was an important and motivating factor when he decided to go ahead with his purchase. The client statement specifically states that:

> *"On the advice of the representatives and believing we were investing in a property, we converted our… European Points to… fractional points…"*

I think this indicates that the *"investment in property"* aspect of Fractional Club membership was the reason he went ahead with the purchase.

While the client statement mentions that Mr H was also told that with fractional points he would have greater availability to additional resorts and a guaranteed exit (implying the shorter membership term compared to European Collection membership was likely discussed), Mr H does not indicate that these were important factors in his decision to purchase, such that he would've done so even if he was not led by the Supplier to believe that Fractional Club membership as an investment in property.

I understand that Fractional Club membership also allowed Mr H to make use of the Supplier's Wish to Rent programme. This let him offer any unused points for rent, which the Supplier could then use to offer promotional holidays to so-called *"marketing clients"* (customers who were not members of any of the Supplier's timeshare clubs). If that happened Mr H would receive a small fee for each week rented out, and a commission if the marketing client purchased membership. However, there is no evidence that makes me think the Wish to Rent programme was given prominence by the Supplier at the Time of Sale or that Mr H had any particular interest in it such that it influenced his purchasing decision. For example, Mr H has not mentioned this when recalling what happened at the Time of Sale.

As mentioned above, in practice the shorter membership would've made no difference to Mr H as he could've given up his European Collection membership after 15 years once he reached the age of 75 (if not sooner). This is around the time his Fractional Club membership would've ended as well. So, it seems unlikely this was an important factor in his decision to enter into the Purchase Agreement.

I'm mindful that Mr H did purchase an additional 5,000 fractional points, meaning he increased his holiday purchasing power by about 17%. But it seems to me that, if that had been his main motivation, he could've achieved that at much less expense by simply purchasing more European Collection points. After all, European Collection points were given a trade-in value in the transaction of £1 per point, whereas Mr H's purchase valued the fractional points at £1.68 per point. That suggests he was paying for something worth much more than simply holiday rights – and the main additional benefit (or value) the fractional points provided was the share in the net sale proceeds of the Allocated Property – which Mr H says he was told would mean a return on his investment (that is, a financial gain or profit).

As Mr H 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 think it is unlikely that he would have pressed ahead with his purchase regardless.

END OF COPY OF MY PROVISIONAL FINDINGS

Additional findings following my Provisional Decision

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

In my Provisional Decision, I noted that, to breach Regulation 14(3), the Supplier had to market or sell Fractional Club membership as an investment, and I used the following definition of 'investment' when considering whether that provision was breached:

> "a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit".

The Lender says my 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:

> "… the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It does not prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se. In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold."

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

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 Regulation 14(3)[2].

I think the Lender (and the Supplier) has too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3). The Supplier did not have to refer to Fractional Club membership expressly as an investment or quantify what the financial gain or profit might be to breach Regulation 14(3). So, 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.

Mr H's Client Statement

In support of this complaint, the PR provided a Client Statement. This was dated 22 February 2019 but was unsigned. Given the Lender's concerns about this, I asked Mr H to confirm if the Client Statement was a fair reflection of his recollection of what happened at the Time of Sale. He has confirmed that it is, and that the PR wrote the statement during a telephone conversation with him in 2019.

That is in line with my understand of how the PR took client statements at the time, which has been confirmed by customers in a number of complaints I have dealt with (as well as by the PR). That being the case, I am satisfied that the Client Statement was written in February 2022 based on what Mr H told the PR. However, that is almost six years after the Time of Sale.

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

At paragraph 40 of the judgment in the case of *Smith v. Secretary of State for Transport [2020] EWHC 1954 (QB)*, 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 H 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 the above, 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 if there are some potential inconsistencies between what Mr H said happened and what other evidence shows. The question to consider is whether there is a core of acceptable evidence from Mr H that any inconsistencies have little to no bearing on, or whether such inconsistencies are fundamental enough to undermine, if not contradict, what Mr H says about what the Supplier said and did to market and sell Fractional Club membership as an investment.

Mr H's Client Statement is quite brief. Clearly it contradicts the Supplier's evidence, which is that it never sold or marketed Fractional Club membership as an investment. But Mr H's Client Statement is the only evidence in this case specific to the sale of Fractional Club membership to Mr H at the Time of Sale from someone who was present at that time.

The Client Statement makes some clear allegations, which also appear in the Letter of Complaint:

- The sales presentation felt high pressured.
- The Supplier had not made clear the purpose of the meeting when inviting Mr H to attend.
- Fractional Points were an investment in the Fractional Club.
- The sale of the Allocated Property guaranteed an exit from the timeshare.
- The purchase would give Mr H improved availability to purchase holidays.
- Mr H struggled to book his chosen holidays.
- Mr H was offered a special purchase price only available on that day.

So, the two documents do suggest the allegations have remained consistent. If they were inconsistent that would suggest that they may be less reliable, with often the earlier documents likely to be given more weight.

The Lender says that some aspects the Client Statement are not consistent with the other evidence of what happened. It points specifically to:

- Mr H saying he could not book holidays using his Fractional Club membership, when the Supplier's records show he regularly did so until he stopped paying management fees in 2018.
- The Client Statement stating the wrong details of the transaction in terms of how many European Collection Points were traded in and how many Fractional Points were purchased.

I can see that Mr H did not say that he could not or did not book any holidays using his Fractional Points. What the Client Statement says is:

> *"We have struggled to book our chosen holidays even with fractional points due the lack of availability."*

It seems clear to me that Mr H is saying he could not always book his preferred or first-choice holidays. He has not said he booked no holidays. And while he used his Fractional Points, that does not mean that he always got the holidays he initially wanted. It may be that

what Mr H wanted to book was unavailable, so he booked something else rather than not use his Fractional Points. This would seem like a logical thing to do and would not lead to the Supplier having a record of there being availability issues. What Mr H has said does not strike me as implausible. So, there does not appear to be the significant inconsistency that the Lender suggests (or any inconsistency).

I note the Client Statement and the Letter of Complaint mis-quote the details of the transaction, in terms of what European Collection points were traded in and what Fractional Points were purchased. But the documents from the time of sale are not the easiest to understand, the transaction having been split across two purchase agreements due to the limitations of the Supplier's systems at the Time of Sale (one of which showed 23,000 European Collection Points being traded in). And from what Mr H has said to explain this, he understood that he was gaining a further 5,000 Fractional Points in addition to the (European Collection) ones he already held. So, I can see how these amounts could be mis-quoted in the Client Statement. And while I expect a professional representative to be more careful with figures like this, I do not think that this serves to significantly undermine the rest of the statement.

The Lender and the Supplier say that Mr H purchased Fractional Club membership for a shorter membership term. I said in my Provisional Decision that I was not persuaded that this was the case, given he could've given up his European Collection membership within 15 years in any case. It appears to me that the shorter membership would not in fact have been beneficial for Mr H. I do not agree that was an unreasonable conclusion to make in the circumstances. If this was a significant factor in Mr H's decision, I would question if he was given clear information about the circumstances in which he could've given up his European Collection membership. If he wasn't and he purchased for a shorter membership term, then potentially that could lead to his relationship with the Lender being unfair as well. But I do not think I need to make a finding on that point.

The Lender says that Fractional Club membership came with a specific package of rights and benefits that Mr H could not have obtained without making the purchase. And that it was the overall package that attracted him to the purchase, not because it was sold to him as an investment. But the question is whether Fractional Club membership was sold or marketed to Mr H as an investment by the Supplier at the Time of Sale, and if so whether this was material to his decision to enter into the purchase agreement.

In relation to the information provided by the Supplier, I accept that this shows the Supplier took steps to avoid breaching Regulation 14(3) when selling fractional timeshares such as Fractional Club membership.

The Policy and Procedure (sales misrepresentation) document included the following:

> "[The Supplier] strictly prohibits any forms of Misrepresentation. In this respect, [the Supplier] specifically stresses the importance of representing the [Supplier's] product in line with the following guidelines:
>
> - [The Supplier] does not represent vacation ownership as an investment.
>
> …
>
> - With regards to the presentation of the Fractional product:
>
> - Sales Team members will not represent the Fractional product as an investment

- Sales Team members will not discuss any predictions with regards to the residual value."

The document went on to say that:

- *"non compliance of the rules established herein, will lead to the adoption of the relevant disciplinary actions … including the automatic extinction of the employment relationship by means of a dismissal."*

The Supplier has provided the Policy and Procedure (sales misrepresentation) documents signed by the salesperson and sales manager involved in Mr H's sale. I can see that they would have signed the document under the statement that:

- *"I hereby acknowledge receipt of the present Misrepresentation [Standard Operating Procedure] … as detailed above."*

The Supplier has also provided a copy of its Training Manual, which states on page 53:

> ***"The basis of both products is centered on the experiences clients will enjoy when travelling, neither product is an investment type product and as such <u>it is forbidden</u> when selling to our guests to discuss eventual values or returns."***
>
> [emphasis in original]

While this forbids discussion of eventual values or returns it does not forbid describing the product in such a way that might imply it is nevertheless an investment. Nor does it mention that the reason for saying this is because the Timeshare Regulations prohibit the sale or marketing of a timeshare as an investment.

The Training Manual includes an exercise on page 54 that asks the question:

> *"Why do you think it is important never to present the Fractional ownership club as an investment?"*

This question does suggest that salespeople should not present Fractional timeshares as an investment. But no examples are given in terms of what answers are to be expected from trainees. Again, there is no mention of the Timeshare Regulations, nor anything that clearly explains what would constitute a breach of Regulation 14(3).

Looking at these documents, I am satisfied that the Supplier took steps to try and prevent a breach of Regulation 14(3) by its salespeople when selling Fractional Timeshares like Fractional Club membership. And that these steps will have gone some way to reducing the risk of breaches occurring. But the materials are not as explicit as they could be in making salespeople aware of the prohibition in Regulation 14(3), which they do not explicitly refer to. So, it is not clear to me that a salesperson would've understood why they should not present a fractional timeshare as an investment (the above question is not answered in the Training Manual). Nor that the concept of an investment was clearly defined nor clear guidance provided on what was acceptable.

For example, there are no sales scripts or prescribed wordings that limit how a salesperson could describe a fractional timeshare and specifically the right to a share in the net sale proceeds of the Allocated Property. Nor is there anything that sets out what a salesperson should do if a prospective customer does end up with the impression that Fractional Club membership is an investment in that they could make a financial gain or profit from it.

In *Shawbrook & BPF v FOS* the judge acknowledged the difficulty in selling a fractional timeshare without breaching Regulation 14(3), where he said at 77:

> *"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 documents referred to above suggest to me that the Supplier may have taken too narrow a view of what constituted selling or marketing a timeshare as an investment (a view which the Lender appears to share). I say this because these documents focus on not presenting the fractional timeshare as an investment in the context of not discussing the residual value of the Allocated Property or the eventual values or returns a customer might receive. I think this left open the possibility that a salesperson might engage in other discussions about this benefit which could cross the line into breaching Regulation 14(3) – even if that was not the intention of the salesperson or the Supplier.

In my opinion, as explained in my Provisional Decision, merely suggesting or implying that a customer might make a financial gain (that is, potentially get back more than they paid for Fractional Club membership) would be enough to breach the prohibition in Regulation 14(3). So, I am not persuaded that these documents are sufficient for me to conclude that it is impossible, implausible or inherently unlikely that Fractional Club membership could have been sold or marketed as an investment at the Time of Sale. That makes it important to consider the evidence from the Time of Sale as well as Mr H's recollections of what happened.

Mr H's recollections are the only evidence available that is specific to the sale from someone who was there. And while the sales documents do reflect the Supplier's intention to comply with Regulation 14(3), the sales documents in themselves again do not guarantee that Regulation 14(3) was not breached. Those documents were provided to Mr H after he had agreed in principle to make the purchase. So, the disclaimers and statements contained therein may not have been enough to prompt Mr H to question what he had been told if that was different to what was shown in the documents.

I have not suggested in my Provisional Decision that there was a systemic issue that meant Fractional Club membership was sold in breach of Regulation 14(3) in every case. I was clear in my decision that a fractional timeshare could be sold without breaching Regulation 14(3). And that my provisional decision was specific to the circumstances of Mr H's sale.

For the reasons I've explained, I do not think that I should disregard Mr H's recollection of events. Nor do I think that the other evidence in this case is sufficient for me to conclude that he is mistaken in his recollections of Fractional Club membership being sold or marketed to him as an investment. And while there were multiple reasons why Mr H was attracted to the purchase, I think the prospect of making a profit on what he paid for Fractional Club membership was material to his decision to purchase. So, I remain of the opinion that this complaint should be upheld.

The Lender's final comments

Having shared the above with the Lender, it provided some final comments for me to consider when making my final decision.

The Lender still does not agree with my interpretation, understanding or application of Regulation 14(3) in this case. It says I have no evidence to support that Fractional Club

membership was sold as an investment, and questions what evidence there is that Fractional Club membership offered Mr H the prospect of a financial return.

I think it is clear that there was the possibility for Mr H to get back more on the sale of the Allocated Property than the purchase price he paid for Fractional Club membership. The value of the Allocated Property at the end of the membership term is unknown – it being in the future. But there is a possibility (however likely or otherwise) that Mr H's share in the net sale proceeds (that is, what he would get back) would exceed what he paid for membership in the first place. It is unclear to me why the Lender does not accept this.

It is clear to me that the Lender does not consider Mr H's recollections to be evidence in this case (or that if it is evidence, then it is of no value and should be ignored). I disagree, for the reasons I have set out above.

The Lender says that the case of *Smith v. Secretary of State for Transport*, which I quoted above, means that the approach I should take is *"to place little if any reliance at all on witnesses' recollection of what was said in meetings and conversation, and to base factual findings on inferences drawn from documentary evidence and known probable facts"*.

But this ignores the rest of what was said by the judge, which I quoted above. In particular, that *"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."*

As an Ombudsman, tasked with making a fair and reasonable decision in an informal complaint resolution process, it is neither unusual nor controversial for a customer's recollections of what happened to form part of the evidence that is taken into account. In this case, the Lender simply disagrees with how much weight I have given to Mr H's recollections when reaching my decision.

The Lender suggests that I should've asked Mr H different questions about his statement. But I am not persuaded that doing so would've led to a different outcome in this case.

The Lender says that the PR enticed Mr H into making a generic claim. But I am not persuaded by that suggestion. The Lender has not provided any evidence that the PR obtained the Client Statement by asking leading questions that would mean I give Mr H's recollections much less weight when making my decision.

The Lender wants me to make inferences based on the PR not providing Mr H with a copy of the Client Statement. But the Lender has misread what Mr H said, which was that he did not recall if he was provided with a copy of the Client Statement prior to the Letter of Claim being sent. That does not seem particularly important to the outcome of this complaint, given Mr H has also confirmed that the Client Statement was taken over the phone in 2019 and is a fair reflection of his recollections of what happened at the Time of Sale.

The Lender insists that the evidence provided by the Supplier shows that Fractional Club membership was not sold to Mr H as an investment. I have analysed that evidence above and have not reached that conclusion.

In summary, the Lender has not in this case persuaded me that I should depart from my Provisional Decision that this complaint should be upheld.

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mr H under the Credit Agreement and related

Purchase Agreement for the purposes of Section 140A. And with that being the case, taking everything into account, I think it is fair and reasonable that I uphold this complaint.

Fair Compensation

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

Mr and Mrs H were existing European Collection members, and their membership was traded in against the purchase price of Fractional Club membership. Under their European Collection membership, they had 30,000 European Collection Points. And, like Fractional Club membership, they had to pay annual management charges as European Collection members. So, had Mr and Mrs H not purchased Fractional Club membership, they would have always been responsible to pay an annual management charge of some sort. With that being the case, any refund of the annual management charges paid by Mr and Mrs H from the Time of Sale as part of their Fractional Club membership should amount only to the difference between those charges and the annual management charges they would have paid as ongoing European Collection members.

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

(1) The Lender should refund Mr H's repayments to it under the Credit Agreement, including any sums paid to settle the debt.

(2) In addition to (1), the Lender should also refund the difference between Mr H's Fractional Club annual management charges paid after the Time of Sale and what his European Collection annual management charges would have been had Mr and Mrs H not purchased Fractional Club membership.

(3) The Lender can deduct:

   i. The value of any promotional giveaways that Mr and Mrs H used or took advantage of; and

   ii. The market value of the holidays* Mr and Mrs H took using their Fractional Points *if* the Points value of the holiday(s) taken amounted to more than the total number of European Collection Points they would have been entitled to use at the time of the holiday(s) as ongoing European Collection members. However, this deduction should be proportionate and relate only to the additional Fractional Points that were required to take the holiday(s) in question.

   For example, if Mr and Mrs H took a holiday worth 2,550 Fractional Points and they would have been entitled to use a total of 2,500 European Collection Points at the relevant time, any deduction for the market value of that holiday should relate only to the 50 additional Fractional Points that were required to take it. But if they would have been entitled to use 2,600 European Collection Points, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

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

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

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

(6) If Mr and Mrs H's Fractional Club membership is still in place at the time of this decision, as long as they both agree to hold the benefit of their interest in the Allocated Property for the Lender (or assign it to the Lender if that can be achieved), the Lender must indemnify Mr H against all ongoing liabilities as a result of their Fractional Club membership.

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

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

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 24 July 2025.

Phillip Lai-Fang
Ombudsman