DRN-5536499

The complaint

Mrs C's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) deciding against paying a claim under Section 75 of the Consumer Credit Act 1974 (as amended) (the 'CCA'), (2) providing credit to fund the purchase of an Unregulated Collective Investment Scheme ('UCIS'), and (3) being party to an unfair credit relationship with her under Section 140A of the CCA.

What happened

Trial membership

In 2010, Mr and Mrs C purchased trial membership of a timeshare from a timeshare provider (the 'Supplier'). This gave them the opportunity to take a number of holidays with the Supplier to help them decide whether to purchase full membership of the Supplier's timeshare clubs. They paid for this using a loan (the 'Trial Loan') from another credit provider (not the Lender).

Vacation Club membership

On 23 May 2011, Mr and Mrs C purchased Vacation Club membership from the Supplier. This provided them with 1,000 Vacation Club Points each year to use on holidays with the Supplier. They paid for this using a loan in Mrs C's name only. This was from another credit provider (not the Lender), under which they borrowed extra to pay off the outstanding debt on the Trial Loan. This loan was paid off on 15 October 2013.

This purchase of Vacation Club membership is the subject of a separate complaint with the Financial Ombudsman Service on which a final decision has already been issued.

First purchase of Fractional Club membership ('FC Membership 1')

On 25 April 2013, Mr and Mrs C agreed to trade in Vacation Club membership and purchase membership of a different type of timeshare (the 'Fractional Club') from the Supplier. They entered into an agreement with the Supplier to buy 1,494 fractional points at a cost of £10,375 (after the unknown trade-in value of their Vacation Club membership was deducted). Mr and Mrs C paid for this using a loan of £10,375 from another credit provider (not the Lender) in Mrs C's name only.

The purchase of FC Membership 1 is the subject of a separate complaint with the Financial Ombudsman Service.

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

Second Purchase of Fractional Club membership ('FC Membership 2')

On 9 October 2013 (the 'Time of Sale'), Mr and Mrs C agreed to trade in FC Membership 1 to upgrade their Fractional Club membership. The next day, 10 October 2013, they entered into an agreement with the Supplier to buy 1,900 fractional points at a cost of £23,055 (the 'Purchase Agreement'). FC Membership 1 was given a trade-in value of £16,434 in the transaction, so Mr and Mrs C paid £6,621 using a loan (the 'Credit Agreement') from the Lender in Mrs C's name only.

The purchase of FC Membership 2 is the subject of this complaint and decision and was linked to a different property (the 'Allocated Property'). As the Credit Agreement is between Mrs C and the Lender, I will mostly refer to Mrs C in this decision, since only she has the right to bring the complaint as a customer of the Lender. But where I am referencing the Purchase Agreement and Fractional Club membership, this should be taken to mean Mr and Mrs C where appropriate.

The complaint

Mrs C – using a professional representative (the 'PR') – wrote to the Lender on 4 February 2020 (the 'Letter of Complaint') to complain about:

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

(2) The Credit Agreement having funded an Unregulated Collective Investment Scheme ('UCIS').

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

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

Mrs C says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale. The Letter of Complaint does not clearly specify what alleged misrepresentations were made, but does mention the following under this section:

1. The Supplier told her the Allocated Property would be sold after 11 years when that wasn't true.

2. The Supplier failed to tell Mrs C that the Supplier could postpone the sale of the Allocated Property for up to two years.

3. The Supplier failed to tell Mrs C that Mr and Mrs C's beneficiaries would inherit FC Membership 2 if they died before the end of the membership term, including the associated liabilities (the payment of annual management fees).

4. The Supplier arranged the Credit Agreement at an interest rate of 17.4%, significantly above the Bank of England Base Rate.

Mrs C says that she 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, she has a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mrs C.

(2) The Credit Agreement funded the purchase of a UCIS

The Letter of Complaint says FC Membership 2 membership is a UCIS, the Supplier was not authorised to sell such an investment, and as such doing so was unlawful, in breach of

regulations and Mrs C has a right to sue for damages.

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

The Letter of Complaint set out that Mrs C thinks the credit relationship between her and the Lender was unfair to her under Section 140A of the CCA. It explains this by saying:

- *"[The Purchase Agreement] is Null and Void as the timeshare is an investment which is illegal. Therefore, due to this related agreement being Null and Void, the [Credit Agreement] creates an unfair relationship between the Bank and our Client under section 140A of the CCA."*

The Lender's response to the complaint

The Lender dealt with Mrs C's concerns as a complaint and issued its final response on 17 February 2020, rejecting it on every ground.

Our Investigator's assessment of the complaint

Mrs C referred the complaint to the Financial Ombudsman Service on 5 May 2020. 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 FC Membership 2 as an investment to Mrs C at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of that breach on her purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mrs C was rendered unfair to her for the purposes of section 140A of the CCA.

Responses to our Investigator's assessment

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

- This purchase was an upgrade to the second version of the Supplier's Fractional Club. The sales presentation and materials for this did not contain content that would lead to a conclusion that FC Membership 2 was sold as an investment.

- The Supplier made notes around the time of sale that indicate the reason Mrs C purchased FC Membership 2 was to get more points to allow her to holiday in New York.

- Documents signed by Mrs C at the Time of Sale made clear that the primary purpose of FC Membership 2 was for holidays.

- The Supplier separately sold real estate (entire holiday homes sold in their entirety to one customer). This had a separate sales journey to sales of Fractional Club membership.

- Mrs C was an experienced timeshare member, having purchased Trial membership, Vacation Club membership (providing points to use on holidays but no share of any property), and the first version of Fractional Club membership before upgrading to the second version at the Time of Sale. The Lender says the additional points

purchased and other benefits like removing booking fees were the main driver of Mrs C's purchase at the Time of Sale.

The PR responded on behalf of Mrs C to provide some further comments. In summary, it said:

- The Financial Ombudsman Service cannot direct the Supplier to reinstate FC Membership 1.

- Deductions should not be made to the settlement to account for repayments Mrs C would've had to make under the loan for FC Membership 1 (including any outstanding balance on that loan), or for management charges she would've paid under FC Membership 1, since that membership was cancelled and surrendered when FC Membership 2 was purchased.

- The trade-in value of FC Membership 1 should be refunded to Mrs C as part of the settlement of this complaint.

My Provisional Decision

I issued a Provisional Decision on 14 April 2025, which explained why I was planning to uphold this complaint and gave Mrs C and the Lender an opportunity to respond before I made my final decision.

Broadly speaking, my Provisional Decision to uphold the complaint was made for the same reasons our Investigator had decided to uphold it in their assessment – that a breach of Regulation 14(3) of the Timeshare Regulations by the Supplier at the Time of Sale led to an unfair credit relationship between Mrs C and the Lender.

My provisional findings are incorporated below in the section "What I've decided – and why".

Responses to my provisional decision

The PR responded to say that Mrs C accepted my provisional decision.

The Lender responded to make a number of points. In essence, the Lender said that:

- My provisional decision is premised on a material error of law in its approach to the prohibition under Regulation 14(3) of the Timeshare Regulations, and (further or alternatively) it errs in its application of that prohibition to the underlying documentation in support of the FPOC 2 sale.

- The above errors undermine my approach to the witness testimony supporting Mrs C's complaint.

- My 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.

- My conclusion in the provisional decision has been based on witness testimony that includes factual inaccuracies. As such, I gave too much weight to the witness testimony when reaching my decision.

I shared the Lender's response with the PR, so both sides are aware of the Lender's concerns about my Provisional Decision. As such, I do not think it necessary to provide

further details here. But I will deal with the relevant aspects below in the section "What I've decided – and why", under the heading "Additional findings following my Provisional Decision".

The Lender's concerns did lead me to ask for Mrs C's additional comments on some aspects of her witness statement. Specifically in relation to where she had said she and her partner *"had been passionate about investing for the future"*.

I shared her response with the Lender, as well as my thoughts on this (a copy of which I also sent to the PR), and informed both sides that I was still intending to uphold this complaint. I invited the Lender and the PR to provide anything further they wanted me to consider when making my final decision. The PR said it had nothing further to add, and the Lender did not respond by the deadline I gave.

The legal and regulatory context

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

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

- The CCA (including Section 75 and Sections 140A-140C).
- The law on misrepresentation.
- The Timeshare Regulations.
- The Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
- The Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations').
- Case law on Section 140A of the CCA – including, in particular:
    - The Supreme Court's judgement 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 judgement 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 have decided to uphold this complaint because, in my opinion, the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling FC Membership 2 to Mrs C as an investment and, in the circumstances of this complaint, this rendered the credit relationship between Mrs C and the Lender unfair to her for the purposes of Section 140A of the CCA.

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

- The Supplier's misrepresentations at the Time of Sale.
- The Credit Agreement funding the purchase of a UCIS.

This is because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mrs C in the same or a better position than she would be if the redress was limited to misrepresentation or the Credit Agreement funding the purchase of a UCIS.

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

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

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between the Mrs C 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 FC Membership 2 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.140A(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 the relevant facts.

I have considered the entirety of the credit relationship between Mrs C and the Lender along with all 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 Mrs C 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 Mrs C's FC Membership 2 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 Mrs C says that the Supplier did exactly that at the Time of Sale – saying the following in her statement dated 28 January 2020:

> *"In October 2013, we were encouraged with a small top-up of £6000 we could increase our share of [Fractional Club membership]. Me and partner have been passionate about investing for our future.* ***We were made to believe that*** *it was a good way of enjoying life with holidays and* ***at the end also get to make money out of it****. So each time we were convinced we were investing."*
>
> (my emphasis added)

In addition to this, Mrs C has indicated in her statement that prior to the Time of Sale, she already viewed Fractional Club membership as an investment because of what she was told by the Supplier during the sale of FC Membership 1:

> *"The main reason we joined the full [Vacation Club] membership was that, according to their salesman, after holidaying for as long as we wanted, we could [sell] the membership and get our money back. Its only after we went back in May 2013 that they said that was not the case, we could mot [sell] the membership. Only if we had [Fractional Club membership] could we do that. So once again, and considering we had already paid a lot of money,* ***we were made to believe that we could get our monies back and maybe more if we signed up to this new product****."*
>
> (my emphasis added)

Mrs C alleges, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because:

(1) By purchasing FC Membership 1 she could sell the membership and make a profit.

(2) By purchasing FC Membership 2 she would increase her share in the Fractional Club and make a profit at the end of the membership term.

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.

I’m satisfied that Mrs C’s description of what she was told about FC Membership 1[2] and FC Membership 2 amounts to the Supplier describing Fractional Club membership as being an investment, because in both cases the Supplier held out the hope or expectation that Mrs C would make a profit from it.

Mrs C’s share in the Allocated Property clearly, in my view, constituted an investment as it offered her the prospect of a financial return – whether or not, like all investments, that was more than what she first put into it. But the fact that FC Membership 2 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 FC Membership 2. They just regulated how such products were marketed and sold.

To conclude, therefore, that FC Membership 2 was marketed or sold to Mrs C 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 her as an investment, i.e. told her or led her to believe that FC Membership 2 offered her the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

Against Mrs C’s recollection of what happened at the Time of Sale, there is evidence in this complaint that the Supplier made efforts to avoid specifically describing FC Membership 2 as an ‘investment’ or quantifying to prospective purchasers, such as Mrs C, the financial value of her 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 FC Membership 2 was not sold to Mrs C as an investment.

The member’s declaration included the following points (number 5 of 15):

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

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

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

And the following on page 8:

- *Primary Purpose: The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for direct purposes of a trade in nor as an*

[2] To be clear, I am not making a finding in this paragraph that Fractional Club membership was sold or marketed by the Supplier at either time as an investment, merely that Mrs C’s description (if accurate) would indicate that it was. This decision and any findings I make are only in relation to FC Membership 2. FC Membership 1 is the subject of a separate complaint which is awaiting a decision.

investment in real estate. CLC makes no representation as to the future price or value of the Allocated Property or any Fractional rights.

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And Mrs C's recollections suggest that the Supplier breached Regulation 14(3) at the Time of Sale because she was made to believe by the Supplier that by purchasing FC Membership 2, she could make 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 FC Membership 2 as an investment, i.e. told Mrs C or led her to believe during the marketing and/or sales process that FC Membership 2 was an investment and/or offered her the prospect of a financial gain (i.e., a profit); and, in turn

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

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

How the Supplier marketed and sold FC Membership 2

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

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

2. screenshots of a Electronic Sales Aid (the 'ESA'); and

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

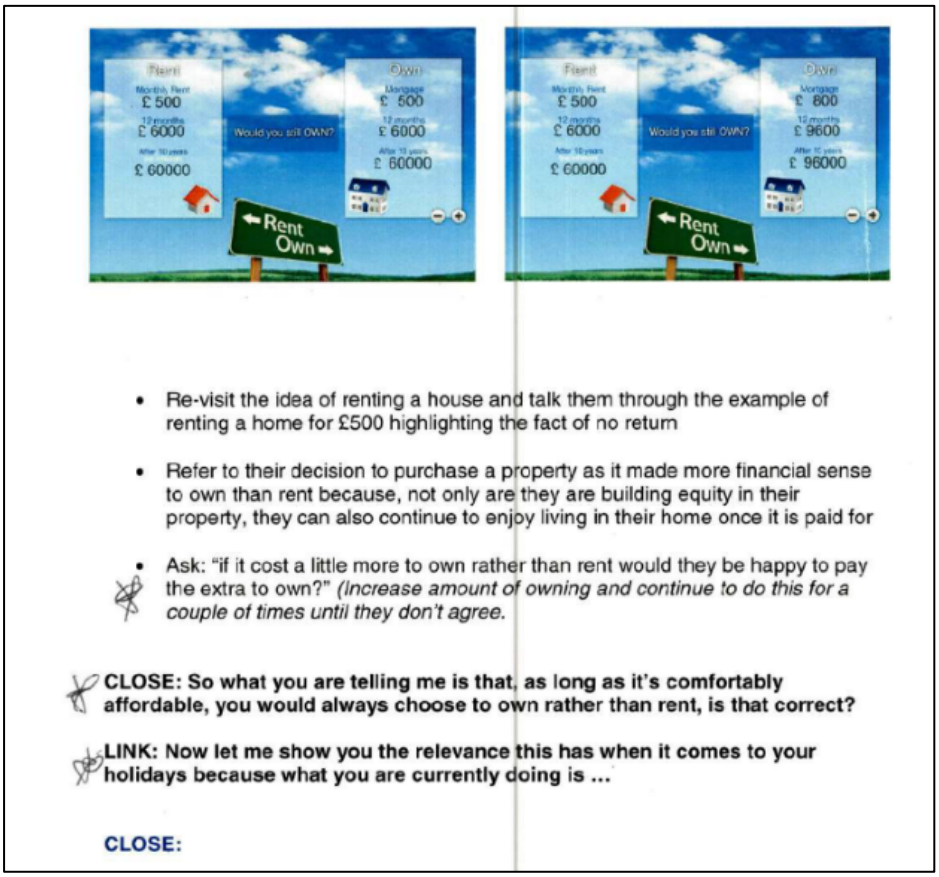
Neither the 2013/2014 Induction Training nor the ESA I've seen included notes of any kind. However, the Fractional Club Training Manual includes very similar slides to those used in the ESA. And according to the Supplier, the Fractional Club Training Manual (or something similar) was used by it to train its sales representatives at the Time of Sale. So, it seems to me that the Training Manual is reasonably indicative of:

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

(2) how the sales representatives would have framed the Supplier's multimedia presentation (i.e., the ESA) during the sale of Fractional Club membership to prospective members – including Mrs C.

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

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



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

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

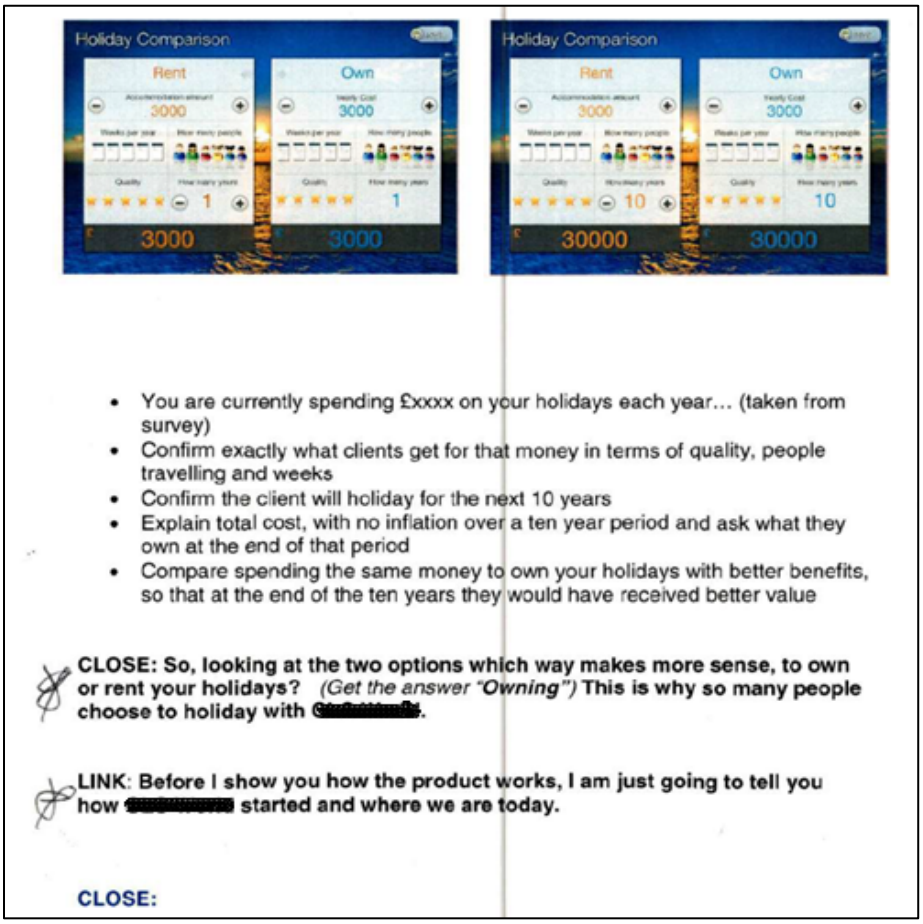
LINK: Now let me show you the relevance this has when it comes to your holidays because what you are currently doing is ...

CLOSE:

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

I acknowledge that the slides don't include express reference to the "investment" benefit of ownership. But the description alludes to much the same concept. It was simply rephrased in the language of "building equity". And with that being the case, it seems to me that the approach to marketing Fractional Club membership was to strongly imply that 'owning' fractional points was a way of building wealth over time, similar to home ownership.

Page 33 of the Fractional Club Training Manual then moved the Supplier's sales representatives onto a cost comparison between "renting" holidays and "owning" them. Sales representatives were told to ask prospective members to tell them what they'd own if they just paid for holidays every year in contrast to spending the same amount of money to "own" their holidays – thus laying the groundwork necessary to demonstrating the advantages of Fractional Club membership:



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

> *"FPOC = small piece of […] World apartment which equals* ***ownership of bricks and mortar***
>
> *[…]*
>
> *Major benefit is the property is sold in nineteen years* ***(optimum period to cover peaks and troughs in the market)*** *when sold you will get your share of the proceeds of the sale*
> *SUMMARISE LAST SLIDE:*
> *FPOC equals a passport to fantastic holidays for 19 years* ***with a return at the end of that period.*** *When was the last time you went on holiday and* ***got some money back? How would you feel if there was an opportunity of doing that?***
>
> *[…]*
>
> *LINK: Many people join us every day and one of the main questions they have is* ***"how can we be sure our interests are taken care of for the full 19 years?*** *As it is very important you understand how we ensure that, I am going to ask Paul to come over and explain this in more details for you.*
>
> […]

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

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

> *"T/O will explain slides emphasising that they only pay a fraction of maintaining the entire property. It also ensures property is kept in peak condition to maximise the return in 19 years['] time.*
>
> […]
>
> *CLOSE: **I am sure you will agree with us that this management fee is an extremely important part of the equation as it ensures the property is maintained in pristine condition so at the end of the 19 year period, when the property is sold, you can get the maximum return.** So I take it, like our owners, there is nothing about the management fee that would stop you taking you holidays with us in the future?..."*
>
> (My emphasis added)

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

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

[…]

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

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

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

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

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

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

I also acknowledge that there was no comparison between the expected level of financial return and the purchase price of Fractional Club membership. However, if I were to only concern myself with express efforts to quantify to Mrs C the financial value of the proprietary interest she was offered, I think that would involve taking too narrow a view of the prohibition against marketing and selling timeshares as an investment in Regulation 14(3).

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

So, if a supplier *implied* to consumers that future financial returns (in the sense of possible profits) from a timeshare were a good reason to purchase it, I think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment. Indeed, if I'm wrong about that, I find it difficult to explain why, in paragraphs 77 and 78 followed by 99 and 100 of S*hawbrook & BPF v FOS* when, Mrs Justice Collins Rice said the following:

> *"[…] I endorse the observation made by Mr Jaffey KC, Counsel for BPF, that, whatever the position in principle,* ***it is apparently a major challenge in practice for timeshare companies to market fractional ownership timeshares consistently with Reg.14(3). […] Getting the governance principles and paperwork right may not be quite enough.***
>
> ***The problem comes back to the difficulty in articulating the intrinsic benefit of fractional ownership over any other timeshare from an individual consumer perspective****. […]* ***If it is not a prospect of getting more back from the ultimate proceeds of sale than the fractional ownership cost in the first place, what exactly is the benefit?*** *[…] What the interim use or value to a consumer is of a prospective share in the proceeds of a postponed sale of a property owned by a timeshare company – one they have no right to stay in meanwhile – is persistently elusive."*

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

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

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

Overall, therefore, as the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members, they indicate that the Supplier's sales representative was likely to have led Mrs C to believe that FC Membership 2 was an investment that may lead to a financial gain (i.e., a profit) in the future. And with that being the case, I don't find her either implausible or hard to believe when she says say she was told that she could make a profit from purchasing FC Membership 2. On the contrary, based on the available evidence discussed here, as well as Mrs C's recollections, which I find plausible and persuasive, I think that's likely to be what Mrs C was led by the Supplier to believe at the relevant time. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

The Lender has pointed out some inaccuracy in the Letter of Complaint, being that the membership term was referred to as 11 years when it was in fact 19 years and that there was no forced inheritance of timeshare membership. But this does not appear to be significant or material to the outcome of this complaint. In my opinion it does not, for example, significantly undermine Mrs C's recollections of what happened at the Time of Sale or what she has said about her motivations for entering into the Purchase Agreement. On the whole I find Mrs C's recollections to be both plausible and persuasive when considering all the circumstances and evidence in this complaint.

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 Mrs C 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 Mrs C and the Lender that was unfair to her and warranted relief as a result, it is important to consider whether the Supplier's breach of Regulation 14(3)[4] led her to enter into the Purchase Agreement and the Credit Agreement.

Based on what Mrs C has said, it appears to me that the opportunity of making a profit from purchasing FC Membership 2 was an important factor in her decision to enter into the Purchase Agreement. She has not mentioned needing or wanting additional holiday rights, although I acknowledge that by purchasing FC Membership 2 she increased her annual Fractional Points from 1,494 to 1,900, an increase of about 27%. Instead, her recollections

[4] (which, having taken place during its antecedent negotiations with Mrs C is covered by Section 56 of the CCA and so 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)

focus on being told she could make a greater profit by increasing her share in the Fractional Club. Mrs C says that she has always been passionate about investing for the future. And that she and Mr C were convinced they were making an investment. All of which leads me to think that, on the balance of probabilities, if the Supplier hadn't sold or marketed FC Membership 2 to Mrs C as an investment, it is unlikely that she would've purchased it.

The Lender has provided a note the Supplier made on 10 October 2013, the day after the sales presentation took place (and seemingly the same day the purchase documents were signed by Mrs C). I'm told that this followed a conversation with Mrs C with a member of the Supplier's Quality Assurance function. It says:

- *"Went down the night [before] after a very long day on a [real estate] tour really wanted property here in Turkey but just not the right time for them hopefully finances will change in a couple of years. So deal went down worksheet signed and [post-sale conversation] agreed for the [next] morning at [meeting location] by [representative's initials]. [Fractional Club version 1] (purchased in May) for [Fractional Club version 2 with] more points. Want to go to New York [next year] with [timeshare exchange program in which they can use their points]… Will use points and cash for New York holiday. 1,000 points given for time in Cornwall… More points more fees but no more [booking fees of 10p per point used]. Will pay [loan] off early have used [before. Cash back given."*

The Supplier says this is sufficient to conclude that Mrs C's main motivation for the purchase was additional points to use to holiday in New York. But I do not agree.

The note shows that Mrs C had attended a real estate tour and was interested in purchasing a holiday home outright – which would clearly be an investment. I think that corroborates what she says about being interested in investing for her future, and that she is likely to have had that in mind around the Time of Sale. But that purchasing a property outright was not feasible for her at that time.

The note also mentions her intention to holiday in New York the following year, and that she intended to use her Fractional points to pay for part of that trip. I accept this may have been part of her motivation for the purchase. But I do not think this is sufficient for me to conclude that Mrs C was not also motivated by the idea of the purchase being an investment. She has clearly stated that she was motivated by both holidaying and making money out of FC Membership 2 when making the purchase, which Mr and Mrs C viewed as increasing their share in the Fractional Club. And in my opinion her statement makes clear that the investment aspect was important to her decision to purchase FC Membership 2.

The idea of purchasing more points to use for one holiday in New York does not seem likely to be the overriding reason for the purchase, given Mrs C expected to have to pay for that holiday using cash as well. I accept that having more points each year and not paying booking fees going forward were benefits that Mrs C could enjoy as a result of the purchase. But the mere existence of these benefits alongside the above note is not sufficient for me to conclude they were the main reasons for the purchase and that the supplier selling or marketing FC Membership 2 to Mrs C as an investment was not influential in her purchasing decision.

Mrs C has said explicitly that the investment aspect (making money out of FC Membership 2) was important to her alongside *"enjoying life with holidays"*. So, it appears it was the combination of the two that led to her entering into the purchase. So, without the investment aspect it seems unlikely that Mrs C would've found the purchase so attractive.

I also think it is unlikely that the Supplier would record that Mrs C was motivated by FC Membership 2 being an investment given the Timeshare Regulations prohibiting the Supplier from selling it as such. Mrs C has not mentioned the removal of booking fees as being important to her. And if the booking fees were 10p per point used, that would be a maximum saving of £190 per year, which does not seem very significant.

With all of that being the case, I am not persuaded that Mrs C would've gone ahead with the purchase if the Supplier had not sold or marketed Fractional Club membership to her as an investment at the Time of Sale in breach of Regulation 14 (3) of the Timeshare Regulations. And because of this I think this rendered her relationship with the Lender unfair to her.

Additional findings following my Provisional Decision

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. 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 said 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:

> *"Mrs C's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the marketing and selling of a timeshare contract as an investment. It does not prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract per se.*
>
> *In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold."*

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)[5].

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

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

With respect to the training material, the Lender said that the parts I highlighted in my Provisional Decision were unobjectionable and that it was unsurprising that there was emphasis on the 19-year period as:

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

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

The training material to which I referred to in my Provisional Decision indicates that the Supplier was likely to have implied to a prospective purchaser that they were buying an interest in 'bricks and mortar', with an emphasis on there being a financial return based on the ownership of a tangible asset, the value of which was maximised thanks to the length of the 19-year membership term. When taken together with Mrs C's memories of the sale, which are not undermined or contradicted by the contents of the training material, I think that there was at least the implication that Fractional Club membership was an investment – which is enough for me to find there was a breach of Regulation 14(3) by the Supplier.

Mrs C's evidence

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 Mrs C have provided. Paragraph 40 reads as follows:

> *"At the start of the hearing, I raised with Counsel the issue of how the Court should assess his oral evidence in light of his communication difficulties. Overnight, Counsel agreed a helpful note setting out relevant case law, in particular the commercial case*

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

of Gestmin SPGS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm) (Leggatt J as he then was at paragraphs 16-22) placed in context by the Court of Appeal in Kogan v Martin [2019] EWCA Civ 1645 (per Floyd LJ at paragraphs 88-89). In the context of language difficulties, Counsel pointed me to the observations of Stuart Smith J in Arroyo v Equion Energia Ltd (formerly BP Exploration Co (Colombia) Ltd) [2016] EWHC 1699 (TCC) (paragraphs 250-251). Counsel were agreed that I should approach Mr Smith's evidence with the following in mind:

In assessing oral evidence based on recollection of events which occurred many years ago, the Court must be alive to the unreliability of human memory. Research has shown that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts (Gestin and Kogan).

A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence (Kogan).

The task of the Court is always to go on looking for a kernel of truth even if a witness is in some respects unreliable (Arroyo).

Exaggeration or even fabrication of parts of a witness' testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony (Arroyo).

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

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

From this, and from my own experience, I find that inconsistencies in evidence are a normal part of someone trying to remember what happened in the past. So, I am not surprised that there are some potential inconsistencies between what Mrs C said happened and what other evidence shows. The question to consider is whether there is a core of acceptable evidence from Mrs C that the inconsistencies have little to no bearing on, or whether such inconsistencies are fundamental enough to undermine, if not contradict, what they say about what the Supplier said and did to market and sell Fractional Club membership as an investment.

The Lender said that Mrs C's recollections are brief and lack detail in terms of how FC Membership 2 was sold as an investment. Mrs C said that when purchasing FC Membership 1, she was made to believe that she could get her money back and maybe more by purchasing Fractional Club membership. And that at the Time of Sale, that purchasing FC Membership 2 would increase her share and at the end she would make money out of it. A lack of detail here does not necessarily mean that what she is remembering is wrong. For example, Mrs C might be expected to remember broadly what she was told and what her understanding was, if not all aspects of the conversation that happened some years previously.

The Lender suggests that if FC Membership 2 was sold as an investment, then Mrs C would've been informed of the likely profit she would receive and how to realise this. But, as mentioned above, I think this takes too narrow a view of what would constitute a breach of Regulation 14(3). Mrs C has made clear that she was at least given the impression that she could "make money" out of the purchase, which clearly implies a financial gain or profit.

I have not upheld the complaint on the basis that Mrs C entered into the contract due to pressure from the Supplier when she otherwise would not have done so. Indeed, her comments about the Time of Sale do not indicate that she felt pressured into the purchase. What she said is that she purchased FC Membership 2 because *"We were made to believe that it was a good way of enjoying life with holidays and at the end also get to make money out of it. So, each time we were convinced we were investing."* In that case, I see no reason why Mrs C would've cancelled the purchase within the 14-day withdrawal period. It seems she was not at that stage unhappy with the purchase.

I do not think it is significant that Mrs C does not mention in the statement that the contractual documents were signed the day after the presentation. She has not suggested, for example, that she did not have time to consider her decision before signing the contract.

The Lender says that Mrs C does not mention in her statement her previous timeshare memberships. But that is not correct. The statement clearly sets out that she previously had Trial Membership before purchasing a non-fractional timeshare, and that in May 2013 she purchased FC Membership 1. I clearly set out her previous membership details at the start of my Provisional Decision, which Shawbrook had provided the detail of when providing its file.

The Lender questions how Mrs C could have been passionate about investing for her future while she also suggested she had no money. I queried this with her. She explained that what she meant by this is that the enthusiastic way the Supplier's representative had sold Fractional Club membership had created a spark in her that the purchase was a great way of securing her future life by being able to make money out of Fractional Club membership when the Allocated Property was sold. But that at the Time of Sale she had no experience of investing.

Mrs C's professional representative also told me that what Mrs C had said about this was consistent with the notes it made on 3 October 2019, when it first discussed the matter with her. These notes state:

> *"We were made to believe that if we upgraded we could get returns of our investment & more if we sign on the day.*
> *We increased our share of the Fractional.*
> *We were thinking about investing for our future.*
> *We were made to believe while taking holiday and get the return of your investment – every question and query we were informed that we were investing in our future – like a pension."*

This note does appear to corroborate what Mrs C has said. That the statement was referring to how she felt at the Time of Sale and her reasons for making the purchase, rather than that she had invested previously. I am satisfied with this explanation, given the evidence available.

The Lender said that Mrs C's interest in purchasing a holiday home in Turkey should not be viewed as her being interested in making an investment. But I think that such a purchase could be seen as both. In any case, this is a minor point on which the outcome of this complaint does not turn.

The Lender pointed to some potential inconsistencies between what Mrs C has said, the Supplier's records and her later actions to do with management fees and surrendering her membership. Those events are sometime after the sale took place and I do not think they provide convincing evidence of Mrs C's motivations at the Time of Sale. Nor do I think that they are sufficient to significantly undermine or contradict what she has said happened at the Time of Sale and why she entered into the Purchase Agreement.

Other matters

I have read and considered the judgment on *Prankard v Shawbrook Bank Limited*. However, that case was decided by the judge on its own facts and circumstances, and it does not change my own findings that, on balance, Mrs C's sale did breach Regulation 14(3).

Conclusion

Given the facts and circumstances of this complaint, I think the Lender participated in and perpetuated an unfair credit relationship with Mrs C 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 Mrs C 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 her back in the position she would have been in had she 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 C *both* agree to assign to the Lender her Fractional Points or hold them on trust for the Lender if that can be achieved.

Mrs C was an existing Fractional Club member through FC Membership 1 and her membership was traded in against the purchase price of FC Membership 2. Under FC Membership 1, she had 1,494 Fractional Points. And, like FC Membership 2, she had to pay annual management charges as part of FC Membership 1. So, had Mrs C not purchased FC Membership 2, she 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 Mrs C from the Time of Sale as part of FC Membership 2 should amount only to the difference between those charges and the annual management charges she would have paid as part of FC Membership 1 (assuming she paid more under FC Membership 2).

I'm conscious that, under FC Membership 1, Mrs C was entitled to a share in an allocated property. I asked the PR to confirm if she wanted FC Membership 1 reinstated, but it has not indicated that she does.

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

(1) The Lender should refund Mrs C's repayments to it under the Credit Agreement, including any sums paid to settle the debt, and cancel any outstanding balance if there is one.

(2) In addition to (1), the Lender should also refund the difference between the annual management charges paid after the Time of Sale under FC Membership 2 and what Mrs C's annual management charges would have been under FC Membership 1 had they not purchased FC Membership 2.

(3) The Lender can deduct:

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

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

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

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

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

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

(6) If Mrs C's Fractional Club membership is still in place at the time of this decision, as long as Mr and Mrs C *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 Mrs C against all ongoing liabilities as a result of her 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 Mrs C took using her 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 her usage.

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

My final decision

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

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs C to accept or reject my decision before 23 July 2025.

Phillip Lai-Fang
Ombudsman