DRN-5553616

The complaint

Mr and Mrs R's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by being party to an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA').

What happened

Previous timeshare membership

In 2012, Mr and Mrs R purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier'). This gave them 1,050 fractional points each year to spend on holidays with the Supplier.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs R 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.

Mr and Mrs R upgraded their membership in 2013, purchasing additional fractional points, giving them a total of 1,420 fractional points. They paid for this using a loan from another lender. In August 2018 Mr R complained about an unfair relationship with that lender. Following the involvement of the Financial Ombudsman Service, that complaint was upheld. The lender settled the complaint by refunding what Mr R paid for the 2013 purchase. The settlement included 78.02% of the maintenance fees Mr and Mrs R paid for their Fractional Club membership purchased in the 2014, which is the subject of the complaint I am now deciding (see below).

2014 purchase – the subject of this complaint

Mr and Mrs R traded in their 2013 membership (1,420 fractional points) and upgraded on 22 September 2014 (the 'Time of Sale'). They entered into an agreement (the 'Purchase Agreement') with the Supplier to buy 1,820 fractional points for a purchase price of £22,082.

Mr and Mrs R paid for this by trading in their existing membership, which was given a value of £14,097 in the transaction, and taking finance of £7,985 from the Lender in both their names (the 'Credit Agreement').

The complaint

Mr and Mrs R – using a professional representative (the 'PR') – wrote to the Lender on 20 August 2018 (the 'Letter of Complaint') to complain about 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.

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

The Letter of Complaint set out several reasons why Mr and Mrs R says that the credit relationship between them and the Lender was unfair to them under Section 140A of the

CCA. In summary, they include the following:

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

2. The Lender paid commission to the Supplier but didn't tell Mr and Mrs R about this.

3. Availability of holidays was not as promised by the Supplier but was very limited.

4. They were told that they would be guaranteed to exit their Fractional Club membership at the end of the membership term, but instead this could continue indefinitely (including Mr and Mrs R's liability for ongoing costs).

5. Mr and Mrs R were pressured to enter into the Purchase Agreement.

6. The Lender did not check that Mr and Mrs R could afford the loan.

The Lender's response to the complaint

The Lender dealt with Mr and Mrs R's concerns as a complaint and issued its final response letter on 11 October 2018, rejecting it on every ground.

Referral to the Financial Ombudsman Service

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

The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr and Mrs R at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of that breach on their purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr and Mrs R was rendered unfair to them for the purposes of section 140A of the CCA.

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

1. Mr and Mrs N gained 400 fractional points when making the purchase, giving them access to higher quality accommodation.

2. They took 16 holidays between 2013 and 2017 using their fractional points.

3. There are inaccuracies in Mr and Mrs R's claim, for example their beneficiaries could not be forced to inherit the Fractional Club membership on their deaths.

4. Mr and Mrs R's statement setting out what happened is undated and unsigned. The allegations made are very similar to those made in the majority of claims submitted by the PR.

5. The sales documents signed by Mr and Mrs R at the Time of Sale make clear Fractional Club membership is not an investment.

My Provisional Decision

I issued a Provisional Decision on 24 April 2025, which explained why I was planning to uphold this complaint and gave Mr and Mrs R 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 Mr and Mrs R 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 Mr and Mrs R accepted my provisional decision and said that they did not want their Fractional Club membership reinstating.

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 sale.

- The above errors undermine my approach to the witness testimony supporting Mr and Mrs R'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 Mr and Mrs R's additional comments on some aspects of their statement. I shared their 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 provide any further comments or arguments, only a document from the time of sale which I had requested (which showed the trade-in value given to Mr and Mrs R's previous membership).

The legal and regulatory context

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

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

- The CCA (including Section 75 and Sections 140A-140C).
- The law on misrepresentation.
- The Timeshare Regulations.
- The Unfair Terms in Consumer Contract Regulations ('UTCCR').
- The Consumer Protection from Unfair Trading Regulations ('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 was good industry practice at the relevant time. In this complaint, this includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 (the 'RDO Code') and the Finance & Leasing Associate Lending Code 2012 (the 'FLA 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 and Mrs R as an investment, which, in the circumstances of this complaint, rendered the credit relationship between them and the Lender unfair to them 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 and Mrs R's complaint, it isn't necessary to make formal findings on whether the Lender paid commission to the Supplier but didn't tell Mr and Mrs R about this, alleged broken promises about availability and a guaranteed exit from Fractional Club membership, pressure, and affordability. This is because, even if those aspects of the complaint ought to succeed, the redress I'm currently proposing puts Mr and Mrs R in the same or a better position than they would be in if the redress was limited to those issues.

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 Mr and Mrs R and the Lender was unfair.

Under Section 140A of the CCA, a debtor-creditor relationship can be found to have been or be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement) (s.140A(1) CCA). Such a finding may also be based on the terms of any related agreement (which here, includes the Purchase Agreement) and, when combined with Section 56 of the CCA, on anything done or not done by the supplier on the creditor's behalf before the making of the credit agreement or any related agreement.

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while Section 56(1) sets out three of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by Section 12(b) of the CCA as *"a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier […]"*. And Section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to *"finance a transaction between the debtor and a person (the 'supplier') other than the creditor […] and "restricted-use credit" shall be construed accordingly."*

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr and Mrs R'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

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

a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in *Plevin* (at paragraph 17):

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

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

I have considered the entirety of the credit relationship between Mr and Mrs R and the Lender along with all of the circumstances of the complaint and I think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale.

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

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

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

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

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs R's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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

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

But Mr and Mrs R say that the Supplier did exactly that at the Time of Sale – saying the following during the course of this complaint:

> *"We were told that* ***purchasing fractional points would be an investment*** *and that after 19 years* ***we would be able to sell our investment and make money on it****."*
>
> (my emphasis added)

This was from their client statement. The PR has provided file notes from their records that suggests this statement was prepared following a meeting with Mr and Mrs R to discuss their recollections of what happened. That meeting took place on 7 December 2017. I appreciate the client statement first sent to the Financial Ombudsman Service was undated and unsigned, but it was sent to us on 11 December 2018. And I have no reason to doubt that it accurately reflects Mr and Mrs R's recollections of the sale – based on the discussion they had with the PR on 7 December 2017.

My reading of what Mr and Mrs R have said is that the Supplier explicitly described Fractional Club membership as an investment and implied that upon the sale of the property they could have some hope or expectation of making a profit.

Mr and Mrs R allege, therefore, that the Supplier breached Regulation 14(3) at the Time of Sale because they were told by the Supplier that:

(1) Fractional club membership was an investment.

(2) There was the hope or expectation of making a profit when the Allocated Property was sold.

The term "investment" is not defined in the Timeshare Regulations. In *Shawbrook & BPF v FOS*, the parties agreed that, by reference to the decided authorities, "*an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit*" at [56]. I will use the same definition.

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

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr and Mrs R as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs R, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs R as an investment.

The Member's Declaration included the following:

- *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 Fractional Rights which are personal rights and not interests in real estate (all as explained in the Information Statement).

The Information Statement included the following:

- *Your Fractional Rights will start on the date shown on the Purchase Agreement and expires automatically when your Allocated Property is sold. There is a provision for distribution of funds or assets to Owners at a future Sale Date after the payment of any taxes and all costs related to that Allocated Property as described in the Rules. Fractional rights have been designed to be used and enjoyed and not bought with the expectation or necessity of future financial gain.*

And:

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

However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And there are several strands to Mr and Mrs R allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that membership of the Fractional Club was expressly described as an *"investment*" and (2) that they would make a profit.

So, I have considered:

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

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

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

How the Supplier marketed and sold the Fractional Club membership

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

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

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

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

Neither the 2013/2014 Induction Training nor the ESA I've seen included notes of any kind. However, the Fractional Club Training Manual includes very similar slides to those used in

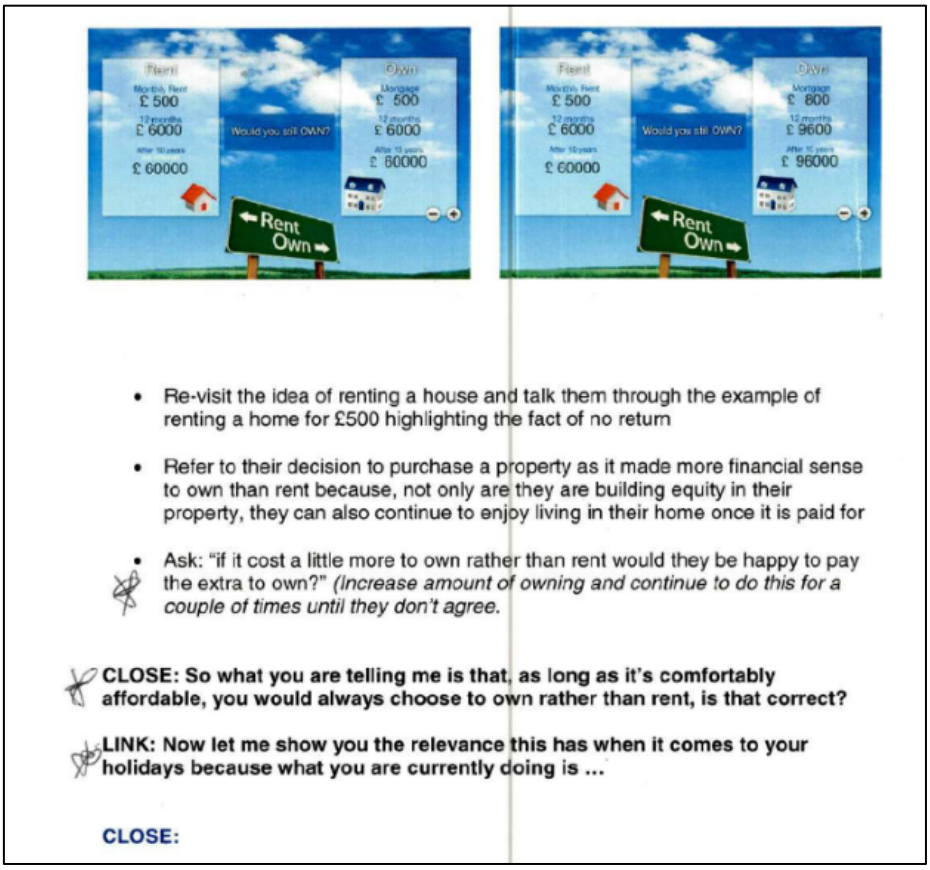
the ESA. And according to the Supplier, the Fractional Club Training Manual (or something similar) was used by it to train its sales representatives at the Time of Sale. So, it seems to me that the Training Manual is reasonably indicative of:

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

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

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?

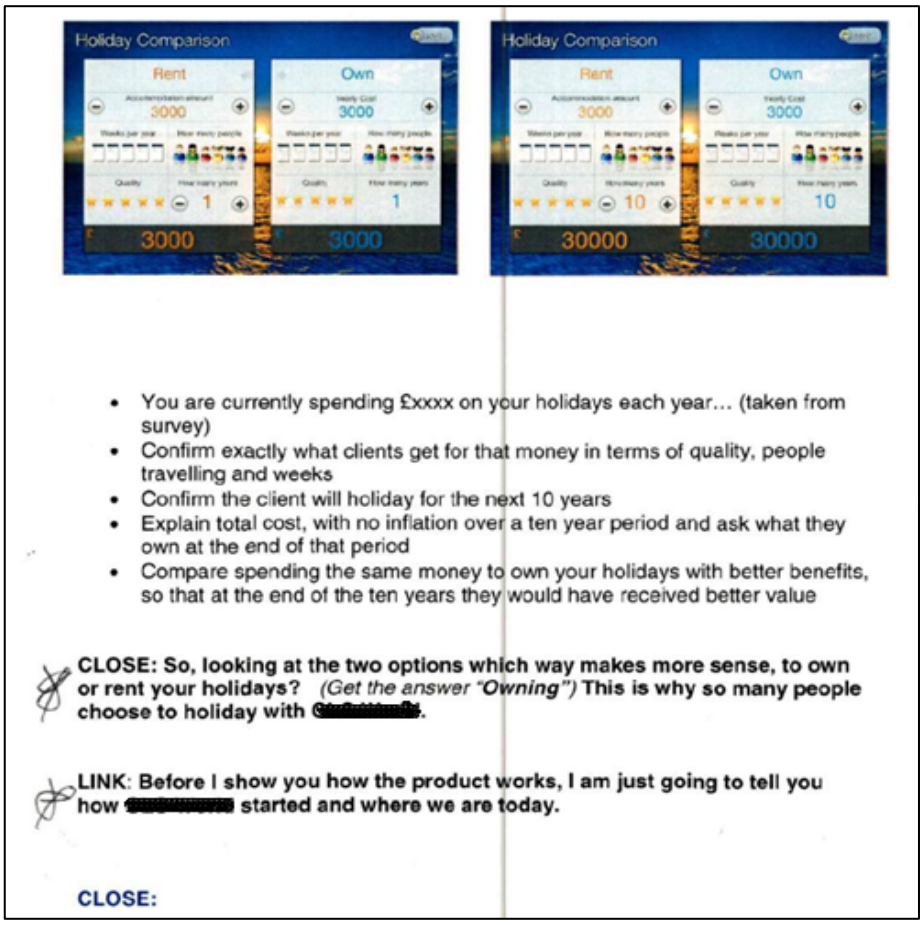
LINK: Now let me show you the relevance this has when it comes to your holidays because what you are currently doing is …

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.

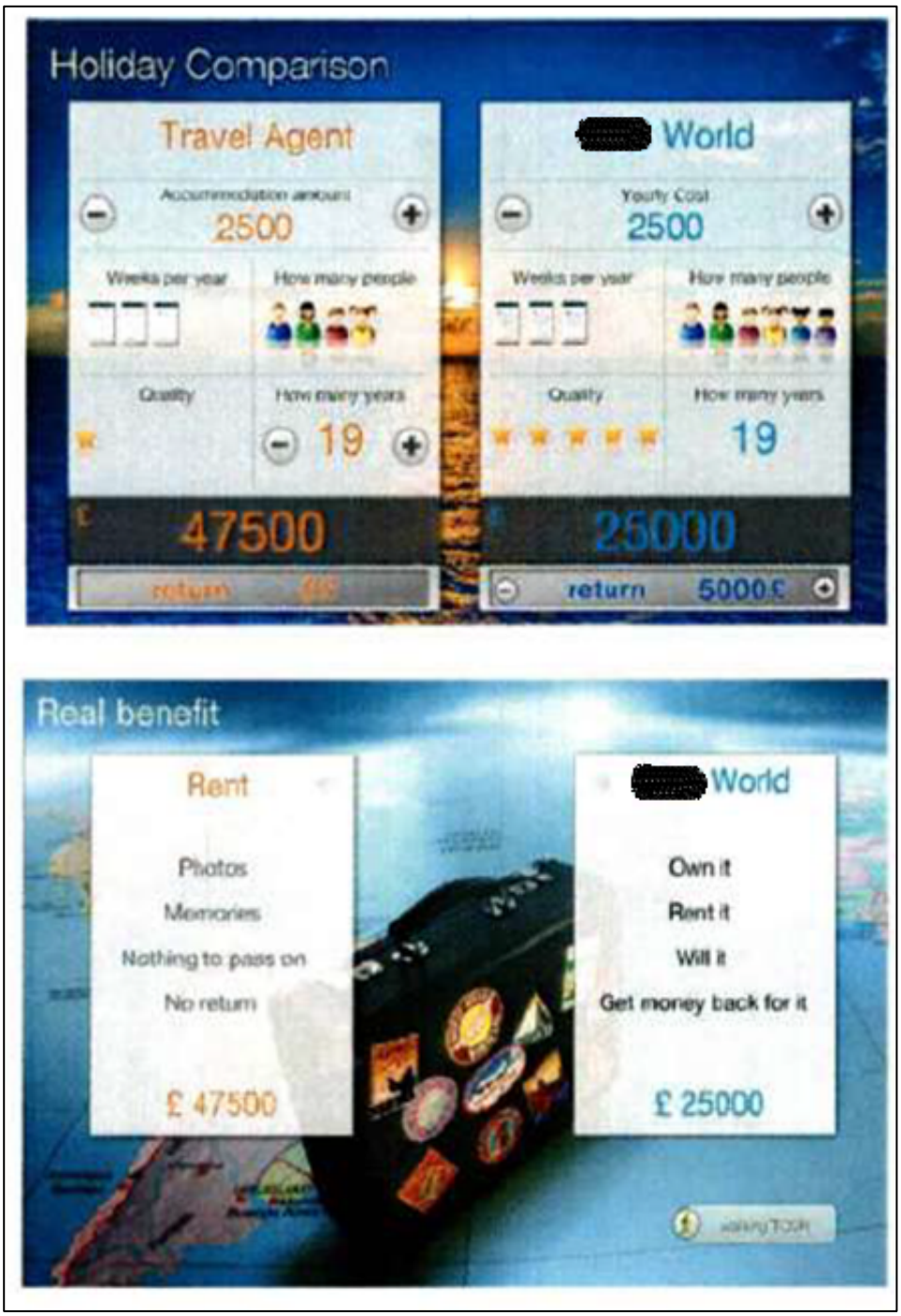
[…]

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

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

When the Government consulted on the implementation of the Timeshare Regulations, it discussed what marketing or selling a timeshare as an investment might look like – saying that *'[a] trader must not market or sell a timeshare or [long-term] holiday product as an investment. For example, there should not be any inference that the cost of the contract would be recoupable at a profit in the future (see regulation 14(3)).'*[2] And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.

So, if a supplier *implied* to consumers that future financial returns (in the sense of possible profits) from a timeshare were a good reason to purchase it, I think its conduct was likely to have fallen foul of the prohibition against marketing or selling the product as an investment.

Indeed, if I'm wrong about that, I find it difficult to explain why, in paragraphs 77 and 78 followed by 99 and 100 of *Shawbrook & BPF v FOS* when, Mrs Justice Collins Rice said the following:

> *"[…] I endorse the observation made by Mr Jaffey KC, Counsel for BPF, that, whatever the position in principle,* ***it is apparently a major challenge in practice for timeshare companies to market fractional ownership timeshares consistently with Reg.14(3). […] Getting the governance principles and paperwork right may not be quite enough.***

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

> ***The problem comes back to the difficulty in articulating the intrinsic benefit of fractional ownership over any other timeshare from an individual consumer perspective****. […]* ***If it is not a prospect of getting more back from the ultimate proceeds of sale than the fractional ownership cost in the first place, what exactly is the benefit?*** *[…] What the interim use or value to a consumer is of a prospective share in the proceeds of a postponed sale of a property owned by a timeshare company – one they have no right to stay in meanwhile – is persistently elusive."*
>
> *"[...] although the point is more latent in the first decision than in the second, it is clear that both ombudsmen viewed fractional ownership timeshares – simply by virtue of the interest they confer in the sale proceeds of real property unattached to any right to stay in it, and the prospect they undoubtedly hold out of at least 'something back' – as products which are inherently dangerous for consumers.* ***It is a concern that, however scrupulously a fractional ownership timeshare is marketed otherwise, its offer of a 'bonus' property right and a 'return' of (if not on) cash at the end of a moderate term of years may well taste and feel like an investment to consumers who are putting money, loyalty, hope and desire into their purchase anyway.*** *Any timeshare contract is a promise, or at the very least a prospect, of long-term delight. [...] A timeshare-plus contract suggests a prospect of happiness-plus. And a timeshare plus 'property rights' and 'money back' suggests adding the gold of solidity and lasting value to the silver of transient holiday joy."*
>
> (My emphasis added)

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

Overall, therefore, as the slides I've referred to above seem to me to reflect the training the Supplier's sales representatives would have got before selling Fractional Club membership and, in turn, how they would have probably framed the sale of the Fractional Club to prospective members, they indicate that the Supplier's sales representative was likely to have led Mr and Mrs R to believe that membership of the Fractional Club was an investment that may lead to a financial gain (i.e., a profit) in the future. And with that being the case, I don't find them either implausible or hard to believe when they say:

> *"We were told that purchasing fractional points would be an investment and that after 19 years we would be able to sell our investment and make money on it."*

On the contrary, based on everything that's been said and/or provided so far, I think that's likely to be what Mr and Mrs R were led by the Supplier to believe at the relevant time. And for that reason, I think the Supplier breached Regulation 14(3) of the Timeshare Regulations.

Is the credit relationship between the Lender and the Consumer unfair?

Having found that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr and Mrs R and the Lender under the Credit Agreement and related Purchase Agreement.

As the Supreme Court's judgment in *Plevin* makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in *Carney* and *Kerrigan* (respectively) on causation.

In *Carney*, HHJ Waksman QC said the following in paragraph 51:

> *"[…] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some material impact on the debtor when deciding whether or not to enter the agreement. […] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. […]"*

And in *Kerrigan*, HHJ Worster said this in paragraphs 213 and 214:

> *"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court **may** make an order **if** it determines that the relationship is unfair to the debtor. […]*
>
> *[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. […]"*

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs R and the Lender that is unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3)[3] led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

The Lender has suggested that some inaccuracies in Mr and Mrs R's recollections of what happened at the Time of Sale mean that I should give little evidential weight to what they remember. Those inaccuracies highlighted are:

---

[3] Which, having taken place during its antecedent negotiations with Mr and Mrs R, 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.

- That Mr and Mrs R have said there was problems with availability, but they have taken 16 holidays using their membership, making good use of their fractional points.
- Mr and Mrs R say they were not told Fractional Club membership would form part of their estate on death and their beneficiaries would be liable for ongoing costs, but while Fractional Club membership can be passed on this cannot be forced onto someone.

I do not think these points significantly undermine Mr and Mrs R's recollections. While they made use of their fractional points, this does not necessarily mean they were able to book their preferred holidays on every occasion. So, it may be accurate for them to say that availability was not as good as they expected.

On the second point, it seems that Mr and Mrs R fear their beneficiaries may be forced to take on the costs of membership after they pass away. The Lender says this is wrong. So, it appears to me that Mr and Mrs R simply misunderstand the situation. Their recollection was that they were not told this incorrect information, which seems likely to be correct. So, I don't see how this can undermine their other recollections.

The Lender has also called into question when Mr and Mrs R's recollections were recorded. But these were provided to the Financial Ombudsman Service in 2018, rather than more recently. The PR's records show the statement was written based on a conversation with Mr and Mrs R that took place in December 2017. So, I do not think the statement being unsigned or undated undermines it. And I have no reason to think it is anything other than a record of what Mr and Mrs R recalled of the sale at that time.

The Lender has suggested that the main reason Mr and Mrs R entered into the Purchase Agreement was to obtain 400 more fractional points so they could benefit from more holiday purchasing power. I do not dispute that part of their motivation for the purchase may have been to take more holiday or to do so in better accommodation. But that does not exclude the possibility that another part of their motivation was to increase their investment and possible future profits on the sale of the Allocated Property. They paid £7,985 for the additional points (£19.96 per point). Whereas in 2013, when they previously purchased more fractional points, they increased their points total by 370 at a cost of £5,901 (£15.94 per point).

So, the additional fractional points Mr and Mrs R purchased at the Time of Sale were worth 25% more per point, despite each point holding the same holiday purchasing power as those they purchased previously. To me, the most likely explanation for that increase is that the points were linked to a different, more valuable holiday apartment. And that points to a motivation for purchase that went beyond simply getting more points to spend on holidays. Otherwise, I wonder why Mr and Mrs R did not purchase extra points linked to the apartment allocated to their 2013 purchase or to one where the points cost a similar amount to what they paid previously (or indeed through one of the Supplier's other timeshare memberships that were not asset backed).

On my reading of Mr and Mrs R testimony, the prospect of a financial gain from entering into the Purchase Agreement was most likely an important and motivating factor when they decided to go ahead with their purchase. That doesn't mean they were not interested in taking more holidays. That they bought more points demonstrates that they were. And that is not surprising given the nature of the product at the centre of this complaint. But as Mr and Mrs R say (plausibly in my view) that Fractional Club membership was marketed and sold to them at the Time of Sale as something that offered them more than just holiday rights, on the balance of probabilities, I think their purchase was motivated by their share in the Allocated Property and the possibility of a profit. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made.

Because Mr and Mrs R faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I have not seen enough to persuade me that they would have pressed ahead with the purchase regardless. And as such, in all the circumstances of this complaint, I think the Supplier's breach Regulation 14(3) of the Timeshare Regulations led to an unfair credit relationship between the Lender and Mr and Mrs R.

Additional findings following my PD

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:

> *"Mr and Mrs R'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, Mr and Mrs R'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 Mr and Mrs R'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.

<u>Mr and Mrs R's evidence</u>

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 and Mrs R 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 Mr and Mrs R said happened and what other evidence shows. The question to consider is whether there is a core of acceptable evidence from Mr and Mrs R 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 pointed out that Mr and Mrs R’s witness testimony was not supported by a statement of truth. The PR referred to the document as a Client Statement, rather than a witness statement or witness testimony. My understanding is that the PR prepared the Client Statement based on a conversation with Mr R that took place on 1 December 2017.

Given the Lender’s concerns, I asked Mr and Mrs R for some more information, including to confirm whether the Client Statement reflects what they told the PR about the sale when the PR spoke to them in December 2017, whether they saw and approved the statement before the Letter of Complaint was sent to the Lender, and whether there were inaccuracies in it.

Mr R has confirmed that the statement reflects what he told the PR in December 2017, that he saw and approved the statement before the Letter of Complaint was issued, and there are no inaccuracies in it.

I asked Mr R why he initially sought to surrender FC Membership 2. He said that it had come to light that:

> *"the contract I had entered was not what [was] verbally sold to me in the first place therefore it was clear that I needed to take action to get out of the contract. It was because of the untruth regarding the investment element as well as the hidden exit policy that was in the contract".*

I asked why the complaint had not been made sooner. Mr R indicated that when he became aware of the issues he mentioned above, he made the decision to start the process of terminating the contract and trying to get his money back.

Mr R confirmed that at the Time of Sale he was told the purchase was an investment that would grow over 19 years, that by upgrading his membership he was increasing his investment for better returns, that the salesperson used the word investment and showed him an illustration of how he would get back more than his initial investment.

I acknowledge that getting the additional comments of Mr R does involve some element of risk in terms of Mr R and the PR having a greater knowledge of this type of complaint than earlier in the process. But, given the Lender's concerns, I felt this would be useful in terms of clarifying things. Not least, to confirm that:

1. The Client Statement was written in December 2017.

2. The Client Statement was an accurate reflection of Mr R's recollections of what happened at the Time of Sale.

Mr R has not, in my opinion, undermined anything that was said in the Client Statement – something which sometimes happens despite the benefit of hindsight and the involvement of a professional representative. On the balance of probabilities, I am satisfied that the Client Statement was written by the PR in December 2017 based on a conversation it had with Mr R.

The Lender says the Client Statement is brief and lacks sufficient details about the sale. The Lender does not specify what level of detail would in its opinion be sufficient. But I'm mindful that a customer is unlikely to remember every detail of a sale that happened years before, and they can only include what they do remember to the best of their ability.

I might expect a customer to remember important details, like what they purchased, its benefits, the broad thrust of the discussions, as well as perhaps where the sale took place – even if they do not remember the names of the salespeople or everything that was said. While additional verifiable details being included would strengthen Mr R's Client Statement, in my opinion the lack of that additional detail does not in this case terminally undermine the veracity of what it says.

The Client Statement does not go into detail about Mr and Mrs R's previous timeshare experience. But it does indicate there was a previous upgrade in 2013, and that the sale being complained about was in 2014. So, I think it is obvious from the Client Statement that Mr and Mrs R were existing timeshare owners. In any case, I was aware of and set out Mr and Mrs R's previous timeshare experience at the start of my Provisional Decision. And I do not think they were seeking to hide this or paint themselves as inexperienced. The Client Statement acknowledges that Mr and Mrs R had attended previous update meetings and were aware they could include breakfast followed by a sales presentation.

While the allegation about being told Fractional Club membership was an investment could be more detailed, I do not agree that to sell or market a timeshare as an investment the Supplier would need to provide information about the projected return (such as quantifying it either in broad strokes or definitively) – although Mr R does say the Supplier indicated the return would exceed what he paid for it. And I think it is accepted that the Supplier would've explained that at the end of the membership term the Trustee would arrange the sale of the Allocated Property and distribute the net sale proceeds to the Fractional Owners in accordance with their fractions. So, the Supplier did provide information about how Mr and Mrs R's returns would be realised.

I don't think it is significant that Mr and Mrs R did not question the trade-in value given to their previous membership at the Time of Sale. I note that this was £14,097, which matched the price that was paid for their initial purchase of Fractional Club membership in 2012, and the trade-in value that was given when they upgraded in 2013. So, overall, Mr and Mrs R had paid £19,998 for their previous memberships, and the trade-in value in 2014 was £5,901 less than this. Whether that reduction was related to their usage of their previous memberships up to that point is unclear.

However, Mr and Mrs R had decided to proceed at the price and trade-in value shown to them – seemingly in the hope of making a financial gain at the end of the membership term, the Supplier having told them that by making the purchase they were increasing their investment. It seems unlikely that Mr and Mrs R were given clear information at that time about what they had paid for their previous memberships or that they were aware that the trade-in value was lower than this. That information was not included in the Pricing Summary generated at the Time of Sale.

I do not think it is in dispute that Mr and Mrs R at least partly made the purchase to get more Fractional Points that could be spent on holidays, which they did. But that does not necessarily mean that was their only reason for the purchase. It is not as though the Supplier did not highlight the benefit of receiving a share of the net sale proceeds of the Allocated Property, given this was a feature of the product. As the Lender has pointed out, not providing this information may have breached other requirements of the Timeshare Regulations. The question is whether there is sufficient evidence that the Supplier went further than that and indicated that Mr and Mrs R could make a profit from the purchase, and if it did, was that material to Mr and Mrs R's decision to purchase, thereby creating an unfair relationship.

The fact that Mr and Mrs R used their membership to take holidays does not mean that they always got to holiday where and when they wanted. It may be that what they wanted to book was unavailable, so they booked something else rather than not use their 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. So, I do not think Mr and Mrs R's comments about holiday availability can be said to significantly undermine the rest of the Client Statement.

The Lender has made some comments about Mr and Mrs R mentioning pressurised sales. And pointed out that that they did not cancel during the 14-day withdrawal period. But I do not think that Mr and Mrs R have said they entered the contract due to pressure placed on them by the Supplier when they otherwise did not want to. And Mr R has indicated in his recent comments that it was only later when he felt he had been misled about the timeshare that he realised he had something to complain about. So, there appears no reason why he would've cancelled the purchase within the withdrawal period.

I do not think it is significant that the Client Statement does not mention Mr and Mrs R's attempts to surrender or terminate their membership. It is clear from Mr R's recent comments that he complained because he felt that the Supplier had misled him by saying Fractional Club membership was an investment when it was not. He seems to have concluded (whether misguided or not) that the Allocated Property would never be sold and that he would not get any money back. Given that, I would not expect Mr and Mrs R to have enquired about realising their investment when seeking to surrender or terminate their membership, but rather to make a complaint, which is what they subsequently did.

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 as set out above.

Conclusion

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

Compensation for distress and inconvenience

The PR requested that the Lender pay a significant amount of compensation in respect of the distress and inconvenience caused to Mr and Mrs R. But the PR has not provided any information specific to them in terms of what distress and inconvenience they have experienced as a result of what the Lender did wrong. So, I am not persuaded any compensation is warranted in this case.

Fair Compensation

Having found that Mr and Mrs R would not have agreed to purchase Fractional Club membership at the Time of Sale were it not for the breach of Regulation 14(3) of the Timeshare Regulations by the Supplier (as deemed agent for the Lender), and the impact of that breach meaning that, in my view, the relationship between the Lender and the Consumer was unfair under section 140A of the CCA, I think it would be fair and reasonable to put them back in the position they would have been in had they not purchased the Fractional Club membership (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided both Mr and Mrs R agree(s) to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs R were existing Fractional Club members ('FC Membership 1'), and their membership was traded in against the purchase price of Fractional Club membership in question ('FC Membership 2'). Under FC Membership 1, they had 1,420 of Fractional Points. And, like FC Membership 2, they had to pay annual management charges as part of FC Membership 1. So, had Mr and Mrs R not purchased FC Membership 2, 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 R 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 they would have paid as part of FC Membership 1 (I understand that the lender who provided credit for Mr and Mrs R's purchase of FC Membership 1 has refunded those management charges – being 70.02% of the management charges they paid under FC Membership 2).

I'm conscious that, under FC Membership 1, Mr and Mrs R were entitled to a share in an

allocated property. It isn't clear if, considering that fact, they want FC Membership 1 reinstated nor, in turn, whether that can be achieved to the satisfaction of both parties to it. If they want FC Membership 1 reinstated, they can let me know in response to this provisional decision.

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

(1) The Lender should refund Mr and Mrs R'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 Mr and Mrs R's annual management charges would have been under FC Membership 1 had they not purchased FC Membership 2 (in this case that is 29.98% of the management charges paid under FC membership 2 – taking into account that the lender that funded the purchase of FC Membership 1 has refunded the rest as part of the settlement of a separate complaint).

(3) The Lender can deduct:

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

   ii. The market value of the holidays* Mr and Mrs R took using FC Membership 2 *if* the Points value of the holiday(s) taken amounted to more than the total number of Fractional Points they would have been entitled to use at the time of the holiday(s) as ongoing FC Membership 1 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 R took a holiday worth 2,550 Fractional Points after the Time of Sale and they 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 they would have been entitled to use 2,600 Fractional Points under FC Membership 1, for instance, there shouldn't be a deduction for the market value of the relevant holiday.

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

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

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

(6) If Mr and Mrs R'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 them against all ongoing liabilities as a result of their Fractional Club membership.

*I recognise that it can be difficult to reasonably and reliably determine the market value of holidays when they were taken a long time ago and might not have been available on the open market. So, if it isn't practical or possible to determine the market value of the holidays Mr and Mrs R 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 and direct Shawbrook Bank Limited to pay fair compensation to Mr and Mrs R as set out above.

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

Phillip Lai-Fang
Ombudsman