

The complaint

Mr and Mrs T'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

Mr and Mrs T originally purchased membership of a timeshare (the 'Fractional Club Membership' - FCM) from a timeshare provider (the 'Supplier') consisting of 2898 Fractional points, in April 2012, when they traded in their existing Vacation Club Membership, and financed the balance by way of a fixed sum loan agreement with the Lender.

On 29 April 2014 (the 'Time of Sale'), they traded in their existing FCM, and entered into an agreement, (the 'Purchase Agreement') with the Supplier to upgrade their existing FCM to one that provided 3,240 fractional points. The purchase price of the FCM was £48,993 and the trade in value of their existing FCM was £42,379. So, Mr and Mrs T had to pay a balance of £6,614 to purchase the upgraded FCM.

FCM was asset backed – which meant it gave Mr and Mrs T more than just holiday rights. It also included a share in the net sale proceeds of a property named on their Purchase Agreement (the 'Allocated Property') after their membership term ends.

Mr and Mrs T paid for their FCM by taking finance of £6,614 from the Lender in their joint names (the 'Credit Agreement').

Mr and Mrs T wrote to the Lender on 16 August 2019 (the 'Letter of Complaint') to complain about the purchase of the FCM in April 2014. In summary they said:

1. There had been misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 140A of the CCA.
2. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA, which they say resulted in a breach of contract.
3. The decision to lend being irresponsible because (1) the Lender did not carry out the right creditworthiness assessment and (2) the money lent to them under the Credit Agreement was unaffordable for them.

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 T say that the credit relationship between them and the Lender was unfair to them under Section 140A of the CCA. Mr and Mrs T say that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier in summary:

1. Told them that FCM was an "investment" which could benefit their children when the

product was sold at a profit, that was not true. The long-term benefits of increasing their investment to a four-week fraction was explained, and they were told they could expect a return on their investment in the future.

2. Put them under pressure to purchase and the meeting would go on for hours. They were induced to purchase based on what they were being told which they later learned had been misrepresented.

3. Told them that the offer made to them had limited availability.

4. Told them the only way they could exit the timeshare was to purchase fractional points when they could have exited by invoking the exceptional circumstances policy and terminated free of charge.

5. Told them they were guaranteed to exit the fractional points membership after eighteen years which wasn't true.

6. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.

The Lender dealt with Mr and Mrs T's concerns as a complaint and issued its final response letter on 16 September 2019, rejecting it on every ground.

Mr and Mrs T 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 lender disagreed with the Investigator's assessment and asked for an Ombudsman's decision. It said in its response to the assessment, that when Mr and Mrs T traded in their FCM towards this purchase, they gained an additional 342 points along with the removal of booking fees. It also said that whilst only taking a maximum of four weeks in various years prior to 2014, after the purchase of the additional points they took six weeks holiday in 2015 and five weeks two days in 2016 which showed the use for the additional points. As no agreement could be reached, the case has been passed to me for review.

I issued a provisional decision (PD) explaining why I intended to uphold the complaint. The Lender disagreed with my decision. In summary it said:

- It was clear from my PD that I had placed a strong reliance on the Letter of Claim (LOC) received from Mr and Mrs T, which it believed was vague, brief, inconsistent and included factual inaccuracies which ultimately distorted the events surrounding the sale.
- Mr and Mrs T's actions were inconsistent with the LOC in that there was no evidence about what would happen to their fractional ownership and any potential return on their investment. It also said the LOC had limited reference to a breach of the regulation and was lacking in detail and generic. It then summarised information provided to it by the Supplier which it said emphasized its arguments.
- It didn't agree that "*the alleged investment element*" was "*an important and motivating factor*" behind the purchase. It said the contemporaneous documentation showed that the real motivations for their purchase was that they "*enjoy their membership...*"
- My PD was premised on a material error of law in its approach to the legal test to determine the existence of an unfair relationship.
- An e-mail from Mr and Mrs T to our service and a note of a telephone call, included a variety of factual inaccuracies which it said weren't acknowledged in the PD. It went on to set out the issues and inaccuracies it considered to be relevant.
- It said I hadn't asked the right questions in the investigation or asked for further

clarity and elaboration. It set out questions it thought should have been asked, including in respect of investment.

- It thought my reliance on the LOC was unsafe and thought Mr and Mrs T had copied and pasted claims that two professional representatives – unconnected to the case – had made on behalf of other clients. It said their allegations were generic and suggested Mr and Mrs T had somehow managed to get templated letters from those representatives to create the LOC, and it asked that I reflect on the conclusion that LOC and allegations were reliable.
- It said if I was prepared to rely on allegations made with the LOC which it considered unreliable, I should equally rely on the contemporaneous documents it had provided. It didn't think what Mr and Mrs T had said about expecting a return on their investment was credible, nor was it credible that the purpose of the sale was the pursuit of an investment objective. As opposed to their motivation to purchase points to meet their future holidays.

The Lender set out what it considered to be the correct legal approach in respect of the sale of the Allocated property in the context of regulation 14(3).

In particular, the Lender says:

- It was crucial my approach in relation to "investment" didn't extend beyond the scope outlined in the case of *Shawbrook v BOS*. It argued that I took the position that "*the mere existence of the "prospect of a financial return" constituted an "investment"*". In particular, the PD falls into that error by conflating two different meanings of the word 'return': (i) a 'return on investment', which is normally understood to mean the measure of profit (the return) on the original investment; and (ii) a customer being told that some money will be 'returned' upon sale, which carries no connotation of investment or profit."
- Selling an investment requires both the finding of a representation by the seller that the reason for a customer to purchase the product was the prospect of financial gain/profit, together with a corresponding financial gain/profit motive on the part of the customer. If the timeshare was to be an investment, then it thought Mr and Mrs T would have been told of the return, which hadn't been included in any correspondence.
- The documentation in relation to the sale was on its face unobjectionable and showed no breach of Reg 14(3).
- I should have asked whether there was sufficiently clear, compelling evidence that the timeshare product was marketed or sold as an investment. It thought I had misinterpreted Reg 14(3).
- I had applied the incorrect legal test to determine whether the relationship was unfair. It referred to the test described in the case of *Carney* and said I had applied a different test to determine if an unfair relationship existed, in that I said: "*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.*"
- It said this appeared to reverse the burden of proof. The correct starting point should be based on the judgment set out in the case of *Carney*, to assess whether there was sufficient evidence of a material impact on the decision to enter the agreement. It considered that Mr and Mrs T's circumstances and motivations for the sale meant the sale of the timeshare didn't have a material impact on them purchasing the FCM,

and that the relationship wasn't unfair.

- In conclusion it said my PD to uphold the complaint ought not to be maintained, as it said there was no clear, compelling evidence that the FPOC 2 product was sold to Mr and Mrs T with the intention of financial gain. The complaint in respect of this sale should be rejected.

In response Mr and Mrs T said they agreed with the overall recommendation and accepted the PD.

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. The legal and regulatory context that I think is relevant to this complaint is set out in an appendix (the 'Appendix') below – which forms part of this decision.

Appendix: The Legal and Regulatory Context

The Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006) (the 'CCA')

The timeshare(s) at the centre of the complaint in question was/were paid for using restricted-use credit that was regulated by the Consumer Credit Act 1974. As a result, the purchase(s) was/were covered by certain protections afforded to consumers by the CCA provided the necessary conditions were and are met. The most relevant sections as at the relevant time(s) are below.

Section 56: Antecedent Negotiations

Section 75: Liability of Creditor for Breaches by a Supplier

Sections 140A: Unfair Relationships Between Creditors and Debtors

Section 140B: Powers of Court in Relation to Unfair Relationships

Section 140C: Interpretation of Sections 140A and 140B

Case Law on Section 140A

Of particular relevance to the complaint in question are:

1. The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ('*Plevin*') remains the leading case.
2. The judgment of the Court of Appeal in the case of *Scotland v British Credit Trust* [2014] EWCA Civ 790 ('*Scotland and Reast*') sets out a helpful interpretation of the deemed agency and unfair relationship provisions of the CCA.
3. *Patel v Patel* [2009] EWHC 3264 (QB) ('*Patel*') – in which the High Court held 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 relationship or otherwise the date the relationship ended.
4. The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 ('*Smith*') – which approved the High Court's judgment in *Patel*.
5. *Deutsche Bank (Suisse) SA v Khan and others* [2013] EWHC 482 (Comm) – in Hamblen J summarised – at paragraph 346 – some of the general principles that apply

to the application of the unfair relationship test.

6. *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 ('Carney').
7. *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ('Kerrigan').
8. *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').

My Understanding of the Law on the Unfair Relationship Provisions

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.*"

So, the negotiations conducted by the Supplier during the sale of the timeshare(s) in question was/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 of the relevant facts.

The Law on Misrepresentation

The law relating to **misrepresentation** is a combination of the common law, equity and statute – though, as I understand it, the Misrepresentation Act 1967 didn’t alter the rules as to what constitutes an effective misrepresentation. It isn’t practical to cover the law on misrepresentation in full in this decision – nor is it necessary. But, summarising the relevant pages in *Chitty on Contracts (33rd Edition)*, a material and actionable misrepresentation is an untrue statement of existing fact or law made by one party (or his agent for the purposes of

¹ The Court of Appeal’s decision in *Scotland* was recently followed in *Smith*.

passing on the representation, acting within the scope of his authority) to another party that induced that party to enter into a contract.

The misrepresentation doesn't need to be the only matter that induced the representee to enter into the contract. But the representee must have been materially influenced by the misrepresentation and (unless the misrepresentation was fraudulent or was known to be likely to influence the person to whom it was made) the misrepresentation must be such that it would affect the judgement of a reasonable person when deciding whether to enter into the contract and on what terms.

However, a mere statement of opinion, rather than fact or law, which proves to be unfounded, isn't a misrepresentation unless the opinion amounts to a statement of fact and it can be proved that the person who gave it, did not hold it, or could not reasonably have held it. It also needs to be shown that the other party understood and relied on the implied factual misrepresentation.

Silence, subject to some exceptions, doesn't usually amount to a misrepresentation on its own as there is generally no duty to disclose facts which, if known, would affect a party's decision to enter a contract. And the courts aren't too ready to find an implied representation given the challenges acknowledged throughout case law.

The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations')

The relevant rules and regulations that the Supplier in this complaint had to follow were set out in the Timeshare Regulations. I'm not deciding – nor is it my role to decide – whether the Supplier (which isn't a respondent to this complaint) is liable for any breaches of these Regulations. But they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair. After all, they signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

The Regulations have been amended in places since the Time of Sale. So, I refer below to the most relevant regulations as they were at the time(s) in question:

- Regulation 12: Key Information
- Regulation 13: Completing the Standard Information Form
- Regulation 14: Marketing and Sales
- Regulation 15: Form of Contract
- Regulation 16: Obligations of Trader

The Timeshare Regulations were introduced to implement EC legislation, Directive 122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts (the '2008 Timeshare Directive'), with the purpose of achieving 'a high level of consumer protection' (Article 1 of the 2008 Timeshare Directive). The EC had deemed the 2008 Timeshare Directive necessary because the nature of timeshare products and the commercial practices that had grown up around their sale made it appropriate to pass specific and detailed legislation, going further than the existing and more general unfair trading practices legislation.²

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

² See Recital 9 in the Preamble to the 2008 Timeshare Directive.

The CPUT Regulations put in place a regulatory framework to prevent business practices that were and are unfair to consumers. They have been amended in places since they were first introduced. And it's only since 1 October 2014 that they imposed civil liability for certain breaches – though not misleading omissions. But, again, I'm not deciding – nor is it my role to decide – whether the Supplier is liable for any breaches of these regulations. Instead, they are relevant to this complaint insofar as they inform and influence the extent to which the relationship in question was unfair as they also signal the standard of commercial conduct reasonably expected of the Supplier when acting as the creditor's agent in marketing and selling membership of the Owners Club.

Below are the most relevant regulations as they were at the relevant time(s):

- Regulation 3: Prohibition of Unfair Commercial Practices
- Regulation 5: Misleading Actions
- Regulation 6: Misleading Omissions
- Regulation 7: Aggressive Commercial Practices
- Schedule 1: Paragraphs 7 and 24

The Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR')

The UTCCR protected consumers against unfair standard terms in standard term contracts. They applied and apply to contracts entered into until and including 30 September 2015 when they were replaced by the Consumer Rights Act 2015.

Below are the most relevant regulations as they were at the relevant time(s):

- Regulation 5: Unfair Terms
- Regulation 6: Assessment of Unfair Terms
- Regulation 7: Written Contracts
- Schedule 2: Indicative and Non-Exhaustive List of Possible Unfair Terms

The Consumer Rights Act 2015 (the 'CRA')

The CRA, amongst other things, protects consumers against unfair terms in contracts. It applies to contracts entered into on or after 1 October 2015 – replacing the Unfair Terms in Consumer Contracts Regulations 1999.

Part 2 of the CRA is the most relevant section as at the relevant time(s).

County Court Cases on the Sale of Timeshares

1. *Hitachi v Topping* (20 June 2018, County Court at Nottingham) – claim withdrawn following cross-examination of the claimant.
2. *Brown v Shawbrook Bank Limited* (18 June 2020, County Court at Wrexham)
3. *Wilson v Clydesdale Financial Services Limited* (19 July 2021, County Court at Portsmouth)
4. *Gallagher v Diamond Resorts (Europe) Limited* (9 February 2021, County Court at Preston)
5. *Prankard v Shawbrook Bank Limited* (8 October 2021, County Court at Cardiff)

Relevant Publications

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

What I’ve decided – and why

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

And having considered everything again, and the submissions provided in response to my PD, I remain of the opinion that this complaint should be upheld, for the reasons I set out in my PD and that the Supplier breached Regulation 14(3) of the Timeshare Regulations by marketing and/or selling FCM to Mr and Mrs T 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. I’ll address the issues the Lender raised in its response later on in this decision.

However, before I explain why I think the complaint should be upheld, I want to reiterate 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. I have read the Lender’s response in full, but I’m going to limit my findings to what I consider to be the relevant points.

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

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

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

I have then considered the impact of these on the fairness of the credit relationship between Mr and Mrs T 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 T’s FCM 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 FCM 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 T say that the Supplier did exactly that at the Time of Sale – saying the following during the course of this complaint:

“While on holiday on 29/04/2014 we were on holiday in Tenerife and were invited to a presentation to discuss the advantages of increasing our investment to a four- week fraction at Paradise, Tenerife. We were 'kept' there for several hours during which time the sales representative stated the 'long term financial benefits' of the purchase and how we should expect a return on our investment in the future, this was a gross misrepresentation.”

“The product was constantly referred to as an investment, which is a misrepresentation, which could benefit our children when the product was sold at a profit. This was one of their main selling points which we found to be appealing.”

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

- (1) They were told by the Supplier that they would in essence get their money back or more during the sale of FCM.
- (2) They were told by the Supplier that FCM was the type of investment that would only increase in value.

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

Mr and Mrs T’s share in the Allocated Property clearly 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 FCM 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 FCM was marketed or sold to Mr and Mrs T 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 FCM 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 T, 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 FCM was not sold to Mr and Mrs T as an investment. For example:

- The information statement at paragraph 11 explained that the vendor, and any sales or marketing agent and their related businesses, were not licensed investment advisers authorised by the Financial Conduct Authority to provide investment or

financial advice. And any information provided was not intended as a source of investment advice.

- Also, The Member's Declaration document signed by Mr and Mrs T, explained that the purchase of the Fraction was for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that the Supplier makes no representation as to the future price or value of the Fractional Rights which are personal rights and not interests in real estate (all as explained in the information statement).

In its response to Mr and Mrs T's complaint, the Lender has highlighted these disclaimers as being important factors to consider when deciding what happened at the Time of Sale. However, weighing up what happened in practice is, in my view, rarely as simple as looking at the contemporaneous paperwork. And there are a number of strands to Mr and Mrs T's allegation that the Supplier breached Regulation 14(3) at the Time of Sale, including (1) that membership of the Fractional Club was expressly described as an "investment" in several different contexts and (2) that membership of the Fractional Club could make them a financial gain and/or would retain or increase in value.

So, I have considered:

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

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

How the Supplier marketed and sold the FCM

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 FCM; and
- (2) how the sales representatives would have framed the Supplier's multimedia presentation (i.e., the ESA) during the sale of FCM to prospective members – including Mr and Mrs T.

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 FCM 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 FCM:




- You are currently spending £xxxx on your holidays each year... (taken from survey)
- Confirm exactly what clients get for that money in terms of quality, people travelling and weeks
- Confirm the client will holiday for the next 10 years
- Explain total cost, with no inflation over a ten year period and ask what they own at the end of that period
- Compare spending the same money to own your holidays with better benefits, so that at the end of the ten years they would have received better value

CLOSE: So, looking at the two options which way makes more sense, to own or rent your holidays? (Get the answer “Owning”) This is why so many people choose to holiday with ~~Confidentiality~~.

LINK: Before I show you how the product works, I am just going to tell you how ~~Confidentiality~~ started and where we are today.

CLOSE:

With the groundwork laid, sales representatives were then taken to the part of the ESA that explained how FCM 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.

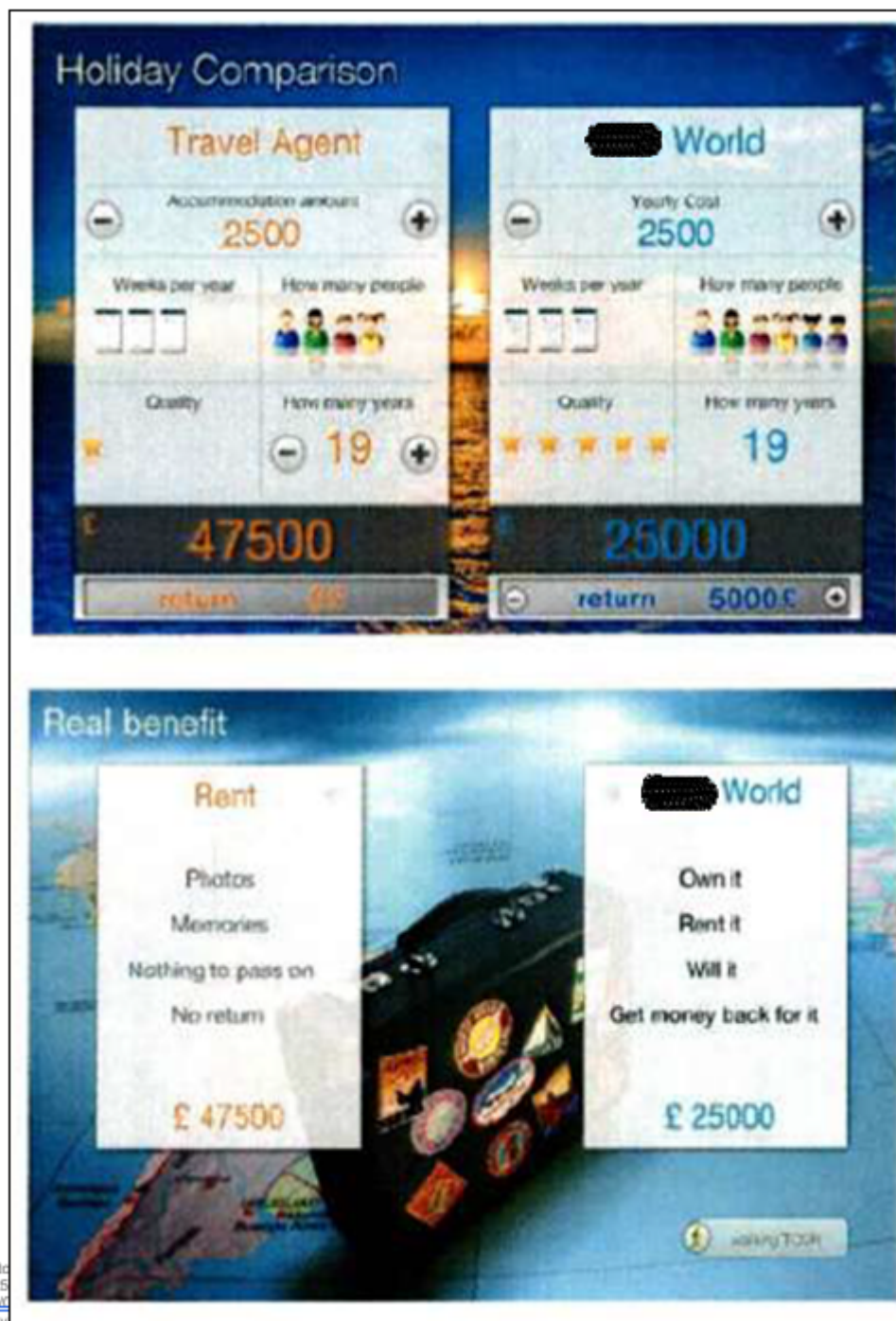
[...]

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 FCM 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 T) who were looking to buy holidays anyway, the comparison the slides make between the costs of FCM 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.

Indeed, that's broadly consistent with what Mr and Mrs T had to say in their submissions, when they said that FCM was positioned by the Supplier as providing them with a four-week fraction, (i.e holidays), with long term financial benefits of the purchase; and how they could expect a return on their investment in the future.

I also acknowledge that there was no comparison between the expected level of financial return and the purchase price of FCM. However, if I were to only concern myself with express efforts to quantify to Mr and Mrs T 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)).'*³ And in my view that must have been correct because it would defeat the consumer-protection purpose of Regulation 14(3) if the concepts of marketing and selling a timeshare as an investment were interpreted too restrictively.

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

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

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>

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.”

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 FCM 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 FCM 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 T 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 they were told:

“While on holiday on 29/04/2014 we were on holiday in Tenerife and were invited to a presentation to discuss the advantages of increasing our investment to a four- week fraction at Paradise, Tenerife. We were 'kept' there for several hours during which time the sales representative stated the 'long term financial benefits' of the purchase and how we should expect a return on our investment in the future this was a gross misrepresentation.”

“The product was constantly referred to as an investment, which is a misrepresentation, which could benefit our children when the product was sold at a profit. This was one of their main selling points which we found to be appealing.”

On the contrary, in the absence of evidence to persuade me otherwise, I think that's likely to be what Mr and Mrs T 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.

Was the credit relationship between the Lender and Mr and Mrs T rendered unfair?

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

It also seems to me in light of Carney and Kerrigan that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs T and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

I've noted that in its response to the investigator's opinion, the Lender has argued that the upgrade was motivated by Mr and Mrs T wanting to gain additional points and have the benefit of the removal of booking fees. And it has referenced another motivating factor from their testimony, when they said:

“as another incentive to increase ownership share, we were given a (the Supplier) Travel saving bonus. This consisted of a monthly amount of £50 being credited for ten months into our bank account.”

I don't doubt these additional benefits might have been attractive to Mr and Mrs T. But, on my reading of Mr and Mrs T's testimony, the prospect of a financial gain from FCM was an important and motivating factor when they decided to go ahead with their purchase. That doesn't mean they were not interested in holidays. Their own testimony demonstrates that they quite clearly were. And that isn't surprising given the nature of the product at the centre of this complaint. And as they had purchased a product that provided them with discounted holidays, it's hardly surprising in my opinion, that they made use of the holidays the FCM afforded them.

But as Mr and Mrs T say (plausibly in my view), that FCM 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 as that share was one of the defining features of membership that marked it apart from the Vacation Club Membership that they had previously held prior to upgrading to FCM. And with that being the case, I think the Supplier's breach of Regulation 14(3) was material to the decision they ultimately made. And in its response to the investigator's assessment, when posing the question as to whether the witness testimony from Mr and Mrs T was clear and credible, the Lender said:

“There is no reason to doubt the customer's testimony because it is sufficient in its information.”

So, it seems to me that the Lender also accepts that what they have said is clear and credible.

Mr and Mrs T have not said or suggested, for example, that they would have pressed ahead with the purchase in question had the Supplier not led them to believe that FCM was an

appealing investment opportunity. And as they faced the prospect of borrowing and repaying a substantial sum of money while subjecting themselves to long-term financial commitments, had they not been encouraged by the prospect of a financial gain from membership of the Fractional Club, I'm not persuaded that they would have pressed ahead with their purchase regardless.

I note that Mr and Mrs T first purchased FCM in April 2012 using a loan from the Lender. That loan was consolidated by the Credit Agreement, making it a related credit agreement for the purposes of an assessment of unfairness under Section 140A. However, as Mr and Mrs T don't appear to have complained about their first purchase, I'm not persuaded that the Lender needs to correct any unfairness over and above that which I've already determined above.

The Lender's response to my provisional decision

Investment and Reg 14(3) of the Timeshare regulations

In my PD, I explicitly said I would use the same definition of 'investment' as was agreed by both parties in *Shawbrook & BPF v FOS*, which is: 'an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit'.

Despite this, the Lender says I departed from this definition when I then said that, 'the Allocated Property clearly constituted an investment as it offered [Mr and Mrs T] the prospect of a financial return'. It says I conflated two different meanings of the word 'return': (1) a 'return on investment', which means the measure of profit (or 'return') on the original investment; and (2) a customer being told that some money will be 'returned' upon sale, which the Lender says carries no connotation of investment or profit.

I can address this point briefly. I've well understood the difference between a 'return on' and a 'return of' monies paid, and I didn't conflate the two at any time. I consistently applied the definition of investment I cited from *Shawbrook*. What's more, while the Lender says I should entirely disregard the consumers' testimony – a point I shall address below – Mr and Mrs T explicitly say they were told they 'should expect a *return on* [their] investment' and membership was 'constantly referred to as an investment...which could benefit our children when the product was sold at a *profit*' (my emphasis). This falls squarely within the meaning of 'investment' agreed by both parties in *Shawbrook*.

Sales and marketing materials

I did acknowledge in my PD, that the Supplier did try, in the sales documentation, to avoid describing FCM as an 'investment' and giving any indication of the likely financial return. For example, the Member's Declaration explained that the purchase of the Fraction was for the primary purpose of holidays, and is not specifically for direct purposes of a trade in and that the Supplier makes no representation as to the future price or value of the Fractional Rights which are personal rights and not interests in real estate (all as explained in the information statement).

In relation to the disclaimers and Mr and Mrs T not being aware of them, I accept that Mr and Mrs T signed the Member's Declaration confirming that they had read and understood its contents. I do not think however that they signed the document to say they understood that FCM was not an investment, as that is not what the Members Declaration said at point 5. So, I have considered what other disclaimers there were in the paperwork. There is on file a 'Standard Information Form provided by The Lender. In that document it says:

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

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

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

11. Investment advice

“The Vendor, any sales or marketing agent and the Manager and their related businesses (a) are not licensed investment advisors authorized by the Financial Services Authority to provide investment or financial advice; (b) all information has been obtained solely from their own experiences as investors and is provided as general information only and as such is not intended for use as a source of investment advice and (c) all purchasers are advised to obtain competent advice from legal, accounting and investment advisors to determine their own specific investment needs; (d) no warranty is given as to any future values or returns in respect of an Allocated Property.” (page 8)

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

However, as I said before, deciding what happened in practice is often not as simple as looking at the contemporaneous paperwork. Especially when such paperwork was produced and signed after a potential customer, such as Mr and Mrs T, had already been through a lengthy sales presentation. So that is why I consider the training materials referred to in my PD to be important.

I have not been provided with any slides or other marketing material that the Supplier says would have been shown to them. In light of that, I repeat my finding from my PD, that the material in question is (1) reasonably indicative of the training the Supplier’s sales staff received around the Time of Sale and (2) how the sales staff were likely to have framed any presentation during the sale.

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

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

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

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

However, as I explained in my PD, I think it is too narrow an approach to take to only find that there was a breach of Reg.14(3) if the likely return from that sale of the Allocated Property was expressly quantified by the Supplier. As I explained in my PD, the training material to which I referred, indicates that the Supplier's sales representatives were encouraged to make prospective Fractional Club members (like Mr and Mrs T) consider the advantages of owning something and view membership as a way of generating a return, rather than simply paying for holidays in the usual way. That was likely to have been reinforced throughout the Supplier's sales presentations by describing membership as a form of property ownership referring to the prospect of a "return". And with that being the case, I think the language used during the Supplier's sales presentations was likely to have been consistent with the idea that FCM was an investment.

When taken together with Mr and Mrs T'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 FCM was an investment – which is enough to find there was a breach of Reg.14(3) by the Supplier.

Mr and Mrs T's evidence

In considering the weight to place on Mr and Mrs T's recollections set out in their witness statement, I have considered the judgment in the case of *Smith v. Secretary of State for Transport* [2020] EWHC 1954 (QB). At paragraph 40 of the judgment, Mrs Justice Thornton helpfully summarised the case law on how a court should approach the assessment of oral evidence. Although in this case I have not heard direct oral evidence, I think this case does set out a useful way to look at the evidence Mr and Mrs T have provided. Paragraph 40 reads as follows:

"At the start of the hearing, I raised with Counsel the issue of how the Court should assess his oral evidence in light of his communication difficulties. Overnight, Counsel agreed a helpful note setting out relevant case law, in particular the commercial case of *Gestmin SPGS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) (Leggatt J as he then was at paragraphs 16-22) placed in context by the Court of Appeal in *Kogan v Martin* [2019] EWCA Civ 1645 (per Floyd LJ at paragraphs 88-89). In the context of language difficulties, Counsel pointed me to the observations of Stuart-Smith J in *Arroyo v Equion Energia Ltd* (formerly BP Exploration Co (Colombia) Ltd) [2016] EWHC 1699 (TCC) (paragraphs 250-251). Counsel were agreed that I should approach Mr Smith's evidence with the following in mind:

- a. In assessing oral evidence based on recollection of events which occurred many years ago, the Court must be alive to the unreliability of human memory. Research has shown that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts (Gestin and Kogan).
- b. A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all the evidence. Heuristics or mental shortcuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence (Kogan).
- c. The task of the Court is always to go on looking for a kernel of truth even if a witness is in some respects unreliable (Arroyo).
- d. Exaggeration or even fabrication of parts of a witness' testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony (Arroyo).
- e. The mere fact that there are inconsistencies or unreliability in parts of a witness' evidence is normal in the Court's experience, which must be taken into account when assessing the evidence as a whole and whether some parts can be accepted as reliable (Arroyo).
- f. Wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, may be neither reliable nor even truthful, the difficulty of discerning where the truth actually lies, what findings he can properly make, is often one of almost excruciating difficulty yet it is a task which judges are paid to perform to the best of their ability (Arroyo, citing *Re A (a child)* [2011] EWCA Civ 12 at para 20)."

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

The Lender has also said that Mr and Mrs T's evidence including the LOC had limited reference to the breach in regulation being alleged and was lacking in detail and generic. It also believed it was vague, brief, inconsistent and included factual inaccuracies which ultimately distorted the events surrounding the sale. In addition, it says the LOC includes sections that are similar to, or the same as two sections of two templates provided by professional representatives (unconnected to this case) which have been used in similar complaints. As a result, it says any reliance on the LOC is unsafe.

I have carefully considered what the Lender has said. First, I don't think it's inappropriate for Mr and Mrs T to have gone online to try to understand what the Supplier could and couldn't do and then use those online resources – or however they came by the specific words they used – to explain why they think the Supplier mis-sold the FCM by reference to the applicable law, rules or regulations.

Just because a consumer or consumers use parts of a template to articulate parts of their complaint doesn't mean that what they say is untrue, or that it's necessarily unsafe for me to rely on what they say elsewhere in the letter. Similarly, I'm not surprised that Mr and Mrs T's recollections aren't especially detailed. As the Lender knows, we're an informal service and, again, Mr and Mrs T are unrepresented. Also, as the Lender will be aware, this service doesn't require complainants to particularise their concerns in the way that may be needed in court proceedings.

The key issue for me in answer to both of these points from the Lender, is, as I've already said, whether there is a core of acceptable evidence from Mr and Mrs T within the LOC, that doesn't undermine or contradict, what they say about what the Supplier said and did to market and sell FCM as an investment. In essence it's important that I hear Mr and Mrs T's "voices" in the LOC notwithstanding their use, in part, of some templates the Lender has provided copies of.

It is clear to me that Mr and Mrs T are saying that the Supplier sold them FCM as an investment, even if they cannot correctly recall the precise manner in which they would realise any return. They said:

"While on holiday on 29/04/2014 we were on holiday in Tenerife and were invited to a presentation to discuss the advantages of increasing our investment to a four- week fraction at Paradise, Tenerife. We were 'kept' there for several hours during which time the sales representative stated the 'long term financial benefits' of the purchase and how we should expect a return on our investment in the future this was a gross misrepresentation."

"The product was constantly referred to as an investment, which is a misrepresentation, which could benefit our children when the product was sold at a profit. This was one of their main selling points which we found to be appealing."

And I think it's significant in this case, that Mr and Mrs T specifically refer to FCM being positioned to them as an investment, when the templates the Lender has provided make no mention of investment. So, I think it's more likely than not that what they have said is, when considered together with the other evidence that I have referred to, to be their own recollections of what they were told, rather than a complaint point they may have seen in a template.

Also, in my opinion, the use of the word "profit" shows that Mr and Mrs T expected to make a financial gain rather than simply get some money back at the end of their membership. On balance, I find there is a consistent and believable recollection that FCM was sold as an investment and, when considered alongside the other evidence, I find the Supplier did breach Reg.14(3) at the Time of Sale.

As I acknowledged in my PD, holidays offered by the FCM were also important to Mr and Mrs T. Given the nature of FCM, I would be surprised if they had shown little or no interest in the prospect of taking holidays through the Supplier. So, I don't find it surprising that the contact notes now provided by the Lender record that. And I am a little surprised that the Lender thinks it significant that the contact notes make no reference to the FCM being sold as an "investment". I say this because I think it's highly unlikely that the Supplier's

representative would record a note that indicated it had breached Reg 14(3). So, for the reasons I have explained in the PD, I remain of the opinion that their purchase of the FCM was strongly motivated by their share in the Allocated Property, and the possibility of a profit. Therefore, the breach of Regulation 14(3) had a material impact on their purchasing decision.

Finally, The Lender has said that the evidence suggests Mr and Mrs T didn't consider the FCM to be an investment as they didn't engage with the supplier to see how they could obtain their return. But Mr and Mrs T have explained that they had learnt that the Supplier owned part of the fractional property and were unlikely to sell it. With this understanding and given the difficult circumstances they appeared to find themselves in at the time of their request to surrender their fractional membership; and taking into account that they had already complained about the sale when the e-mail the Lender has provided a copy of, was sent in February 2022, I'm not necessarily surprised in the particular circumstances of this case, that they didn't pursue trying to sell their FCM.

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

Conclusion

Given the facts and circumstances of this complaint, it follows that, I still think that The Lender participated in and perpetuated an unfair credit relationship with Mr and Mrs T 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.

Putting things right

Having found that Mr and Mrs T would not have agreed to purchase FCM 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 FCM (i.e., not entered into the Purchase Agreement), and therefore not entered into the Credit Agreement, provided Mr and Mrs T agree to assign to the Lender their Fractional Points or hold them on trust for the Lender if that can be achieved.

Mr and Mrs T were existing Fractional Club members ('FC Membership 1') and their membership was traded in against the purchase price of FCM in question (which I'll refer to as 'FC Membership 2' from here on in). Under FC Membership 1, they had 2898 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 T 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 T 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.

Further, Mr and Mrs T paid for FC Membership 1 using finance ('Loan 1') that they refinanced using the Credit Agreement. So, part of what they borrowed at the Time of Sale

was used to repay the borrowing under Loan 1 that always had to be repaid. So, I do not think it would be fair for the Lender to refund everything that was paid and, if relevant, due to be repaid under the Credit Agreement, otherwise Mr and Mrs T would be in a better position than they would have been if they hadn't purchased FC Membership 2. Given that, I think this ought to be reflected in my redress when remedying the unfairness I have found.

However, I am also conscious that this means Mr and Mrs T paid for (or might still be paying for) FC Membership 1, under which they were entitled to a share in an allocated property they no longer have because it was traded in against FC Membership 2. It isn't clear if, in light of 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 T with that being the case – whether or not a court would award such compensation:

(1) The Lender should refund the difference between Mr and Mrs T's repayments to it under the Credit Agreement and what they would have paid under Loan 1, including the difference between any sums paid to settle the debt owing under the Credit Agreement and what would have needed to have been paid to settle Loan 1. The Lender should also reduce any outstanding balance under the Credit Agreement, if there is one, so that Mr and Mrs T would only owe now what they would have owed under Loan 1 and change any future repayments so that they are making the same repayments they were towards Loan 1.

(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 T'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 Mr and Mrs T used or took advantage of; and
- ii. The market value of the holidays* Mr and Mrs T 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 T 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 T's credit

files in connection with the Credit Agreement reported within six years of this decision.

(6) If Fractional Membership 2 is still in place at the time of this decision, as long as Mr and Mrs T 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 Fractional Membership 2.

However, as I've already said, I'm conscious that Mr and Mrs T paid or (or might still be paying for) FC Membership 1, under which they were entitled to a share in an allocated property they no longer have because it was traded in against FC Membership 2. It isn't clear if, in light of that fact, they want FC Membership 1 reinstated nor, in turn, whether that can be achieved to the satisfaction of both parties to it. But if Mr and Mrs T want FC Membership 1 reinstated, they can let me know in response to this provisional decision.

*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 T 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 set out above, my final decision is to uphold Mr and Mrs T's complaint about Shawbrook Bank Limited. It needs to calculate and pay any compensation due to Mr and Mrs T, using the methodology I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs T and Mr T to accept or reject my decision before 19 August 2025.

Simon Dibble
Ombudsman