DRN-4490394

The complaint

1. Mr S says that Clydesdale Financial Services Limited, trading as Barclays Partner Finance ("BPF"), did not act fairly or reasonably when considering its obligations under the Consumer Credit Act 1974 ("CCA") in relation to loan taken to pay for a timeshare.

What happened

2. Mr S, in 2016, along with his wife, took out a timeshare membership from a timeshare supplier ("the Supplier"). This was membership of the Fractional Property Owners Club ("FPOC Membership"). FPOC Membership provided Mr S with a number of 'points' every year that he could spend to stay at properties provided by the Supplier. But this was also 'asset backed', so that his membership was linked to a specified property ("the Property"). Mr S had no preferential right to stay at the Property, but after seventeen years, the Property would be placed for sale and the proceeds of sale would be divided amongst the people whose membership was linked to the Property.

3. Whilst Mr S's FPOC Membership was in place, he had to pay maintenance fees every year for the running of the membership programme, including the upkeep of the Property. In the first year, this charge was set at €999. The FPOC Membership cost £16,188 and Mr S paid for this by taking a ten-year loan for the full purchase price from BPF.[1]

4. In June 2018, Mr S made a claim to BPF using the assistance of a professional representative ("PR1"). The claim was set out in detail in a nine-page letter. In summary, it was said:

    - Mr S thought BPF was liable to pay him compensation in relation to the sale of the FPOC Membership due to the operation of ss.75 and 140A CCA.
    - Mr S alleged that he was offered a 'free holiday' by the Supplier, being told at the outset that he was not obliged to purchase anything whilst away.
    - Mr S was pressured to sit through a presentation for the offer of a 'trial' membership. This was presented as an investment.
    - Mr S was told he could sell his membership at any time, but this was untrue, and he found it difficult to find the availability for holidays that he wanted.
    - PR1 alleged that there were a number of representations made about the FPOC Membership and set these out in detail on page 2 of the letter of claim.[2]
    - Maintenance fees were due annually, however the cost of these has increased substantially over time.
    - FPOC Membership did not fit Mr S's needs and requirements as set out in a questionnaire he completed at the time of the sale.
    - The sale of FPOC Membership was carried out in breach of Regulation 12(4) of The Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010

[1] As the loan that forms the subject of this complaint is in Mr S's name, only he is eligible to make it. So I refer to him throughout, even though the membership was in the names of Mr and Mrs S.
[2] I have not set these out in detail as none of the alleged 'misrepresentations' amounted to statements allegedly made by the Supplier, so I do not think could have amounted to misrepresentations

("the Timeshare Regulations") as the Supplier did not provide enough information so Mr S could make an informed decision about the purchase.
- The contract itself was long and complex and Mr S was unable to properly understand the nature of FPOC Membership before he took it out.
- s.75 CCA meant that BPF was jointly liable for the Supplier's misrepresentations made at the time of sale.
- There was an unfair debtor-creditor relationship between Mr S and BPF arising out of sales, as defined by s.140A CCA.
- It was alleged that BPF lent irresponsibly by not undertaking any assessment of Mr S's ability to repay the loan.
- PR1 said Mr S was entitled to a refund of what he had paid toward the loan and in maintenance fees, plus interest.

5. BPF responded to PR1 in August 2018 to say it treated the letter from PR as a complaint made on Mr S's behalf, but it would not uphold any elements of the complaint. In summary, BPF said there was not sufficient evidence provided by PR1 of the truth of any of the allegations raised.[3]

6. Unhappy with BPF's response, PR1 referred a complaint to our service on Mr S's behalf in November 2018. When doing so, it reiterated what had been said before, but nothing new was added.

7. BPF responded with submissions from itself, but also from the Supplier. The Supplier had recorded that Mr S wanted to purchase the PFOC Membership for family holidays and that he did not ask for more time to consider the purchase. Two days after the purchase, Mr S told the Supplier that he was happy with it, having friends who were also members of the Supplier's club. The following year, Mr S requested to cancel the FPOC Membership, using the help of a different representative to PR1.

8. In 2020, PR1 lost its authorisation to bring complaints to our service, so Mr S represented himself in his dealings with our service. In December 2020, one of our adjudicators considered the complaint and did not think it was one that should be upheld. She did not think there was enough evidence to conclude that it was more likely than not that FPOC Membership had been presented to Mr S as an investment. Nor was there enough to suggest that Mr S was told there was unlimited availability for booking holidays. She also concluded that neither the alleged level of pressure in the sale nor the level of commission paid to the Supplier was sufficient to cause an unfair debtor-creditor relationship. So, in conclusion, our adjudicator did not think BPF needed to compensate Mr S under either of the provisions of the CCA to which PR1 had referred. Mr S did not accept the adjudicator's view and so the complaint was referred to an ombudsman to consider.

9. In June 2021, a different representative ("PR2") made a further complaint on Mr S's behalf. It too was made referencing the same provisions of the CCA and repeated some of the same issues that PR1 had previously raised. The letter of claim said that the Supplier presented FPOC Membership to Mr S as an investment that would lead to a significant profit later on. It was also said that Mr S struggled to book holidays despite assurances that he would be able to book holidays around the world. Again, it was alleged that no credit checks were carried out, that commission was paid to the Supplier by BPF and that maintenance fees had increased significantly over the duration of the agreement.

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[3] Much of BPF's response is technical in nature and no longer pertains to the issues relevant in deciding this complaint, so I have not set out the detail of the eight-page response

10. In addition to the factual matters concerning Mr S's sale, PR2 set out problems it said there were with FPOC Membership in general. It said that there was no guarantee the Property would be sold in the future and this led to an unfairness.

11. After PR2 contacted our service, Mr S confirmed that he wished for PR2 to represent him in respect of his open complaint.

12. Before the complaint was passed to an ombudsman, a different investigator looked into matters again and asked PR2 if it had any evidence from Mr S to consider. PR2 provided a statement from Mr S dated 7 October 2020.

13. Our investigator considered the new evidence but did not think that Mr S's complaint should have been upheld. He said that it was quite possible the Supplier may have made mistakes during the sale, but it did not automatically follow that there was an unfair debtor-creditor relationship. He thought it was not likely Mr S only took out FPOC Membership due to the pressure of the sale or that the Supplier's sales practices prejudiced the purchasing decision he took. Our investigator also said that it was possible some of the terms in the purchase agreement were 'unfair', but there was no evidence the terms had caused an unfairness that required a remedy under the CCA. He also thought that it was possible Mr S had not been given all of the information he needed, but again he did not think that played a significant part in Mr S's decision to take out FPOC Membership. Our investigator did not think there was enough evidence to conclude that there were any false representations made to Mr S that amounted to actionable misrepresentations. Finally, he also said there was no evidence that the lending was unaffordable for Mr S.

14. PR2 disagreed with our investigator and provided a twelve-page response. It is not practical nor necessary to set out in detail everything that was raised, but in summary it was said:

    - FPOC Membership was marketed and sold to Mr S as an investment contrary to Reg.14(3) of the Timeshare Regulations. The evidence suggested that Mr S bought membership in the expectation of making a profit or getting something back.
    - PR2 pointed to the judgment of Mrs Justice Collins Rice in *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd; R. (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin) ("the Judicial Review"). PR2 argued that it was held it was difficult to sell timeshares, such as FPOC Membership, without marketing it as an investment, and it pointed to paragraphs of the judgment in support of that. PR2 argued that the evidence suggested that was exactly what had happened in Mr S's case.
    - PR2 argued that, just because parts of Mr S's memories may be inconsistent or unclear, that does not mean that his evidence should be ignored. There may still be a core of acceptable evidence in what he had said.
    - PR2 noted that the prohibition on selling a timeshare as an investment was not to be construed narrowly and the seller did not need to use specific words, such as 'investment', when selling to breach that prohibition. As long as there was an implication that there was a future financial gain to be had, that would be sufficient.[4]
    - PR2 pointed me to a recent decision issued by a different ombudsman in which he found that, in that case, the Supplier had marketed and sold a similar timeshare as an investment. PR2 argued that this analysis and conclusion should be adopted in all

[4] This was reflected in the Judicial Review judgment at paragraph 76

subsequent complaints regarding the sales of fractional memberships.

- PR2 pointed to the passages in the Judicial Review judgment where the judge noted that selling a timeshare as an investment knocks away the central consumer protection safeguard the law provides for consumers buying timeshares. And the judge was not able to fault the finding of unfairness that flowed from those breaches of Reg.14(3) of the Timeshare Regulations in the reviewed decisions. PR2 argued this is exactly what happened to Mr S, and so his complaint too should be upheld.
- PR2 argued that BPF should have offered compensation to Mr S due to the clear outcome in the Judicial Review and not doing so has caused additional distress and inconvenience to him. It requested that an additional £1,000 was awarded to reflect this.

15. As the parties could not come to an informal agreement, the complaint was passed to me for a decision.

16. After I reviewed all of the evidence and arguments, I came to the same overall outcome as our investigator, but for different reasons. So I issued a provisional decision setting out my reasoning and I invited both parties to respond.

17. I explained that when deciding what is a fair and reasonable outcome to complaints, I am required by DISP 3.6.4 R of the Financial Conduct Authority's ("FCA") Handbook to take into account:

> *"(1) relevant:*
>
> > *(a) law and regulations;*
> > *(b) regulators' rules, guidance and standards;*
> > *(c) codes of practice; and*
>
> *(2) (where appropriate) what [the ombudsman] considers to have been good industry practice at the relevant time."*

18. Where I needed to make a finding of fact based on the evidence, I made my decision on the balance of probabilities. In other words, when I made a finding that something happened, that is because I thought it was more likely than not that that thing did happen.

19. Given the submissions from PR2 in response to the final view, the bulk of my provisional decision was concerned with the question of whether the Supplier marketed and sold FPOC Membership to Mr S as an investment. So I set out the evidence of the parties and my findings on whether the way FPOC Membership came to be sold led to an unfair debtor-creditor relationship. I also considered whether BPF needed to compensate Mr Z for anything else that arose out of the sale of FPOC Membership.

Mr S's evidence

20. Mr S provided a two-page witness statement, dated 7 October 2020. This was provided to our service in 2023 and I could not see it was ever provided to BPF by PR2 before then.

21. Mr S set out his memories of the sale in July 2016. He described a fast moving and intense sales process and of feeling pressured to buy on the day. Mr S said:

> *"We decided to purchase as we were told that there would be the opportunity to*

easily terminate this contract, as they would happily buy this back from us. One of the main reasons we purchased this timeshare was the impression we were given that we could sell our timeshare in the future for profit. Unfortunately, we later found out that this was not the case."

22. Mr S said that after taking out FPOC Membership, he found that the availability of resorts was very limited and inflexible. He explained that he went on a free holiday arranged by the Supplier and took out a further membership, but then cancelled that within the fourteen-day cooling off period. He said that he had hoped that this would have also cancelled the FPOC Membership that is the subject matter of this complaint, but found out later that it did not.

23. When describing his FPOC Membership, Mr S said:

    "We are very frustrated by this whole scheme as we have not been able to ever use our Fractional points due to the fact that we were unable to access availability in the first year and then taking the free promotional holiday in the second year."

24. I also considered what had been said on Mr S's behalf in the both PR1 and PR2's letters of claim.

The Supplier's evidence

25. In July 2018, the Supplier sent a response to BPF, setting out its position on Mr S's complaint. It said:

    "The notes taken on the day of their purchase indicate that they were purchasing to enjoy family holidays and understood very well the finance agreement; Mr and Mrs [S] felt no pressure at all and confirmed they did not need further time to consider their purchase.

    They were of course fully protected by a statutory 14-day rescission period.

    Two days after their purchase, Mr and Mrs [S] spoke again with their Compliance Officer and confirmed they had no further questions. They confirmed they had friends who are happy members with [the Supplier] and they were fully aware of how [the Supplier] operate. They liked the quality and high standards and the fact of having access to Travel Club department for additional services with all their bookings and requirements. Mr and Mrs [S] were very positive."

26. The Supplier noted that the following year Mr and Mrs S bought a second fractional membership, but cancelled it within the fourteen-day 'cooling off' period. The Supplier recorded that this was due to the illness of a family member and as Mrs S's job was at risk. At the same time, they also requested the cancellation of their FPOC Membership.

27. The Supplier said, in relation to PR1's allegation that Mr S was not given the opportunity of a fourteen-day cooling off period, that such a period was clearly set out in the documentation and Mr S signed a notice showing he was aware of such a period. It also said that the management fees had not changed at all by the date of the response, and had remained at €999 for all years.

28. With respect to the sale itself, the Supplier denied that FPOC Membership was sold or marketed as an investment. It also said its records showed Mr S had never tried to book

a holiday using the FPOC Membership, save for trying to book a hotel stay within the UK.

The FPOC Membership sale documents

29. A large number of documents had been provided to me from the time of sale. I did not set them out in detail in my provisional decision, but I highlighted some of the relevant parts.

30. There was a "MEMBER'S DECLARATION" that Mr S signed when he bought FPOC Membership. The document was one page long and Mr S initialled each of the fifteen clauses, so I thought Mr S had the opportunity to read it at the time it was signed. That declaration included the following:

> *"3. We understand that currently the annual Management Charge is €999.00 for 2016 and that an invoice will be sent for this within 3 months of full payments of the Agreement and thereafter by 1st January each year.*
>
> *4. We understand that [the Supplier], the Trustee or the Manager does not and will not run any resale or rental programmes and will not repurchase Fractions (or Vacation Club Points) or act as an agent in the sale other than as a trade in against future purchases…*
>
> *5. We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that [the Supplier] makes no representation as to the future price or value of the Fractional Rights which are personal rights and not interests in real estate (all as explained in the Information Statement).*
>
> *…*
>
> *14. We have received a copy of our Agreement together with the notices and Information Statement (which we have had adequate time to review before signing) required under the EU Timeshare Directive 2008/122/EC."*

31. There was also an "INFORMATION STATEMENT" provided that set out the standard information required to be provided under the Timeshare Regulations. This document ran to nine pages and described details about the FPOC Membership, including a description of the product, as well as information about how it worked, for example, by setting out some of the maintenance costs payable by members. Extracts of that read:

> *"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."*
>
> *"…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 supply and demand at the time of sale."*
>
> *"The purchase of Fractional Rights is for the primary purpose of holidays and is neither specifically for direct purposes of a trade in nor as an investment in real estate. [the Supplier] makes no representation as to the future price or value of the Allocated Property or any Fractional rights"*

*"**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 Conduct 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 it 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 then Allocated Property."

32. Attached to the information statement was a one page form, again signed by Mr S. It was titled "SEPARATE STANDARD WITHDRAWAL FORM TO FACILITATE THE RIGHT OF WITHDRAWAL". It explained that Mr S had the right to withdraw from the agreement within fourteen days without giving any reason. The form also explained that it was prohibited for any payment to be taken from Mr S in that time and it gave details of how to withdraw, if Mr S wished to do so.

The law

33. I did not think the legal framework was in dispute, so I only set out a summary of the law relating to the claims made.

34. Mr S said that BPF was liable to pay compensation due to the operation of the CCA, specifically that there was a misrepresentation that BPF was responsible to answer under s.75 CCA and that BPF was party to an unfair debtor-creditor relationship, as defined by s.140A CCA, caused by the sale of the FPOC Membership. I noted that this was relevant law that I have to think about.

35. The sale of timeshares like Mr S's was regulated by the Timeshare Regulations. The regulation most important to this decision was Reg.14(3), which read:

"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."

PR2 argued that the Supplier breached this regulation when selling FPOC Membership to Mr S and that led to an unfair debtor-creditor relationship.

36. I noted that the leading judgment on unfair debtor-creditor relationships is that in the case of *Plevin v. Paragon Personal Finance Limited* [2014] UKSC 61 ("Plevin"), in which it was held that the level of commission paid in respect of an insurance policy paid for by a loan was so high it created an unfair relationship. In Plevin, the Court held that the standard of commercial conduct was something to consider when determining the fairness of any debtor-creditor relationship, and relevant rules can be evidence of what that standard was. But whether a creditor (or someone acting on their behalf) had broken a rule is not determinative to the question asked by s.140A CCA. The Court held (at para 17):

"Section 140A, by comparison, 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 the question whether the creditor's relationship with the debtor was

unfair. It may be unfair for a variety of reasons, which do not have to involve a breach of duty."

37. The Plevin case concerned the duty to disclose certain information under the Financial Services Authority's (as it was then) rules for financial firms conducting certain business, in particular the ICOB rules. It was further said (at para 17):

> *"The ICOB rules impose a minimum standard of conduct applicable in a wide range of situations, enforceable by action and sounding in damages.* ***Section 140A introduces a broader test of fairness applied to the particular debtor- creditor relationship, which may lead to the transaction being reopened as a matter of judicial discretion.*** *The standard of conduct required of practitioners by the ICOB rules is laid down in advance by the Financial Services Authority (now the Financial Conduct Authority), whereas the standard of fairness in a debtor-creditor relationship is a matter for the court, on which it must make its own assessment. Most of the ICOB rules, including those relating to the disclosure of commission, impose hard-edged requirements, whereas the question of fairness involves a large element of forensic judgment.* ***It follows that the question whether the debtor-creditor relationship is fair cannot be the same as the question whether the creditor has complied with the ICOB rules, and the facts which may be relevant to answer it are manifestly different. An altogether wider range of considerations may be relevant to the fairness of the relationship, most of which would not be relevant to the application of the rules.*** *They include the characteristics of the borrower, her sophistication or vulnerability, the facts which she could reasonably be expected to know or assume, the range of choices available to her, and the degree to which the creditor was or should have been aware of these matters." (emphasis my own)*

38. I thought it is apparent that the question of 'fairness' is broader than simply considering whether the supplier or the lender (or its agent) has breached a rule or other obligation during the course of relevant dealings. And the Court went on to hold (at para 18):

> *"A sufficiently extreme inequality of knowledge and understanding is a classic source of unfairness in any relationship between a creditor and a non-commercial debtor. It is a question of degree."*

39. But paragraph 10 of the judgment made clear that there will normally be large differences of financial knowledge and expertise between a debtor and a creditor, and this unequal relationship is not necessarily unfair. Rather it was when the inequality of knowledge and understanding was "sufficiently extreme".

40. Finally, it was held (at para 20):

> *"On that footing, I think it clear that the unfairness which arose from the nondisclosure of the amount of the commissions was the responsibility of Paragon [the lender]. Paragon were the only party who must necessarily have known the size of both commissions. They could have disclosed them to Mrs Plevin. Given its significance for her decision, I consider that in the interests of fairness it would have been reasonable to expect them to do so. Had they done so this particular source of unfairness would have been removed because Mrs Plevin would then have been able to make a properly informed judgment about the value of the PPI policy. This is sufficiently demonstrated by her evidence that she would have questioned the commissions if she had known about them, even if the evidence does not establish what decision she would ultimately have made."*

41. Here, the Court found that it was enough that Mrs Plevin would have questioned whether the insurance provided good value for money when considering the question of the fairness of the relationship. It was the non-disclosure that caused the unfairness. The Court made no finding whether Mrs Plevin would have made a different purchasing decision had she known more, but that did not prevent it finding unfairness.

42. I was also mindful of the judgment in *Carney v. NM Rothschild & Sons Ltd* [2018] EWHC 958 ("Carney") where HHJ Waksman QC (as he then was) held (at para 51):

> *"Causation is perhaps less straightforward. 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. And thus in Plevin, while the unfairness was said to be the failure to disclose the commission, there was at least a finding that the debtor would have "certainly questioned this" the size of the commission being of "critical relevance" – see paragraph 18 of the judgment. However, the Supreme Court then remitted the case back to the Manchester County Court to decide what relief, if any, under s140B should be awarded. But 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. See also the case of Graves v CHL [2014] EWCA Civ 1297 at paragraph 22 of the judgment of Patten LJ where it was held (among other things) that the impugned conduct of the LPA receivers was not causally related to the loss complained of by Mr Graves."*

43. And of the judgment in *Kerrigan v. Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) ("Kerrigan"), where HHJ Worster held (at paras 213 and 214):

> *"Having considered which relationships are likely to be unfair, I turn to the question of relief. 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. The order must be from the menu of orders provided for under section 140B in connection with the credit agreement, but otherwise there is very little in the way of guidance in the section. As Mr Justice Hildyard put it in his judgment in McMullon v Secure the Bridge Limited [2015] EWCA Civ 884 @ [13]:*
>
> > *'Suffice it to say as to the powers of the court that considerable discretionary latitude is supplied.'*
>
> *That is not to say that the court is free to do anything. Having determined that the relationship is unfair to the debtor, the court will look to relieve that unfairness by making an order or orders under section 140B(1). Whilst HHJ Platts emphasised that his decision as to remedy in Plevin turned on the particular facts of that case and was no precedent, it is a helpful illustration of how the jurisdiction works on well known facts. 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. If the court decides to make an order, then it "should reflect and be proportionate to the nature and degree of unfairness which the court has found": Patel v Patel [2009] EWHC 3264 (QB)*

George Leggatt QC at [79]-[80]. It should not give the Claimant a windfall, but should approximate, as closely as possible, to the overall position which would have applied had the matters giving rise to the perceived unfairness not taken place…"

44. I explained that the approach to unfair debtor-creditor relationships, specifically with respect to the sale of fractional memberships, was recently clarified by the High Court in the Judicial Review judgment. As the judgment was familiar to both BPF and PR2, I did not set out the background at length. But I said that in the judgment, the Court considered two decisions, issued by me and another ombudsman, concerning the sale of fractional timeshares similar to Mr S's, paid for with loans provided by Shawbrook Bank Ltd and BPF. In summary, it was held if a timeshare was sold as an investment, that would be a breach of Reg.14(3) of the Timeshare Regulations. Further, that was something that could properly be considered when determining whether there was an unfair debtor-creditor relationship between the purchaser of the timeshare and the lender who provided credit for the purchase. In the two decisions considered, the Judge held that the breaches of Reg.14(3) in those instances were sufficient for an ombudsman to conclude there were unfair debtor-creditor relationships and the remedies to unwind the agreements set out in the decisions were within the range of remedies a court might properly have made.

45. In the Judicial Review, Mrs Justice Collins Rice considered the effect of a breach of Reg.14(3) on the question of assessing the fairness of the debtor-creditor relationship. It was said (at para 183):

"The prohibition [in Reg.14(3) of the Timeshare Regulations] was held by the ombudsmen to have been breached in both present cases. That is not challenged in the second case, and I have not interfered with the ombudsman's decision on this point in the first case. That means that by law, these timeshare contracts, and their associated loan agreements, should not have been entered into in the way they were at all. That makes the ombudsmen's determinations on this point in each case a finding which eclipses an array of other fairness points about the detail of the circumstances of marketing, negotiation and sale, and the terms of the contracts themselves."

46. And (at para 185):

"Challenges are made in these proceedings to the adequacy of the evaluation by which the ombudsmen reached their final conclusions of unfairness – in particular to whether they had regard to all relevant matters within the terms of s.140A(2). But the ombudsmen had the full facts and circumstances, as they had found them, firmly in mind. Breaching Reg.14(3) by selling a timeshare as an investment – whether doing so explicitly or implicitly, whether in a slideshow or in a to-and-fro conversation with individual consumers – is conduct that knocks away the central consumer protection safeguard the law provides for consumers buying timeshares. The ombudsmen held the breach in each case to be serious/substantial and the constituent conduct causative of the legal relations entered into: timeshare and loan. As such, it is hard to fault, or discern error of law in, a conclusion that the relationship could scarcely have been more unfair. It was constituted by the acts/omissions of the timeshare companies in the antecedent negotiations leading up to the contractual commitments. Those are acts/omissions for which the banks are 'responsible' by operation of law. The timeshare companies and lenders clearly benefited overall thereby and the consumers, as the ombudsmen found as a matter of fact, were disproportionately burdened. No error of law appears from the ombudsmen's conclusions in any of these respects. I am satisfied their findings of unfairness were properly open to them on this basis alone."

47. To summarise, I explained that the passages in the judgment in Plevin set out above made plain that the breach of a legal duty, such as either the breach of the FCA's rules by a creditor or the breach of the Timeshare Regulations by a supplier on a creditor's behalf, was neither a prerequisite for a finding of an unfair debtor-creditor relationship, nor was it an automatic gateway to such a finding.

48. Further, the judgment in Plevin, read alongside that in Carney and Kerrigan, made clear that in a case such at Mr S's, an important consideration can be whether the relevant misconduct caused the debtor to enter into the agreements. This was considered also in the Judicial Review, where it was held that a breach of Reg.14(3) meant that by law, both the timeshare agreements and loan agreements should not have been entered into in the way they should have been. And, in finding that the decisions reached were permissible and not based on errors of law, the judge said:

> *"The ombudsmen held the breach in each case to be serious/substantial* ***and the constituent conduct causative of the legal relations entered into****: timeshare and loan." (emphasis my own)*

49. It seemed to me that, therefore, for a breach of Reg.14(3) to lead to an unfair debtor-creditor relationship that requires relief from that unfairness, it was normally a relevant consideration whether the breach caused the debtor to enter into the timeshare and/or loan agreement. This accorded with common sense: if events would have unfolded in the same way whether or not such a pre-contractual breach had occurred, it may be hard to attribute great importance to the breach when deciding whether an unfair debtor-creditor relationship ensued, or whether a remedy is appropriate.

<u>My assessment of the parties' evidence and sales documents on whether the sale breached Reg.14(3)</u>

50. Having considered everything, I concluded that, the evidence did not suggest that FPOC Membership was sold to Mr S in breach of Reg.14(3) in the way alleged. Nor did I think there was any other reason to tell BPF to do anything further.

51. Mr S first raised a complaint with BPF when PR1 sent a letter to it on his behalf. That letter ran to nine pages and detailed a number of different reasons why PR1 said the timeshare and associated loan was mis-sold. The part of the letter relevant to Reg.14(3) read:

> *"1.5 Upon Arrival, Our Clients were pressured to sit through the presentation screening beautiful destinations as the price of signing up to a Trial Membership.*
>
> *1.6 Our Clients were convinced into this purchase as an investment.*
>
> *1.7 Our Clients will say they were convinced into this purchase under the impression they would be able to sell at any given time, however this was later found to be untrue."*[5]

The remainder of the letter did not mention this allegation further.

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[5] In this letter of claim, PR1 referred to breaches of the Timeshare Regulation, but did not specifically allege a breach of Reg.14(3). But the Supplier answered this allegation and the relevant legal provision was later relied on by PR2.

52. In June 2021, PR2 raised a second complaint on Mr S's behalf. That letter of complaint ran to eight pages. Here it was said by PR2:

> *"It was represented to our client/s that these fractional points would be an investment and that they would be sold after the contract had come to its end date. It was further represented to our client/s that they would make a significant profit from the sale of these points."*

And

> *"The representation that this product was an investment is contrary to Regulation 14 of [the Timeshare Regulations]. Your representative advised our clients that the property would increase in value, that the property would be sold and that our clients would not only receive return of the cost of the product but would also make a profit. That cannot be guaranteed."*

53. I noted that both of these allegations differed to what Mr S said in his own words. Namely that he could terminate FPOC Membership easily as the Supplier would buy it back from him and that he was given the impression that he could sell FPOC Membership in the future for a profit.

54. Mr S's memories were also different from PR2's arguments in response to our investigator's view. It was said in response that Mr S was clear that FPOC Membership was sold to him as an investment and his memories fit with the facts of the complaints considered in the Judicial Review. Having considered everything, I did not think Mr S's memories identified the same concerns with the sale as were dealt with in the decisions considered in the Judicial Review.

55. When determining what happened, I explained that I made findings on the balance of probabilities. In doing so, I had to consider what both parties said happened and weigh that up against the other available evidence. Here, I thought Mr S's own statement was the best and most direct testimony from him as to what he remembered happened. I thought the representations from PR1 and PR2 were less likely to be accurate as they simply did not contain memories or recollections from Mr S in his own words, in the way that his statement did. Rather they contained PR1 and PR2's arguments why they said BPF needed to compensate Mr S. I also thought PR2's submissions that were made after our investigator's view were made in an attempt to align what Mr S had said with the facts of the decisions considered in the Judicial Review. Instead, I thought the starting point was to determine whether I thought Mr S was told the things he said he was in his witness statement and I did not think it was credible that he was told the things alleged by PR1 and PR2 not contained in that statement.

56. When assessing what Mr S has said, I noted that memories are imperfect and do change over time. I further accepted what PR2 said that evidence should not be ignored or excluded just because it is not entirely consistent with other evidence and there may be a core of acceptable evidence within the overall body of a person's evidence.[6] I said that I would be surprised if Mr S, or any person, could recall precise details of events that took place a number of years beforehand.

57. Mr S said he was told he could terminate FPOC Membership as the Supplier would buy this back from him. But I had seen that he signed the member's declaration and initialled next to the statement that he understood the Supplier did not buy back 'fractions'. It was

[6] I also considered the summary of how courts approach the assessment of evidence as contained at para 40 in the judgment in *Smith v. Secretary of State for Transport* [2020] EWHC 1954 (QB).

possible that Mr S signed this document without properly reading it or that he did not understand that what the Supplier meant was that it would not buy back his timeshare. However, I said that this document is one of the things I must take into account when assessing the evidence.

58. But Mr S also said that he was told he would make a profit by selling FPOC Membership in the future. That was set out in the same part of his statement where he said the Supplier would buy back FPOC Membership, so I thought the allegations were linked – after all, on Mr S's case, the simplest way to make a profit would be to sell FPOC Membership back to the Supplier. But I thought it was inherently unlikely that a seller of a product would give an oral assurance to a customer that they would be prepared to 'buy back' that product at any date in the future and would do so for more than they were selling it. To come to that finding would mean there would be no reason why any potential customer would not buy membership, even if they held no interest in owning a timeshare, as they would be able to sell it back the following day for a profit.

59. I looked at the FPOC Membership agreements and other documents from the time of sale, but they were silent on these issues, apart from what was said in the member's declaration as discussed above. So I considered whether this was something that could have been said orally during Mr S's sale. I considered the slides that the Supplier used when selling fractional memberships to prospective members, but I did not see anything in those slides that explicitly said, or gave the impression that, the Supplier would have bought back FPOC Membership or that the membership could be sold to the Supplier at a profit.[7] I was aware that PR2 had access to those slides, but it had not pointed to anything in those slides that it argued could have given such an impression.

60. Finally, I was aware that the Supplier did agree to transfer memberships if its customers were able to sell them on the open market, but I did not think that amounted to a representation that Mr S would be able to sell his FPOC Membership or that he would be able to do so at a profit.

61. In all the circumstances, I was not persuaded, on the balance of probabilities, that the Supplier made the representations that it would buy FPOC Membership back from Mr S nor that it could be sold to the Supplier in the future for a profit. It followed, I did not think there was a misrepresentation that BPF would have to answer for under s.75 CCA nor that there was a breach of Reg.14(3) that could have led to an unfair debtor-creditor relationship.

<u>Mr S's other points of complaint</u>

62. As well as the allegations that FPOC Membership was sold as an investment, Mr S raised other problems he said there were with membership for which he said BPF were answerable.[8]

63. Mr S said he was pressured to sit through a presentation for the FPOC Membership. If the levels of pressure were so extreme as to cause him to buy something that he otherwise would not have done, that was something that could lead to an unfair debtor-creditor relationship. However, Mr S described a fast moving sales environment, albeit

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[7] This was a materially different statement to the possibility that the proceeds of sale of the Property provided to Mr S at the end of the agreement would be more than he paid for FPOC Membership, which is not an allegation contained in Mr S's witness statement.

[8] In response to the investigator's view, PR2 had sent twelve pages of submissions related solely to the argument that the timeshare was sold as an investment, so I was not sure whether Mr S still relied on those other allegations. But for completeness, I dealt with them briefly.

one that lasted most of the day. He said he found it intense, but he then went on to say that he purchased FPOC Membership due to some of the benefits he was told about it and not because he felt forced into taking it out. So although I thought it was likely that there was an intense sales environment, I did not think it went so far as to cause an unfairness.

64. Mr S claimed that the cost of maintenance fees had increased substantially over time, however the Supplier said that was not the case and the fees did not increase at all. Mr S neither referred to this issue in his statement nor provided any invoices or demands for payment that showed what the Supplier said was wrong. So I did not have any evidence that the maintenance fees did increase.

65. Mr S claimed that FPOC Membership did not fit his needs and requirements as set out in a questionnaire he completed at the time of the sale. But I had not been provided a copy of the questionnaire, nor had Mr S mentioned this as something he was concerned about in his statement. So I did not have any evidence to make any findings on this matter.

66. PR1 said that the Supplier did not provide enough information so Mr S could make an informed decision about the purchase. However, Mr S had not pointed to what information it was he said should have been provided that, had it been, would have meant he did not buy FPOC Membership.

67. PR1 said the contract itself was long and complex and Mr S was unable to properly understand the nature of FPOC Membership before he took it out. Here, Mr S did not set out what terms he said operated unfairly to his detriment. So although it was possible that some of the Supplier's terms could have been unfair, I could not see how such an unfairness operated in practice. It followed, I did not think any terms led to an unfair debtor-creditor relationship.

68. It was alleged that BPF lent irresponsibly by not undertaking any assessment of Mr S's ability to repay the loan. However, in any complaint about lending there are a number of matters to consider. First, a lender had to undertake reasonable and proportionate checks to make sure a prospective borrower was able to repay any credit in a sustainable way. Secondly, if such checks were not carried out, it is necessary to determine what the right sort of checks would have shown. Finally, if the checks showed that the repayment of the borrowing was not sustainable, did the borrower lose out?

69. It was said that BPF did not carry out any checks at all when deciding to lend to Mr S. But even if that was the case, I had not been provided with anything to show that the lending was not affordable for Mr S. I had seen nothing to suggest there were any affordability issues, such as missed payments or other financial difficulties at the time of the loan. So I was not persuaded that the complaint should be upheld on that basis.

70. Mr S said that he thought BPF paid a commission to the Supplier when the loan was granted and that could have created an unfair debtor-creditor relationship. From what I understood, if BPF paid any commission, it tended to be low and of less than 10%. I was satisfied BPF did not breach any duty in making such a payment, nor was it under any regulatory duty to disclose the amount of commission paid in these circumstances. Further, I did not think the levels of commission that were sometimes paid in this situation were sufficiently high to mean that the relationship was unfair under s.140A CCA.

71. Finally, Mr S alleged that he was not able to get the availability of holidays that he wanted. In response, the Supplier said:

"Except for their promotional holiday enjoyed in June 2017 at [the Supplier's] resort in Spain, Mr and Mrs [S] have not made any attempt to use their membership and never requested any availability. However, our records show that they wanted to use a benefit of their membership to reserve hotel nights and they contacted our Travel Department in July 2016 requesting availability for a hotel in London for August 2016 and a quotation was sent to them; However, they did not confirm the offer."

Mr S had not provided any evidence in response to that, for example setting out times when he wished to book holidays but was unable to do so. It followed, I could not say he was unable to get the holidays he wanted through his FPOC Membership.

72. In conclusion, I saw no reason to say BPF were responsible under any claims that could be made under s.75 CCA or were a party to an unfair debtor-creditor relationship as defined by s.140A CCA. And I saw no other reason why it would be fair to direct BPF to pay anything to Mr S arising out of the sale of FPOC Membership.

73. BPF responded to my provisional decision to say it had nothing further to add.

74. PR2 responded to say it disagreed with what I had said. It has said that I conflated two things that Mr S had said, which meant the findings I reached were unsound. It argued that there was no link between the statement that the Supplier would buy FPOC Membership back from him and the statement that he could sell it in the future for a profit.

75. PR2 also provided an additional statement from Mr S and his wife that clarified what was meant in his earlier statement. PR2 provided additional arguments on why Mr S's FPOC Membership was sold in breach of Reg.14(3), including by pointing to the Supplier's sales materials, passages of the Judicial Review judgment and passages of another ombudsman's decision in a similar case.

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.

76. Given the responses I received from BPF and PR2, I cannot see that the parts of my provisional decision referred to in paragraphs 62 to 71 above are in dispute. As I have received no further submissions or comments on Mr S's other points of compliant, i.e. those outside of the alleged breach of Reg.14(3), I see no reason to depart from my provisional findings as set out in paragraphs 62 to 71 above.

77. It seems to me that the only issue that I now need address is whether the Supplier's sale to Mr S breached Reg.14(3) and, if it did, did that cause an unfair debtor-creditor relationship that requires a remedy.

<u>Mr S's new evidence</u>

78. Mr S has provided a new statement dated 20 February 2024 that has been signed by himself and his wife. The statement is written at times as if it is from one person, but at times as if it is from two. So, for example, it reads:

"*I have read the provisional decision issued by Mark Hutchings at the Financial Ombudsman Service. Mark has rejected our complaint and we are really shocked by this.*"

79. As explained above at paragraph 3, only Mr S is eligible to bring this complaint, so I have treated the things contained in that statement as coming from Mr S as he has signed it.

80. The statement expands on and clarifies what Mr S said before in his statement from October 2020. He explained that he did not say that the Supplier would buy the fractional points back in the future for a profit, rather in his new statement Mr S said:

> *"We said the following two, separate sentences:*
>
> *1. We decided to purchase as we were told that there would be the opportunity to easily terminate this contract, as they would happily buy this back from us.*
>
> *2. One of the main reasons we purchased this timeshare was the impression we were given that we could sell our timeshare in the future for profit."*

81. Mr S then set out what he says he meant in each of those two sentences. In respect of the first sentence, amongst other things, it was said:

> *"The initial comment about [the Supplier] buying it back was more to do with them promising it would be very easy to transfer it back to them if someone wanted to come out of the fractions. They said there were lots of people keen to buy it, so if we wanted to come out of it before the sale at the end, it was easy to transfer it back to them as they could easily sell it to someone else.*
>
> *This was part of the sales pitch where they convinced us that if we bought fractions today and we said we didn't want to keep it for the full term until it was sold, they would easily transfer it back from us and sell it on as there was a really good market for it. [The Supplier] did not say they would buy it back as a profit."*

82. In respect of the second sentence, amongst other things, it was said:

> *"We clearly said at the beginning "one of the main reasons we purchased this…", so obviously the rest of the sentence is us explaining one of the main reasons we bought it. Which is clearly separate to the first sentence. If they had been the same – we would have said this sentence first and let the second sentence run on from it as a form of explanation.*
>
> *But we didn't do that. We purposely said the 2 separate things.*
>
> *[The Supplier] sold us fractional points as property which would be sold in the future and they said multiple times that there will be an increase in the value. They said "these things go up in value all the time anyway" so it would be a bricks and mortar investment for a profit. We were told we could sell it anytime but also there will be an increase in value for it for us. We were told that we should put our money in now and it will increase in value and we will get a return on that investment."*

PR2's request for an oral hearing

83. PR2 is concerned that Mr S's credibility and character is being questioned, so it asked me to hold an oral hearing. And if I were to hold a hearing, it suggested that I scrutinise the Supplier's representative who sold FPOC Membership to Mr S.

84. Oral hearings are something that I can direct happen under DISP 3.5.5. However, having considered everything, I did not think I need to hold an oral hearing to fairly determine this complaint and I wrote to PR2 to explain my reasons. I thought PR2's request was

based on my finding that I did not accept the evidence of Mr S on whether the sale breached Reg.14(3) and because it wanted me to ask questions of the seller to determine the issue. I explained that the Financial Ombudsman Service is set up to decide complaints informally and it is for me as the decision maker to determine what evidence I think I need to determine what is a fair and reasonable outcome to a complaint. Further, I do not have the power to compel witnesses to attend a hearing, even if one party wants them to be questioned.

85. In this case, I had two statements from Mr S, other evidence, including the documents from the sale, and full submissions from PR2 on that evidence to decide what I think was most likely to have happened. I was satisfied I was able to weigh up what Mr S had said against all of the available evidence and arguments to determine what I find happened on the balance of probabilities without the need for an oral hearing. I said that the Supplier's representative may or may not be traceable or willing to attend, but even if they were, I thought it unlikely they would be in a position to provide any direct or reliable recollection of Mr S's particular sale made in 2016, nor would they be able to shed any meaningful light on the allegations made by him.

86. I explained that I thought I was able to fairly determine this complaint without the need for an oral hearing. But I did say that I would be happy to speak to Mr S and hear directly from him about his memories of the sale if he was prepared to speak with me. After taking instructions, PR2 said that Mr S did not wish to speak with me and wished for the matter to conclude without further delay.

My analysis of the evidence

87. When considering whether the sale breached Reg.14(3), it is important to consider the way in which the FPOC Membership was positioned by the Supplier when it was sold. The FPOC Membership clearly had an investment element to it (the interest in the sale proceeds of the Property), but merely selling such a membership did not breach the prohibition in Reg.14(3). Rather, that provision was only breached if the Supplier sold or marketed the membership as an investment – which would include the Supplier using the prospect of a financial gain as a way to induce Mr S into taking out FPOC Membership.

88. As I explained in my provisional decision, when determining what happened, I must make a finding on the balance of probabilities. In doing so, I have to consider what both parties say happened and weigh that up against the other available evidence. I explained in my provisional decision why I was not persuaded that the Supplier made the representations that it would buy FPOC Membership back from Mr S nor that it could be sold to the Supplier in the future for a profit (paragraph 61 above). In my provisional decision I also thought those two statements were linked, based on what Mr S said in his first witness statement. Having considered Mr S's words again, I acknowledge that the passage in the first witness statement is ambiguous and it is possible, therefore, that Mr S did not intend it to be read in the way I did in my provisional decision. So, I am prepared to proceed on the basis that he did not intend the two sentences to be linked in the way that I read them. It follows that I need to determine two matters – (1) did the Supplier say it would buy back FPOC Membership from Mr S and (2) was there an impression given that Mr S could sell FPOC Membership to a third party for a profit. I will consider each in turn.

89. In his latest statement, Mr S expanded on what he meant when he said the Supplier would buy back FPOC Membership from him. Mr S is now saying that he was told there was a good market for the resale of FPOC Memberships and there were lots of people

keen to buy them. So, with that being the case, the Supplier would happily buy membership back and then sell it on.

90. But as I noted above in paragraphs 57 and 59, that does not fit with the documents produced at the time of sale, nor with the slides used when marketing FPOC Memberships to prospective buyers. In particular Mr S initialled next to paragraph four of the Members Declaration that he understood that the Manager and Trustee did not repurchase fractions or points. Further, Mr S has now explained that the Supplier did not say it would buy back FPOC Membership for a profit, so it appears that no assurance was given to him as to any prospective price at which it would buy back the membership. Given that FPOC Membership cost over £16,000, and was paid for using an interest bearing loan, I would have expected Mr S to have questioned the price at which the Supplier would have bought it back if he wanted to give up his membership had any such assurance been given. Based on the evidence available, I do not find Mr S was told by the Supplier that it would buy back FPOC Membership from him.

91. Turning to the allegation that FPOC Membership was sold as an investment, in Mr S's first statement he said "*[o]ne of the main reasons we purchased this timeshare was the impression we were given that we could sell our timeshare in the future for profit.*" But since Mr S wrote that statement, he has clarified what he meant – he now says he was told that the Property associated with FPOC Membership would be sold and his interest in that would be "*a bricks and mortar investment for a profit.*" He says that as well as realising the interest in the Property at the end of the FPOC Membership period, *"[w]e were told we could sell it anytime but also there will be an increase in value for it for us."*

92. From Mr S's second statement I think there are two possible representations that he could argue were made – (1) that FPOC Membership could be sold at any time for a profit and (2) that at the end of the FPOC Membership term, the Property would be sold, generating a return of more than what was paid for FPOC Membership.

93. The first of those allegations is similar to the one that I dealt with in my provisional decision, but Mr S has now explained that he meant the sale could be to a third party rather than to the Supplier. Having reviewed all of the material available from Mr S's sale and all of the marketing material in use at the time of his sale, I cannot see anything that explicitly said, or gave the impression that, FPOC Membership could be sold to a third party for a profit. As noted in my provisional decision, I am aware that the Supplier did agree to transfer memberships if its customers were able to sell them on the open market, but I do not think that amounted to a representation that Mr S would be able to sell his FPOC Membership at a profit.

94. A statement that Mr S could have sold his FPOC Membership at any time at a profit would have placed the Supplier in a difficult position if Mr S tried to resell shortly after taking FPOC Membership out. If representations like these were made to prospective purchasers, it is highly likely they would blame the Supplier if a resale could not take place at a profit. Further, I have seen nothing to suggest that the Supplier could have known, or caused them to reasonably believe, that Mr S or any other customer could have sold their FPOC Membership to a third-party for a profit, especially given that any sale would have been subject to the usual negotiation process between a buyer and seller. Such a statement would be a hostage to fortune, opening the Supplier up to ongoing complaints. Given that, I think it is inherently implausible that such a statement was made.

95. Finally, if the Supplier had made such a representation to Mr S, and he had relied upon it, I would have expected that a key part of his complaint from the outset would have

been that he had tried to sell FPOC Membership and receive a profit, but he had been unable to do so. In none of the letters of claim or the witness statements was it said that Mr S had been trying unsuccessfully to sell FPOC Membership to receive an expected and assured profit.

96. The second of those allegations (that at the end of the FPOC Membership term, the Property would be sold, generating a return of more than what was paid for FPOC Membership) is different and was not dealt with in my provisional decision. In that decision I noted, at paragraphs 54 above, that the allegations contained in Mr S's first statement did not identify the same concerns with the sale as were dealt with in the decisions considered in the Judicial Review. However, the allegation Mr S now says he is making is much closer in nature to the issues dealt with in the decisions considered in the Judicial Review.

97. I find that the allegation, that the increase in value of the Property would generate a profit, is a new allegation made by Mr S for the first time in his recent statement. I do accept that a similar claim was made in PR2's first letter of claim, but as I explained in my provisional decision at paragraph 55, I did not find it credible that the Supplier did the things alleged by PR2 that were not contained in his first statement. I find it difficult to understand why, if FPOC Membership had been sold in that way or that it was important to him, it was not part of his original statement.

98. The first time Mr S put this allegation in his own words was in February 2024, almost eight years after FPOC Membership was taken out and almost six years after PR1 first contacted BPF on his behalf. So, I do have to take into account that his memories are not fresh. Further, I am conscious of what was said by Mrs Justice Thornton in the judgment in *Smith v. Secretary of State for Transport* [2020] EWHC 1954 (QB), where it was held (at para 40):

> *"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."*

99. Here, I am conscious that Mr S's evidence was given after the outcome of the Judicial Review, where it was held that in *some* circumstances a breach of Reg.14(3) could lead to an unfair debtor-creditor relationship. Given the widespread publicity given to that judgment and the timing of the new evidence in 2024, i.e. after the Judicial Review decision but relating to a transaction back in 2016, about which Mr S had complained in 2018, I consider it likely that the inclusion of this new allegation was influenced by the outcome of the Judicial Review and I can attach little weight to it.

100. PR2 points some slides that were used during the sale of a FPOC membership similar to Mr S's that was considered in one of the decisions subject to the Judicial Review. It says that, in the Judicial Review, the Supplier did not dispute that its timeshare was sold as an investment and, therefore, PR2 questions why I concluded that Mr S's FPOC Membership was not sold in that way. But the slides discussed in the Judicial Review concerned a different version of the FPOC to that which Mr S joined. Further, as I understand it, the slides were in use by the Supplier until the end of 2013. So, in the absence of any evidence to persuade me otherwise, they were not used in the

sale of FPOC Membership to Mr S, which was more than two years after the slides were likely to have been last used by the Supplier to train its sales representatives. Further, each complaint turns on its own facts; an ombudsman's decision on how one timeshare sale occurred does not determine his, or any other ombudsman's, decisions about the facts of other sales at different times to different purchases.

101. I acknowledge that it is *possible* that some of the Supplier's training material may have led some of its sales representative to position FPOC membership as an investment. But I do not think that is *probable* on this occasion given the facts and circumstances of this particular complaint. After all, as I have already found, that is not what Mr S said or suggested had happened at the time of sale until very recently. Further, I have seen no evidence in and amongst everything that has been said and/or provided throughout this complaint to persuade me that FPOC membership was likely to have been sold in the way Mr S now says it was. It follows that, on the balance of probabilities, I do not think FPOC Membership was sold to Mr S as an investment and I am not persuaded that the sale of Mr S's FPOC Membership breached Reg.14(3).

102. However, even the Supplier had breached Reg.14(3), that is not an end of the matter. As noted above, to find there was an unfair debtor-creditor relationship that requires relief from the unfairness, it is normally relevant to consider whether the breach caused the debtor to enter into the timeshare and/or the loan agreement. Here, Mr S simply did not allege in his first statement that the Supplier used the prospect of an increase in the value of the Property as a way of inducing him to take out FPOC Membership, which is something I would have expected to have been specifically included if it was important to him or caused him to enter into the timeshare and/or the loan agreement. In the absence from his first witness statement of a clear statement that his purchase of FPOC Membership relied upon, or was influenced by, a representation by the Supplier that the value of the Property would increase, I find that I cannot say that the breach of Reg.14(3) alleged by PR2, even if true, played such a part Mr S's contractual decision as caused the debtor-creditor relationship to be unfair to him; nor that it was something that warranted relief in the circumstances of this case.

103. So, for this reason, given all the circumstances of this complaint, I am not persuaded, on the balance of probabilities, that (a) the Supplier did breach of Reg.14(3) in Mr S's sale; or (b) if there was such a breach, that led to a credit relationship that was unfair to Mr S for the purposes of s.140A CCA.

My final decision

104. I do not uphold Mr S's complaint against Clydesdale Financial Services Limited, trading as Barclays Partner Finance.

105. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 14 June 2024.

Mark Hutchings
Ombudsman