DRN-5107608

The complaint

Mr and Mrs M's complaint is, in essence, that Shawbrook Bank Limited ("the Lender") acted unfairly and unreasonably by: (1) being party to an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 (the 'CCA'), (2) deciding against paying a claim under Section 75 of the CCA, and (3) lending to them irresponsibly.

Background to the complaint

Mr and Mrs M purchased membership of an asset-backed timeshare called the Fractional Owners Property Club (the 'Fractional Club') from a timeshare provider ('the Supplier') on 24 April 2014 (the 'Time of Sale'). They bought 1,700 Fractional Points at a cost of £22,253. But after trading in their existing Membership for £16,434, they ended up paying £4,579 for membership of the Fractional Club.

Fractional Club membership was asset backed – which meant it gave Mr and Mrs M 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 M paid for their Fractional Club Membership and the first year's annual management charge of £1,240[1] by taking finance from the Lender in their name for the sum of £5,819.

Mr and Mrs M – using a professional representative (the 'PR') – wrote to the Lender on 16 August 2018 (the 'Letter of Complaint') to complain about:

- misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
- 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.
- 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.

<u>Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale</u>

Mr and Mrs M say that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

- They were told that FPOC membership had a guaranteed end date when that was not true.
- They were told that they were buying an interest in a specific piece of "real property" when that was not true.
- They were told that FPOC membership was an "investment" when that was not true.

[1] As per a Pricing Sheet from the Time of Sale.

Mr and Mrs M say they have a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to 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 M say that the credit relationship between them and the Lender was unfair to them under Section 140A of the CCA. In summary, they include the following:

1. The contractual terms setting out (i) the duration of their Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of their membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
2. They were pressured into purchasing Fractional Club membership by the Supplier.
3. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.
4. The decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment and the loan was unaffordable.
5. The Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs.

The Lender dealt with Mr and Mrs M's concerns as a complaint and issued its final response letter on 21 March 2019, rejecting it on every ground.

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

Mr and Mrs M disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

In September 2023, the PR provided a witness statement from Mr and Mrs M, which is signed by them and is dated 18 October 2017 ('The First Statement').

In April 2019, the PR provided a copy of a letter from Mr and Mrs M that is not signed but was dated 20 April 2019. This letter was described as a reply to the Lender's response to the complaint and set out some of the background to the complaint in Mr and Mrs M's own words. Given that, I have treated this as if it were a statement of their evidence that was drafted after the First Statement ("the Second Statement").

Following the investigator's assessment, PR sent a supplementary witness statement ('the Third Statement') dated 17 November 2023 and signed by Mr M only.

I then set out the legal and regulatory context for the complaint.

I issued my provisional findings to the parties on 7 October 2024. In my provisional decision, I said:

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

And having done that, I do not currently think this complaint should be upheld.

But before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

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

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

The CCA introduced a regime of connected lender liability under section 75 that affords consumers ("debtors") a right of recourse against lenders that provide the finance for the acquisition of goods or services from third-party merchants ("suppliers") in the event that there is an actionable misrepresentation and/or breach of contract by the supplier.

In short, a claim against the Lender under Section 75 essentially mirrors the claim Mr and Mrs M could make against the Supplier.

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender does not dispute that the relevant conditions are met in this complaint. And as I'm satisfied that Section 75 applies, if I find that the Supplier is liable for having misrepresented something to Mr and Mrs M at the Time of Sale, the Lender is also liable.

This part of the complaint was made for several reasons that I set out at the start of this decision. They include the suggestion that Fractional Club membership had been misrepresented by the Supplier because Mr and Mrs M were told that they were buying an interest in a specific piece of "real property" when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr and Mrs M's share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.

I've also considered the testimony from Mr and Mrs M's First Statement in tandem with the allegation in PR's letter that the timeshare was misrepresented to them as an investment. Having done this, I don't agree that this allegation is reflected in what they've said about the events at the Time of Sale. And even if they were told the timeshare represented an investment, which I make no finding on, I don't agree this would amount to a misrepresentation, for the reasons I've given above.

As for the rest of the Supplier's alleged pre-contractual misrepresentations, while I recognise that Mr and Mrs M have concerns about the way in which their Fractional Club membership was sold, they have not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale for the other reasons they allege. And I say that having considered the documents Mr and Mrs M were given by the Supplier, in particular the document titled "FRACTIONAL PROPERTY OWNERS CLUB INFORMATION STATEMENT". This document provided Mr and Mrs M with the information the Supplier was required to give them according to the Timeshare Regulations.

It says:

"Your Fractional Rights will start on the date shown on the Purchase Agreement and

expires automatically when your Allocated Properly 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."
…
"Each Allocated Property is or will be legally owned or controlled by a UK company (Owning Company) which will be controlled either directly or indirectly by the Trustee, operating in accordance with the Deed of Trust…The Owning Company will retain such Allocated Property until the automatic sale date in 19 years time or such later date as is specified in the Rules or the Fractional Rights Certificate."
…
"The Trustee will manage the sales process of the Allocated Property and following a sale distribute the net proceeds among the Owners and the Vendor. Each Owner will be entitled to a distribution as set out on the Fractional Rights Certificate for each Weekly Period held under a Fractional Rights Certificate subject to being in good standing and up to date with Management Charges. The Vendor is entitled to use up to 4 weeks for maintenance (and Week 53 when it occurs) during the term of the Project and a similar fractional share for anything else held as if an Owner for any other Fractional Rights which are unsold or have been acquired by the Vendor. The Rules provide for mechanisms to postpone the sale date in certain circumstances…"
…
Exact period within which the right which is the subject of the contract may be exercised and, if necessary, its duration:
…
"Your Fractional Rights will start on the date shown on the Purchase Agreement and expires automatically when the Properties are sold."

While I can't be certain that Mr and Mrs M read the document in full prior to signing the agreement, I think the above paragraphs make it sufficiently clear that the membership only ended when the Property was sold, not the date on which the sales process is initiated. I've also considered the sales process and what I know about how the Supplier sold its products.

I have seen a set of presentation slides that were used by the Supplier at around the same time as Mr and Mrs M's purchase. In the slides, it is said:

"19 years later the property is sold. You receive your share of the sale of the property."

While I can't be certain that Mr and Mrs M were shown the slides, or that they were influenced by this information at the time, I think it's more likely than not that they were told something similar – that being the Property would be sold and the proceeds from the sale would be distributed to the members.

What's more, as there's nothing else on file that persuades there were any false statements of existing fact made to Mr and Mrs M by the Supplier at the Time of Sale, I do not think there was an actionable misrepresentation by the Supplier for the reasons they allege.

For these reasons, therefore, I do not think the Lender is liable to pay Mr and Mrs M any compensation for the alleged misrepresentations of the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

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

I have already explained why I am not persuaded that the contract entered into by Mr and Mrs M was misrepresented (or breached) by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But they also

say that the credit relationship between them and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that they have concerns about. It is those concerns that I explore here.

As Section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between Mr and Mrs M and the Lender was unfair.

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

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

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

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr and Mrs M's membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by Section 12(b). That made them antecedent negotiations under Section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per Section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

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

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

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

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

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

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

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

What's more, the scope of that responsibility extends to both acts and omissions by the Supplier as the Supreme Court in Plevin made clear when it referred to 'acts or omissions' when discussing Section 56. And as Section 56(3)(b) says that an applicable agreement can't try to relieve a person from liability for 'acts or omissions' of any person acting as, or on behalf of, a negotiator, it must follow that the reference to 'omissions' would only be necessary because they can be attributed to the creditor under Section 56.

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.

---

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

I have considered the entirety of the credit relationship between Mr and Mrs M and the Lender along with all of the circumstances of the complaint and I do not 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:

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

- *The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;*
- *Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;*
- *The inherent probabilities of the sale given its circumstances.*

I have then considered the impact of (1) and/or (2) on the fairness of the credit relationship between Mr and Mrs M and the Lender.

The Supplier's sales & marketing practices at the Time of Sale

Mr and Mrs M's complaint about the Lender being party to an unfair credit relationship was also made for several reasons, all of which I set out at the start of this decision.

They include the allegation that the Supplier misled Mr and Mrs M and carried on unfair commercial practices which were prohibited under the CPUT Regulations for the same reasons they gave for their Section 75 claim for misrepresentation. But given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.

The PR says that the right checks weren't carried out before the Lender lent to Mr and Mrs M. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that the money lent to them was actually unaffordable before also concluding that they lost out as a result and then consider whether the credit relationship with the Lender was unfair to them for this reason. Again, from the information provided, I am not satisfied that the lending was unaffordable for Mr and Mrs M, particularly as they repaid the loan in full within several months of entering the agreement, utilising their savings. If there is any further information on this (or any other points raised in this provisional decision) that Mr and Mrs M wishes to provide, I would invite them to do so in response to this provisional decision.

Mr and Mrs M say that they were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledge that they may have felt weary after a sales process that went on for a long time. But this appears to me to be at odds with their own testimony provided in the First Statement, where they say they initially rejected the proposal to purchase more points and that they "ended the meeting as something did not feel right". They say "they left us alone for a couple of days" before accepting the offer of a free meal and continuing the conversation. They say they were "in the meeting for an hour", which to me does not sound particularly arduous. The Third Statement gives a different account of the sale, where Mr M says "we were exhausted by the end of the afternoon". For reasons I will expand upon later, as it was taken closer to the time and memories do naturally fade, I think the First Statement gives a more accurate account of the events leading up to the sale, so I have placed more weight on what was said by Mr and Mrs M in their First Statement than the two later statements.

Mr and Mrs M were existing customers of the Supplier, who have previously sat through sales presentations, so they would have known more or less what to expect from the process. They were also given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel their membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs M made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

I'm not persuaded, therefore, that Mr and Mrs M's credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why they say their credit relationship with the Lender was unfair to them. And that's the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

Was Fractional Club membership marketed and sold at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations?

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

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling membership of the Fractional Club 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 PR says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.

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

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

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr and Mrs M 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 or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

In the letter of claim, PR quotes the Supplier as saying Mr and Mrs M were told that "you will have a share in a specific property", "bricks and mortar" and "this is a good investment". But these statements are provided without much context or supporting evidence. Mr and Mrs M's First Statement indicates these statements were made during an earlier timeshare sale in 2012. They also say:

"We wish to relinquish our timeshare because we have been lied to by [the Supplier] that this was an investment in property. We do not believe that [the Supplier] will sell the property in 15 years and that we will get any money back".

But despite Mr and Mrs M having said that they believed they had an investment in property, having reviewed the First Statement in full, I cannot see that Mr and Mrs M have claimed that the Fractional Club membership in question was marketed and sold to them as an investment at the Time of Sale – instead they said they purchased Fractional Club membership for other reasons that I will deal with further below. Their First Statement also incorrectly states the length of the contract as lasting 15 years, which I think casts some doubt over their recollection of events. And, while their First Statement further describes the earlier timeshare as being sold as a way to "get our money back and make a profit", I do not see any such testimony about the purchase – and relationship – in question. Likewise, Mr and Mrs M's Second statement seems geared towards problems they had with the way their first fractional membership was sold to them, for example fractional membership being a solution to problems Mr and Mrs M say they had with their previous membership type. Further, Mr M's Third Statement does not suggest there might have been a breach of Regulation 14(3) at the time of the sale in question.

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 M, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs M as an investment. However, Mr and Mrs M said that they paid £30,099 for their first fractional membership in 2012 but were only offered a trade in value of £16,434 when they traded that in for Fractional Club membership two years later. Given that significant loss in value, I fail to see how they could have thought Fractional Club membership was something that was likely to have generated them a profit on what they paid.

With that said, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. And I accept that it's possible that Fractional Club membership was marketed and sold to them as an investment in breach of Regulation 14(3) given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Club membership without breaching the relevant prohibition.

So, I have taken all of that into account. However, on my reading of the evidence provided and Mr and Mrs M's initial recollections of the sales process at the Time of Sale, that is not what appears to have happened at that time. They did describe being told by the Supplier that they would receive the net sale proceeds of their share in the Allocated Property once their Fractional Club membership ended. But at no point during the sale in question did they say or suggest that the Supplier led them to believe that their Fractional Club membership would lead to a financial gain (i.e., a profit).[3]

---

[3] This is different from any finding that the earlier, 2012 purchase was marketed or sold in breach of Regulation 14(3), which is beyond the scope of this decision. That is because the earlier sale was not paid for using credit

So, while PR argues that the Supplier marketed and sold Fractional Club membership to Mr and Mrs M as an investment, I don't recognise that assertion in their initial recollections of the sale.

Indeed, Mr and Mrs M's First Statement and the Letter of Complaint were put together much closer to the Time of Sale and are, in my view, better evidence of what they remember of the sales process at that time and why they were unhappy with it than their very recent recollections. After all, if Fractional Club membership had been marketed and sold as an investment by the Supplier at the Time of Sale, it is difficult to understand why they did not mention that in their First Statement, or why the claim letter did not give more detail about this aspect of their complaint. And with that being the case, in the absence of persuasive evidence to suggest otherwise, I find that it is unlikely that the Supplier led them to believe that membership offered them the prospect of a financial gain (i.e., a profit).

But even if I am wrong to conclude that, on this occasion, membership was unlikely to have been sold in that way given what I have already said about Mr and Mrs M's recollections of the sales process at the Time of Sale, I am not currently persuaded that would make a difference to the outcome in this complaint anyway.

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

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

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

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

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

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

*"[…] The terms of section 140A(1) CCA do not impose a requirement of "causation" in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court **may** make an order **if** it determines that the relationship is unfair to the debtor. […]*

[…] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the

---

from the Lender, nor is it something that the Lender could be responsible for by the operation of Section 56 of the CCA.

same sort of approach applies when considering what relief is required to remedy that unfairness. […]"

So, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr and Mrs M and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) which, having taken place during its antecedent negotiations with Mr and Mrs M, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender lead them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

But as I've already said, there was no suggestion in Mr and Mrs M's initial recollections of the sales process at the Time of Sale that the Supplier led them to believe that the Fractional Club membership was an investment from which they would make a financial gain nor was there any indication that they were induced into the purchase on that basis. Further, Mr and Mrs M have provided some very specific reasons why they decided to take out Fractional Club membership, none of which were related to investment potential. In the First Statement, they said:

"46. We went to the usual meeting and were told by the sale people that we should put our children onto our membership so they could book holidays for themselves. They told us we would need more points if the children were going to become associate members.

47. If we purchased there and then we would get financial help of £60 a month for 10 months to help pay the interest on our loan and we would also get 1000 bonus points that we our children could use."

And in the Third Statement, in addition to repeating what was said about putting their children on the membership, Mr M said:

"12. In addition, we were told that if we purchased extra Fractional Points, this would enable us to have better availability and better quality holidays. They would also be a reduction in their annual fees, and also no booking fees for booking holidays. Our adult children could make their own holiday bookings, rather than having us having to do it for them."

So, it seems to me that Mr and Mrs M were motivated to purchase Fractional Club membership for a number of reasons, none of which were related to any alleged breach of Regulation 14(3).

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Mrs M's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr and Mrs M and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

The provision of information by the Supplier at the Time of Sale

The PR says in its letter of claim that the Supplier did not make Mr and Mrs M aware of Clause 7 of the Articles of Association, which it says allowed members to exit the existing Membership held by Mr and Mrs M. PR says:

“We consider that the membership of the CLC Fractional Ownership Scheme has been sold on the basis of the systematic misrepresentation of the true position in all cases where it is sold on the basis of being a "solution" to the clients' concerns over the liability to pay continuing annual management charge without the clients' attention being brought to clause 7 of the Company's Articles of Association.”

PR says that this amounts to a misleading omission, in breach of Paragraph 6 of CPUT Regulations.

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mr and Mrs M when they purchased membership of the Fractional Club at the Time of Sale. But they and PR say that the Supplier failed to provide them with all of the information they needed to make an informed decision.

PR also says that the contractual terms governing the ongoing costs of Fractional Club membership and the consequences of not meeting those costs were unfair contract terms under the CPUT Regulations.

One of the main aims of the Timeshare Regulations and CPUT Regulations was to enable consumers to understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. And if a supplier’s disclosure and/or the terms of a contract did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn’t fully understand at the time of contracting, that may lead to the Timeshare Regulations and the CPUT Regulations being breached, and, potentially the credit agreement being found to be unfair under Section 140A of the CCA.

However, as I’ve said before, the Supreme Court made it clear in Plevin that it does not automatically follow that regulatory breaches create unfairness for the purposes of Section 140A of the CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

Given the facts and circumstances of this complaint, I am not persuaded that the Supplier’s alleged breaches of the CPUT Regulations are likely to have prejudiced Mr and Mrs M’s purchasing decision at the Time of Sale and rendered the credit relationship with the Lender unfair to them for the purposes of section 140A of the CCA. And I say this because Mr and Mrs M do not say they entered into the Fractional Club Membership in order to shorten their obligations to the Supplier. Indeed, they already held an existing membership with a similar remaining term, and their testimony does not suggest that they sought a shorter term as part of their reasoning for agreeing to enter the Purchase Agreement (as opposed to the shorter term their previous purchase would have provided them). Mr M’s own testimony reasons that he was motivated by gaining more points, which could be used by his children to allow them to take holidays independently. PR’s letter says that Mr and Mrs M were motivated by having better availability and better-quality holidays, a reduction in the annual fees and no booking fees. I’ve not seen any testimony indicating that Mr and Mrs M were looking to exit their existing membership. And I don’t think it’s plausible that the Supplier has made a misleading omission in relation to the options available to them to exit the membership if – as PR suggests – this information is contained within the documentation given to them at the Time of Sale.

Moreover, as I haven’t seen anything else to suggest that there are any other reasons why the credit relationship between the Lender and Mr and Mrs M was unfair to them, because of an information failing by the Supplier, I’m not persuaded it was.

Section 140A: Conclusion

In conclusion, therefore, given all of the facts and circumstances of this complaint, I don't think the credit relationship between the Lender and Mr and Mrs M was unfair to them for the purposes of Section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

In summary, I wasn't minded to think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs M's section 75 claims.

In November 2024, after I issued my provisional decision, the PR first raised the matter of commission disclosure. I've since written to the parties setting out my thoughts on why I wasn't persuaded to uphold this aspect of the complaint.

Applying the principles and factors set out in the Supreme Court judgment[4] handed down on 1 August 2025, I found nothing to suggest to suggest that the Lender and Supplier were tied to one another contractually or commercially in a way that wasn't properly disclosed to Mr and Mrs M. Nor did I see anything that persuaded me that the commission arrangements between them gave the Supplier a choice over the interest rate which led Mr and Mrs M into a credit agreement that cost disproportionately more than it otherwise could have.

Further, the flat rate and amount of commission paid was such that it gave me no reason to think that any failure to disclose it to Mr and Mrs M had a material impact on their decision to enter into the Credit Agreement. At £581.90, it was only 9.9% of the amount borrowed and even less than that (5.4%) as a proportion of the charge for credit. That didn't strike me as disproportionate; nor were the surrounding circumstances otherwise capable of rendering unfair the credit relationship between the Lender and Mr and Mrs M such that the Lender needed to take any action in redress.

I didn't find any of the other arguments put forward demonstrated that the credit agreement between Mr and Mrs M and the Lender was unfair to them under section 140A of the CCA. Absent any other reason why it would be fair or reasonable to direct the Lender to compensate Mr and Mrs M, I said I didn't propose to uphold the complaint.

Responses to my provisional findings

The Lender acknowledged my provisional decision and had nothing further to add. The PR didn't accept the proposed outcome. It submitted further comments and evidence in support of Mr and Mrs M's position.

Having received and reviewed these, I'm now proceeding with my final decision.

The legal and regulatory context

The legal and regulatory context that I think is relevant to this complaint has been shared in several hundred published decisions on very similar complaints, as well as in previous correspondence with the parties. So there's no need for me to set this out again in detail here. I simply remind the parties that our rules[5] say that in considering what is fair and reasonable in all the circumstances of the complaint, I will take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and

[4] *Johnson v FirstRand Bank Ltd, Wrench v FirstRand Bank Ltd and Hopcraft v Close Brothers Ltd* [2025] UKSC 33 ("*Hopcraft, Johnson and Wrench"*)
[5] Financial Conduct Authority ("FCA") Handbook – DISP 3.6.4R ("R" denotes a rule).

(where appropriate), what I consider to have been good industry practice at the relevant time.

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.

After considering the case afresh and having regard for what's been said in response to my provisional decision and in my subsequent correspondence, I find it offers no persuasive reason to depart from the conclusions I've previously set out. I'll explain why.

The PR originally raised various points of complaint, such as those giving rise to Mr and Mrs M's section 75 claim, which I addressed in my provisional decision. In its response, it hasn't made any further comments in relation to most of its original points, or said anything that leads me to think it disagrees with my provisional conclusions in relation to those points. So I'll focus here on the points the PR *has* made in response.

The PR's response to my provisional decision relates mainly to the issue of whether the credit relationship between Mr and Mrs M and the Lender was unfair *per* section 140A of the CCA. In particular, the PR has provided more comment in relation to whether the membership was sold to Mr and Mrs M as an investment at the Time of Sale. It has also made further submissions in support of its position that the payment of a commission by the Lender to the Supplier led to an unfair credit relationship between the Lender and Mr and Mrs M.

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

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

The PR has questioned whether my provisional conclusions run contrary to precedent decisions issued by my ombudsman colleagues and the judgment handed down in *Shawbrook & BPF v FOS*. I don't believe they do. However, for the avoidance of doubt, other decisions issued by other ombudsmen do not have a precedent effect like some court judgments might, and each ombudsman must determine each case on its own specific facts. Further, the judgment referred to did not make a blanket finding that all products of the type that Mr and Mrs M purchased were mis-sold in the way the PR appears to be suggesting.

I remind the PR that in my provisional decision I accepted the possibility that Fractional Club membership was marketed and/or sold to Mr and Mrs M as an investment, in breach of Regulation 14(3). I went on to explain that relevant case law[6] indicates that in considering the question of relief for any resultant unfairness in the credit relationship, I needed to take into account any material impact of such a breach on Mr and Mrs M's decision whether to enter into the Purchase and Credit Agreements. It doesn't strike me that doing so flies in the face of either the handed down judgment or previous decisions the PR has mentioned.

While the PR has referred me to Mr and Mrs M's recollections and the Supplier's training materials, I have already considered these and what was said. And I set out in my provisional decision the reasons why I didn't find that evidence sufficiently persuasive that Mr and Mrs M's purchase decision would have been any different, given the other motivational factors they had described. Having re-examined Mr and Mrs M's statement, that remains my view, for the reasons previously given.

[6] *Carney* and *Kerrigan*

So, as I said previously, whether or not the Supplier marketed or sold Fractional Club membership as an investment in breach of Regulation 14(3), I'm not persuaded Mr and Mrs M's decision to make the purchase was materially impacted by the prospect of a financial gain. It follows that I find the credit relationship between Mr and Mrs M and the Lender was not rendered unfair to them for this reason.

The provision of information by the Supplier at the Time of Sale

The PR has asked for the documents the lender has provided to evidence the commission arrangements. As the PR will be aware, under DISP 3.5.9R I may, where I consider it appropriate, accept information in confidence (so that only an edited version, summary or description is disclosed to the other party). I'm satisfied that agreements between the Lender and the Supplier are commercially sensitive and that the summary information on commission arrangements we've already shared with the PR is appropriate in this case. I've seen nothing in this case that leads me to think what the Lender has said about the commission arrangements is inaccurate. So there's no reason for me to reach a different finding over those commission arrangements.

As I've noted, the PR has disagreed with my provisional conclusions on whether the Lender should pay redress because of an unfair credit relationship arising in connection with commission arrangements between the Lender and the Supplier. The PR says, in summary, that when the overall circumstances of those arrangements are considered in the round, the credit relationship was plainly unfair. In support of this position the PR has expressed, among other things, that:

- The provisional decision doesn't properly apply the Supreme Court's judgment in *Hopcraft, Johnson and Wrench,* which concluded a range of factors informed whether a credit relationship between a consumer and a lender was unfair
- A conflict of interest existed on the part of the Supplier, who provided neither independent nor competent explanation of the credit
- Failure to disclose payment of commission – irrespective of the size of any payment - was a regulatory breach that goes to the heart of fairness

I have thought about what the PR has said, but I don't think it has provided persuasive grounds for me to reach a different conclusion on this issue.

I've previously set out my thoughts on any impact the Supreme Court's conclusions in *Hopcraft, Johnson and Wrench* has on Mr and Mrs M's arguments that their credit relationship with the Lender was unfair to them for reasons relating to commission given the facts and circumstances of this complaint.

The PR's response doesn't offer anything that leads me to think that, for the most part, any of the factors it has referenced were in fact at play in Mr and Mrs M's case. It hasn't, for example, provided evidence to show the existence of commercial or contractual ties that were concealed from Mr and Mrs M, any persuasive reasons to conclude that the Supplier's role was that of advisor to Mr and Mrs M, or to show that any other conflict of interest arose from the roles the Supplier did perform. For such a claim to be successful would require more than the bare assertions that have been made in this case.

In its correspondence the PR has emphasised the regulatory breaches connected with a failure to disclose commission payment. I have already set out why in my view this doesn't automatically lead to an unfair credit relationship for which the Lender needs to offer redress. I remain of that view, the PR's submissions notwithstanding.

Section 140A: Conclusion

Given all of the factors I've looked at in this part of my decision, and having taken all of them into account, I remain unpersuaded that the credit relationship between Mr and Mrs M and the Lender under the Credit Agreement and related Purchase Agreement was unfair to them such that it warrants the Lender offering any redress.

Commission: The Alternative Grounds of Complaint

In my previous correspondence I mentioned that some of the grounds for complaint about the fairness or otherwise of the credit relationship could also constitute separate and freestanding complaints. I'll reiterate my findings here.

The first ground relates to whether the Lender is liable for the dishonest assistance of a breach of fiduciary duty by the Supplier because it took a payment of commission from the Lender without telling Mr and Mrs M (that is, secretly). The second relates to the Lender's compliance with the regulatory guidance in place at the Time of Sale insofar as it was relevant to disclosing the commission arrangements between them.

For the reasons I set out previously, I'm not persuaded that the Supplier – when acting as credit broker – owed Mr and Mrs M a fiduciary duty. So, the remedies that might be available at law in relation to the payment of secret commission aren't, in my view, available to them. And while it's possible that the Lender failed to follow the regulatory guidance in place at the Time of Sale insofar as it was relevant to disclosing the commission arrangements between it and the Supplier, I don't think any such failure on the Lender's part is itself a reason to uphold this complaint. For the reasons I have also previously set out, I think they would still have taken out the loan to fund their purchase at the Time of Sale had there been more adequate disclosure of the commission arrangements that applied at that time.

Conclusion

After careful reconsideration of the facts and circumstances of this complaint, I adopt my provisional conclusions as part of my final decision. For the reasons I've given above and in my earlier correspondence I've mentioned, I don't think the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs M's section 75 claims. And I'm not persuaded that the Lender was party to a credit relationship with Mr and Mrs M that was unfair to them for the purposes of section 140A of the CCA. Having taken everything into account, I see no other reason why it would be fair or reasonable for me to direct the Lender to compensate Mr and Mrs M.

My final decision

For the reasons set out above, my final decision is that I don't uphold Mr and Mrs M's complaint against Shawbrook Bank Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M and Mrs M to accept or reject my decision before 12 January 2026.

Andrew Anderson
Ombudsman