

The complaint

Mrs B's complaint is, in essence, that Clydesdale Financial Services Limited trading as Barclays Partner Finance (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 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

What happened

Mrs B purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 20 August 2015 (the 'Time of Sale'). She entered into an agreement with the Supplier to buy 1200 fractional points at a cost of £13,348 (the 'Purchase Agreement').

Fractional Club membership was asset backed – which meant it gave Mrs B more than just holiday rights. It also included a share in the net sale proceeds of a property named on the Purchase Agreement (the 'Allocated Property') after her membership term ends.

Mrs B paid for her Fractional Club membership by taking finance of £13,348 from the Lender (the 'Credit Agreement').

Mrs B – using a professional representative (the 'PR') – wrote to the Lender on 15 September 2022 (the 'Letter of Complaint') to raise a number of different concerns. As those concerns haven't changed since they were first raised, and as both sides are familiar with them, it isn't necessary to repeat them in detail here beyond the summary above. The Lender dealt with Mrs B's concerns as a complaint and issued its final response letter on 2 February 2024, rejecting it on every ground.

The complaint was then referred to the Financial Ombudsman Service. It was assessed by an Investigator who thought that the Lender hadn't unfairly or unreasonably declined Mrs B's Section 75 claim by relying on the defence available to it under the Limitation Act 1980. Our Investigator, having considered the information on file, also thought that Mrs B's complaint about being party to an unfair credit relationship should not be upheld.

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

I considered the matter and issued a provisional decision (the 'PD'). In that 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 think this complaint should be upheld.

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

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. Put simply, Section 75 creates a financial liability that the creditor is bound to pay. Liability under Section 75 isn't based on anything the lender does wrong, but upon the misrepresentations and breaches of contract by the supplier, for which Section 75 imposes on the lender a "like claim" to that which the borrower enjoys against the supplier. If the lender is notified about a valid Section 75 claim, it should pay its liability. And if it fails or refuses to do so, that failure or refusal can give rise to a complaint to the Financial Ombudsman Service.

In his complaint, Mrs B says the Supplier made a number of misrepresentations at the Time of Sale – namely that she was: -

- 1. Told that she had purchased an investment that would "considerably appreciate in value".*
- 2. Promised a considerable return on her investment because she was told that she would own a share in a property that would considerably increase in value.*
- 3. Told that she could sell her Fractional Club membership to the Supplier or easily to third parties at a profit.*
- 4. Made to believe that she would have access to "the holiday apartment" at any time all year round.*

The Financial Ombudsman Service doesn't have the power to investigate every complaint that's referred to us. We can only consider complaints which fall within our jurisdiction. The Financial Services and Markets Act 2000 (FSMA) gives the Financial Conduct Authority (FCA) the power to say which complaints we can and can't consider. The rules setting this out are known as the DISP rules and can be found within the FCA handbook.

Where – as is the case here – a respondent business (the Lender) hasn't consented to us dealing with a complaint, I can't usually deal with complaints raised more than six years after the event complained about or, if later, more than three years after the complainant knew (or ought reasonably to have known) they had cause for complaint.

Here, the Lender has said that Mrs B's Section 75 claim was made out of time. So, I have considered, therefore, whether her complaint about that decision has been brought in time or not.

Section 2 of our DISP rules covers whether Mrs B's complaints were made in time for the purposes of allowing the Financial Ombudsman Service to consider them. This is what DISP 2.8.2 R says (insofar as its relevant to this complaint): -

"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

[...]

(2) more than:

- (a) six years after the event complained of; or (if later)*
- (b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;*

unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received; [...]

unless:

[...]

(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R [...] was as a result of exceptional circumstances; or [...]"

When a complaint is referred to the Financial Ombudsman Service on the back of an unsuccessful attempt to advance a Section 75 claim, the act or omission that engages the Service's jurisdiction is the creditor's refusal to accept and pay the debtor's claim – rather than anything that occurs before the claim was put to the creditor, such as the supplier's alleged misrepresentation(s) and/or breach(es) of contract.

As a result, the six and three year time limit to complain about an unsuccessful attempt to initiate a Section 75 claim I have set out above doesn't usually start until the respondent firm answers and refuses the claim.

In this case, as the Lender refused to accept and pay Mrs B's claim on 2 February 2024, the primary time limit (of 6 years) only started at that time. And as this complaint about the Lender's handling of that claim was referred to the Financial Ombudsman Service on 12 July 2024, it was made in time for the purpose of the rules on our jurisdiction.

However, like our Investigator, I don't think it would be fair or reasonable to uphold this complaint for reasons relating to Mr A's Section 75 claim. As a general rule, creditors can reasonably reject Section 75 claims that they are first informed about after the claim has become time-barred under the Limitation Act 1980 ('LA') as it wouldn't be fair to expect creditors to look into such claims so long after the liability arose and after a limitation defence would be available in court. So, it is relevant to consider whether Mr A's Section 75 claim was time-barred under the LA before they put it to the Lender.

As I have said above, a claim under Section 75 is a "like" claim against the creditor. It essentially mirrors the claim the consumer could make against the Supplier.

A claim for misrepresentation against the Supplier would ordinarily be made under Section 2(1) of the Misrepresentation Act 1967. And the limitation period to make such a claim expires six years from the date on which the cause of action accrued (see Section 2 of the LA).

But a claim, like the one in question here, under Section 75 is also "an action to recover any sum by virtue of any enactment" under Section 9 of the LA. And the limitation period under that provision is also six years from the date on which the cause of action accrued.

The date on which the cause of action accrued was the Time of Sale. I say this because Mrs B entered into the purchase of her timeshare at that time based on the alleged misrepresentations of the Supplier – which she says she relied on. And as the loan from the Lender was used to help finance the purchase, it was when she entered into the Credit Agreement that she suffered a loss.

Mrs B first notified the Lender of her Section 75 claim on 15 September 2022. And as more than six years had passed between Time of Sale and when she first put her claim to the

Lender, I don't think it was unfair or unreasonable of it to reject Mrs B's concerns about the Supplier's alleged misrepresentations.

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

I've already explained why I'm not persuaded that Fractional Club membership was actionably misrepresented by the Supplier at the Time of Sale. But there are other aspects of the sales process that, being the subject of dissatisfaction, I must explore with Section 140A in mind if I'm to consider this complaint in full – which is what I've done next.

Having considered the entirety of the credit relationship between Mrs B and the Lender along with all of the circumstances of the complaint, I don't think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

- 1. The standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Time of Sale along with any relevant training material;*
- 2. The provision of information by the Supplier at the Time of Sale in relation to Fractional Club membership, including the contractual documentation and disclaimers made by the Supplier;*
- 3. The commission arrangements between the Lender and the Supplier at the Time of Sale and the disclosure of those arrangements;*
- 4. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;*
- 5. The inherent probabilities of the sale given its circumstances; and, when relevant*
- 6. Any existing unfairness from a related credit agreement.*

I have then considered the impact of these on the fairness of the credit relationship between Mrs B and the Lender given her circumstances at the Time of Sale.

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

Mrs B's complaint about the Lender being party to an unfair credit relationship was made for several reasons.

The PR says, for instance, that the right checks weren't carried out before the Lender lent to Mrs B. 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 Mrs B 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 her for this reason. But from the information provided, I am not satisfied that the lending was unaffordable for Mrs B.

Connected to this is the suggestion by the PR that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that the Lender wasn't permitted to enforce the Credit Agreement. However, it looks to me like Mrs B knew, amongst other things, how much she was borrowing and repaying each month, who she was borrowing from and that she was borrowing money to pay for Fractional Club membership. And as the lending doesn't look like it was unaffordable for Mrs B, even if the Credit Agreement was arranged by a broker that didn't have the necessary permission to do so (which I make no formal finding on), I can't see why that led to a financial loss for Mrs B – such that I can say that the credit relationship in question was unfair on her as a result. And with that being the case, I'm not persuaded that it would be fair or reasonable to tell the

Lender to compensate Mrs B, even if the loan wasn't arranged properly.

The PR also says that there was one or more unfair contract terms in the Purchase Agreement. But as I can't see that any such terms were operated unfairly against Mrs B in practice, nor that any such terms led her to behave in a certain way to her detriment, I'm not persuaded that any of the terms governing Fractional Club membership are likely to have led to an unfairness that warrants a remedy.

I acknowledge that Mrs B may have felt weary after a sales process that went on for a long time. But she says little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to. Mrs B was also given a 14-day cooling off period and she has not provided a credible explanation for why she did not cancel her membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mrs B made the decision to purchase Fractional Club membership because her ability to exercise that choice was significantly impaired by pressure from the Supplier.

Overall, therefore, I don't think that Mrs B's credit relationship with the Lender was rendered unfair to her under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why the PR says the credit relationship with the Lender was unfair to Mrs B. And that's the suggestion that Fractional Club membership was marketed and sold to her as an investment in breach of prohibition against selling timeshares in that way.

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

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

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

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

But the PR says that the Supplier did exactly that at the Time of Sale – saying, in summary, that Mrs B was told by the Supplier that Fractional Club membership was the type of investment that would only increase in value.

The term "investment" is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and 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.

A share in the Allocated Property clearly constituted an investment as it offered Mrs B the prospect of a financial return – whether or not, like all investments, that was more than what she first put into it. But it is important to note at this stage that 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 Mrs B as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to her as an investment, i.e. told her or led her to believe that Fractional Club membership offered her the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

There is competing evidence in this complaint as to whether Fractional Club membership was marketed and/or sold by the Supplier at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations.

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mrs B, 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.

On the other hand, I acknowledge that the Supplier's sales process left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mrs B as an investment in breach of Regulation 14(3).

However, whether or not there was a breach of the relevant prohibition by the Supplier is not ultimately determinative of the outcome in this complaint for reasons I will come on to shortly. And with that being the case, it's not necessary to make a formal finding on that particular issue for the purposes of this decision.

Would the credit relationship between the Lender and Mrs B have been rendered unfair to her had there been a breach of Regulation 14(3) of the Timeshare Regulations?

Having found that it was possible that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mrs B and the Lender under the Credit Agreement and related Purchase Agreement as the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

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

But on my reading of the evidence before me, the prospect of a financial gain from Fractional Club membership was not an important and motivating factor when Mrs B decided to go ahead with her purchase. That doesn't mean she wasn't interested in a share in the Allocated Property. After all, that wouldn't be surprising given the nature of the product at the centre of this complaint. But as Mrs B herself does not persuade me that purchase was motivated by her share in the Allocated Property and the possibility of a profit, I don't think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decision Mrs B ultimately made.

What I am considering here, though, is whether any such positioning of the Fractional Club membership as an investment was material to Mrs B's decision to purchase it (and in turn, therefore, to enter into the Credit Agreement). Mrs B's comments do not lead me to think that it was.

I've considered the chronology of the complaint including when Mrs B /her PR complained to the Lender, the date she gave authority to the PR to represent her, and when she gave her 'witness statement'. The PR sent the letter of complaint to the Lender on 15 September 2022 and set out, amongst other things, that it considered the timeshare had been sold as an investment; no witness statement was attached. Mrs B's witness statement is undated and was never provided to the Lender. It was however included as part of her complaint to this Service which was made on 12 July 2024. I can see that Mrs B's Letter of Authority for the PR to represent her is dated 3 July 2024 so I think that it is reasonable to assume that the witness statement was made at a similar point in time. That is almost two years after the dispute was first raised with the Lender and some nine years after the Time of Sale. The timing of this is critical as I would've expected to see such evidence – if it was available – to be lodged along with the dispute at the outset; but this didn't happen, and it's not clear why. The witness statement is the only account I have from Mrs B.

I'm conscious that it was only after the judgment in Shawbrook & BPF v FOS was handed down in June 2023, that Mrs B stated that the Supplier told her or led her to believe that the Fractional Club membership offered her the prospect of a financial gain – in other words this is when she first said that she was told "The property that we would own a fraction of, was a 2 bedroom apartment at the [resort] in Tenerife, where we were assured would always go up in value due to their popularity". And I'm cognisant that the more time that passes between the event complained about and a complaint being made, the more risk there is of recollections being vague, inaccurate and influenced by discussions with others.

In this case, given Mrs B's witness statement post-dated the judgment in Shawbrook & BPF v FOS - which established this Service's approach to these complaints – I simply can't rule out the latter. In the circumstances, and on balance, I think there's a high risk that Mrs B was influenced by discussions she had with others. Put simply, I can't put enough weight on her account that would enable me to uphold this complaint.

Here, I'm also hindered in assessing the strength of the submissions by not having much detail or context either about what Mrs B was told about how she would make a financial gain/profit from Fractional Club membership. Mrs B says nothing in her statement about how the value of the property was meant to increase in value over time. Instead much of her unhappiness with the sale largely centres around the sales process, how long it took and the stress of having her children present.

Direct testimony from Mrs B, in full and in her own words, is important in a case like this, because it allows me to assess credibility and consistency, to know precisely what was supposedly said, and to understand the context in which it was supposedly said. It's also important for the decision-maker to be able to see that the Letter of Complaint genuinely reflects the consumer's testimony. Again, that simply isn't possible in this case.

Nevertheless, I can't rule out the possibility that Mrs B may have been interested in a share in the Allocated Property. After all, that wouldn't be surprising given the nature of the product at the centre of this complaint. But as Mrs B herself does not persuade me that her purchase was motivated by her share in the Allocated Property and the possibility of a profit, I don't think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decision they ultimately made.

I've thought too about the PR's response to our Investigator's view which is principally concerned with comments about the marketing and sale of the time share as an investment but – as I have said above – I accept that it is possible that this is, indeed, what happened. But, as I have also explained here, it does not automatically follow that any such sales practises rendered the credit relationship between Mrs B and the Lender unfair for the purposes of s140A. And also, for the reasons I have given here, I can't put sufficient weight on Mr B's account such that I could reasonably uphold his complaint.

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 Mrs B'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 she would have pressed ahead with her 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 Mrs B and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

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'm not persuaded that the credit relationship between Mrs B and the Lender under the Credit Agreement and related Purchase Agreement was unfair to her. And as things currently stand, I don't think it would be fair or reasonable that I uphold this complaint on that basis."

In conclusion, given the facts and circumstances of this complaint, I did not think that the Lender acted unfairly or unreasonably when it declined Mrs B's Section 75 claim as it is effectively time-barred by the Limitation Act 1980. I was not persuaded that the Lender was party to a credit relationship with Mrs B under the Credit Agreement that was unfair to her for the purposes of Section 140A of the CCA. And having taken everything into account, I could see no other reason why it would be fair or reasonable to direct the Lender to compensate Mrs B.

The Lender responded to the PD and accepted it.

The PR also responded. It did not accept the PD and provided some further comments it wanted me to take into account.

Having received the relevant responses from both parties, I'm now finalising my decision.

The legal and regulatory context

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

The legal and regulatory context that I think is relevant to this complaint is, in many ways, no different to that shared in several hundred published ombudsman decisions on very similar complaints – which can be found on the Financial Ombudsman Service's website. And with that being the case, it is not necessary to set out that context in detail here. But I would add that the following regulatory rules/guidance are also relevant:

The Consumer Credit Sourcebook ('CONC') – Found in the Financial Conduct Authority's (the 'FCA') Handbook of Rules and Guidance

Below are the most relevant provisions and/or guidance as they were at the relevant time:

- CONC 3.7.3 [R]
- CONC 4.5.3 [R]
- CONC 4.5.2 [G]

The FCA's Principles

The rules on consumer credit sit alongside the wider obligations of firms, such as the Principles for Businesses ('PRIN'). Set out below are those that are most relevant to this complaint:

- Principle 6
- Principle 7
- Principle 8

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.

Following the responses from both parties, I've considered the case afresh and having done so, I've reached the same decision as that which I outlined in my provisional findings, for broadly the same reasons.

Again, my role as an Ombudsman isn't to address every single point which has been made to date, but to decide what is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, this doesn't mean I haven't considered it.

Rather, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision.

The PR's further comments in response to the PD in the main relate to the issue of whether the credit relationship between Mrs B and the Lender was unfair. In particular, the PR has provided further comments in relation to whether the membership was sold to Mrs B as an investment at the Time of Sale as well as comments about her motivation for making the purchase. It has also now argued for the first time that the payment of a commission by the Lender to the Supplier led to an unfair credit relationship.

As outlined in my PD, the PR originally raised various other points of complaint, all of which I addressed at that time. But it didn't make any further comments in relation to those in their response to my PD. Indeed, it hasn't said it disagrees with any of my provisional conclusions in relation to those other points. And since I haven't been provided with anything more in relation to those other points by either party, I see no reason to change my conclusions in relation to them as set out in my PD. So, I'll focus here on the PR's points raised in response.

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

The PR has highlighted under Section 140B (9) of the CCA, the burden of proof falls on the Lender to disprove the allegation that its relationship with Mrs B was unfair. I agree that this is correct, placing a burden on lenders during the process of litigation. That does not mean,

though, that the Lender – or I – should take a claim at face value. There remains an onus on Mrs B to provide some evidence for the claim she is making, despite the overall burden of proof resting with the Lender, as was set out in the judgment in *Smith and another v Royal Bank of Scotland plc* [2023] UKSC 34 at paragraph 40. I also remind both parties that it is my role to make findings on what I consider to be fair and reasonable in all the circumstances of any given complaint.

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

In its response to my PD, the PR has reasserted its view that the Supplier marketed the Fractional Club membership to Mrs B as an investment and that this was a motivating factor in her decision.

I accepted in my PD that the membership may well have been marketed as an investment to Mrs B in breach of the prohibition in Regulation 14(3) of the Timeshare Regulations. I also explained that while the Supplier's sales processes left open the possibility that the sales representative may have positioned Fractional Club membership as an investment, it wasn't necessary for me to make a finding on this as it is not determinative of the outcome of the complaint. I explained that regulatory breaches do not automatically create unfairness and that such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way. The PR's response to my PD hasn't changed my view of this, and so whether the Supplier's breach of Regulation 14(3) led Mrs B to enter into the Purchase Agreement and the Credit Agreement remains an important consideration.

In my PD I explained the reasons why I didn't think any breach of Regulation 14(3) had led Mrs B to proceed with her purchase. In short, I was not persuaded that Mrs B's decision was motivated by the prospect of a financial gain (i.e., a profit). In reaching that view, I took into account the testimony given by Mrs B in the course of her complaint. I recognise the PR has interpreted Mrs B's testimony differently to how I have, and I have carefully considered its further comments. Ultimately though, they have not led me to a different conclusion.

I've thought about the concerns expressed by the PR in reply to my PD, specifically about there being no requirement to provide a witness statement at the same time as making claim. Whilst no formal requirement existed, providing testimony in support of a claim provides it credibility, context and consistency. As I said in my PD, it's important for the decision-maker to be able to see that the Letter of Complaint genuinely reflects the consumer's testimony which simply isn't possible in this case.

I have noted too the PR's comments about it being highly unlikely that Mrs B was aware of the judgment in *Shawbrook & BPF v FOS* and/or if she was whether she was able to interpret it. And I note that the PR does not consider that Mrs B's memory could have faded over time. But, as I said in my PD, the fact that Mrs B's testimony post-dated that judgment the greater the *risk* that her recollection could be influenced by discussions with others. In short, I remain of the view that I am unable, in such circumstances, to put enough weight on Mrs B's limited testimony that would allow me, in all reasonableness, to uphold this complaint.

Furthermore, Mrs B's witness statement makes no mention that the timeshare was marketed to her as an investment - only that she had been subjected to pressured selling and only signed up to membership because of it. As I said in my PD, it seems to me that much of Mrs B's unhappiness is with the sales techniques she was subjected to at the Time of Sale. Mrs B's testimony makes no mention that her purchase was motivated by any investment possibility nor does she state what she was told about how she would make a financial gain/profit from it aside from her statement that the value of the property was meant to increase/hold its value over time because it was 'popular'.

I appreciate that the PR objects to the approach I've taken in assessing this aspect of the complaint, believing that I have detracted from the judgment in *Shawbrook & BPF v FOS*¹ and the case law that contributed to it, by requiring Mrs B to have been “primarily or mainly motivated” by the investment element in order to uphold the complaint. But I did not make such a finding. In my view, Mrs B herself failed to persuade me that the time share had been marketed to her as an investment. Rather it seems to me she made the purchase after experiencing pressured sales techniques and because she wanted to enjoy ‘quality family holidays’. These were the factors in my overall conclusion that, in light of all the available evidence she would, on balance, have pressed ahead with her purchase of the Fractional Club membership even if there had been a breach of Regulation 14(3).

So for the reasons given in my PD and above, I still do not think that any breach of Regulation 14(3), if there was one, was material to Mrs B's decision to purchase Fractional Club membership.

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

The PR says that a payment of commission from the Lender to the Supplier at the Time of Sale should lead me to uphold this complaint because, simply put, information in relation to that payment went undisclosed at the Time of Sale.

As both sides already know, the Supreme Court handed down an important judgment on 1 August 2025 in a series of cases concerned with the issue of commission: *Johnson v FirstRand Bank Ltd, Wrench v FirstRand Bank Ltd and Hopcraft v Close Brothers Ltd [2025] UKSC 33* (*'Hopcraft, Johnson and Wrench'*).

The Supreme Court ruled that, in each of the three cases, the commission payments made to car dealers by lenders were legal, as claims for the tort of bribery, or the dishonest assistance of a breach of fiduciary duty, had to be predicated on the car dealer owing a fiduciary duty to the consumer, which the car dealers did not owe. A “disinterested duty”, as described in *Wood v Commercial First Business Ltd & ors and Business Mortgage Finance 4 plc v Pengelly [2021] EWCA Civ 471*, is not enough.

However, the Supreme Court held that the credit relationship between the lender and Mr Johnson was unfair under Section 140A of the CCA because of the commission paid by the lender to the car dealer. The main reasons for coming to that conclusion included, amongst other things, the following factors:

1. The size of the commission (as a percentage of the total charge for credit). In Mr Johnson's case it was 55%. This was “*so high*” and “*a powerful indication that the relationship...was unfair*” (see paragraph 327);
2. The failure to disclose the commission; and
3. The concealment of the commercial tie between the car dealer and the lender.

The Supreme Court also confirmed that the following factors, in what was a non-exhaustive list, will normally be relevant when assessing whether a credit relationship was/is unfair under Section 140A of the CCA:

1. The size of the commission as a proportion of the charge for credit;

¹ R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service [2023] EWHC 1069 (Admin) (*'Shawbrook & BPF v FOS'*).

2. The way in which commission is calculated (a discretionary commission arrangement, for example, may lead to higher interest rates);
3. The characteristics of the consumer;
4. The extent of any disclosure and the manner of that disclosure (which, insofar as Section 56 of the CCA is engaged, includes any disclosure by a supplier when acting as a broker); and
5. Compliance with the regulatory rules.

From my reading of the Supreme Court's judgment in *Hopcraft, Johnson and Wrench*, it sets out principles which apply to credit brokers other than car dealer-credit brokers. So, when considering allegations of undisclosed payments of commission like the one in this complaint, *Hopcraft, Johnson and Wrench* is relevant law that I'm required to consider under Rule 3.6.4 of the Financial Conduct Authority's Dispute Resolution Rules ('DISP').

But I don't think *Hopcraft, Johnson and Wrench* assists Mrs B in arguing that her credit relationship with the Lender was unfair to her for reasons relating to commission given the facts and circumstances of this complaint.

I haven't seen anything to suggest that the Lender and Supplier were tied to one another contractually or commercially in a way that wasn't properly disclosed to Mrs B, nor have I seen anything that persuades me that the commission arrangement between them gave the Supplier a choice over the interest rate that led Mrs B into a credit agreement that cost disproportionately more than it otherwise could have.

I acknowledge that it's possible that the Lender and the Supplier failed to follow the regulatory guidance in place at the Time of Sale insofar as it was relevant to disclosing the commission arrangements between them.

But as I've said before, the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way. And with that being the case, it isn't necessary to make a formal finding on that because, even if the Lender and the Supplier failed to follow the relevant regulatory guidance at the Time of Sale, it is for the reasons set out below that I don't think any such failure is itself a reason to find the credit relationship in question unfair to Mrs B.

In stark contrast to the facts of Mr Johnson's case, the amount of commission paid by the Lender to the Supplier for arranging the Credit Agreement that Mrs B entered into wasn't high. At £333.70, it was only 2.5% of the amount borrowed and even less than that (2.32%) as a proportion of the charge for credit. So, had Mrs B known at the Time of Sale that the Supplier was going to be paid a flat rate of commission at that level, I'm not currently persuaded that she either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. After all, Mrs B wanted Fractional Club membership and had no obvious means of her own to pay for it. And at such a low level, the impact of commission on the cost of the credit she needed for a timeshare she wanted doesn't strike me as disproportionate. So, I think Mrs B would still have taken out the loan to fund her purchase at the Time of Sale had the amount of commission been disclosed.

What's more, based on what I've seen so far, the Supplier's role as a credit broker wasn't a separate service and distinct from its role as the seller of timeshares. It was simply a means to an end in the Supplier's overall pursuit of a successful timeshare sale. I can't see that the Supplier gave an undertaking – either expressly or impliedly – to put to one side its commercial interests in pursuit of that goal when arranging the Credit Agreement. And as it wasn't acting as an agent of Mrs B but as the supplier of contractual rights she obtained

under the Purchase Agreement, the transaction doesn't strike me as one with features that suggest the Supplier had an obligation of 'loyalty' to her when arranging the Credit Agreement and thus a fiduciary duty.

Overall, therefore, I'm not persuaded that the commission arrangements between the Supplier and the Lender were likely to have led to a sufficiently extreme inequality of knowledge that rendered the credit relationship unfair to Mrs B.

S140A 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'm not persuaded that the credit relationship between Mrs B and the Lender under the Credit Agreement and related Purchase Agreement was unfair to her. So, I don't think it is fair or reasonable that I uphold this complaint on that basis.

Commission: The Alternative Grounds of Complaint

While I've found that Mrs B's credit relationship with the Lender wasn't unfair to her for reasons relating to the commission arrangements between it and the Supplier, two of the grounds on which I came to that conclusion also constitute separate and freestanding complaints to Mrs B's complaint about an unfair credit relationship. So, for completeness, I've considered those grounds on that basis 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 Mrs B (i.e., secretly). And 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.

However, for the reasons I set out above, I'm not persuaded that the Supplier – when acting as credit broker – owed Mrs B 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 her. 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 because, for the reasons I also set out above, I think she would still have taken out the loan to fund her purchase at the Time of Sale had there been more adequate disclosure of the commission arrangements that applied at that time.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it declined Mrs B's Section 75 claim as it is effectively time-barred by the Limitation Act 1980. I am not persuaded that the Lender was party to a credit relationship with Mrs B under the Credit Agreement that was unfair to her for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate Mrs B.

My final decision

For the reasons set out above, my final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 11 March 2026.

Claire Woollerson
Ombudsman