DRN-5194204

The complaint

Mr B and Mrs N'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 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

What happened

Mr B and Mrs N were members of a timeshare provider (the 'Supplier') – having purchased another product from it previously. But the product at the centre of this complaint is their membership of a timeshare that I'll call the 'Signature Collection' – which they bought on 24 July 2016 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 2650 points at a cost of £12,436 (the 'Purchase Agreement').

Signature Collection membership was asset backed – which meant it gave Mr B and Mrs N 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 their membership term ends.

Mr B and Mrs N paid for their Signature Collection membership by trading in their earlier membership and taking finance from the Lender (the 'Credit Agreement'). After refinancing an earlier loan, they ended up borrowing £29,436 from the Lender (the 'Credit Agreement').

Mr B and Mrs N– using a professional representative (the 'PR') – wrote to the Lender on 22 March 2023 (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 Mr B and Mrs N's concerns as a complaint and issued its final response letter on 25 April 2024, rejecting it on every ground.

The complaint was then referred to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, thought that Mr B and Mrs N's complaints about being party to an unfair credit relationship and about their credit being arranged by an unauthorised broker, should not be upheld. Our Investigator also thought that it would not have been unfair or unreasonable of the Lender to have declined Mr B and Mrs N's Section 75 claim by relying on the defence available to it under the Limitation Act 1980.

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 currently 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 Times 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.

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 doesn't dispute that the relevant conditions are met. But for reasons I'll come on to below, it isn't necessary to make any formal findings on them here.

I should also say here that whilst I can see that our Investigator found that it would not have been unreasonable or unfair for the Lender to have rejected Mr B and Mrs N's claim on the basis that it had become time-barred under the Limitation Act 1980, the fact remains that the Lender didn't do so. So here, what I am considering is the fairness of the basis of the decision the Lender did take when declining Mr B and Mrs N's s75 claim.

It was said in the Letter of Complaint that Signature Collection membership had been misrepresented by the Supplier at the Time of Sale because Mr B and Mrs N were:

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

However, neither points 1 nor 2 strike me as misrepresentations even if such representations had been made by the Supplier (which I make no formal finding on). Telling prospective members that they were investing their money because they were buying a fraction or share of one of the Supplier's properties was not untrue. And even if the Supplier's sales representatives went further and suggested that the share in question would increase in value, perhaps considerably so, that sounds like nothing more than a honestly held opinion as there isn't any accompanying evidence to persuade me that the relevant sales representative(s) said something that, while an opinion, amounted to a statement of fact that they did not hold or could not have reasonably held.

As for points 3 and 4, while it's possible that Signature Collection membership was misrepresented at the Time of Sale for one or both of those reasons, I don't think it's probable. They're given little to none of the colour or context necessary to demonstrating that the Supplier made false statements of existing fact and/or opinion. And as there isn't any other evidence on file to support the suggestion that Signature Collection membership was misrepresented for these reasons, I don't think it was.

So, while I recognise that Mr B and Mrs N and the PR have concerns about the way in which Signature Collection membership was sold by the Supplier, when looking at the claim under Section 75 of the CCA, I can only consider whether there was a factual and material misrepresentation by the Supplier. For the reasons I've set out above, I'm not persuaded that there was. And that means that I don't think that the Lender acted unreasonably or unfairly when it dealt with this particular Section 75 claim.

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

I've already explained why I'm not persuaded that Signature Collection membership was actionably misrepresented by the Supplier at the Time of Sale. But there are other aspects of the sales processes 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 relationships between Mr B and Mrs N and the Lender along with all of the circumstances of the complaint, I don't think the credit relationships between them were 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, 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 relevant credit relationships between Mr B and Mrs N and the Lender.

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

Mr B and Mrs N's complaint about the Lender being party to unfair credit relationships was made for several reasons.

The PR says, for instance, that the right checks weren't carried out before the Lender lent to Mr B and Mrs N. 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 Mr B and Mrs N 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. But from the information provided, I am not satisfied that the lending was unaffordable for them.
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 Mr B and Mrs N knew, amongst other things, how much they were borrowing and repaying each month, who they were borrowing from and that they were borrowing money to pay for Signature Collection membership. And as none of the lending looks like it was unaffordable for them, 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 Mr B and Mrs N suffering a financial loss – such that I can say that the credit relationship in question was unfair on them 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 them, 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 Mr B and Mrs N in practice, nor that any such terms led them to behave in a certain way to their detriment, I'm not persuaded that any of the terms governing Signature Collection membership are likely to have led to an unfairness that warrants a remedy.

Overall, therefore, I don't think that Mr B and Mrs N'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 the PR says the credit relationship with the Lender was unfair to them. And that's the suggestion that Signature Collection membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

<u>The Supplier's alleged breach of Regulation 14(3) of the Timeshare Regulations</u>

The Lender does not dispute, and I am satisfied, that Mr B and Mrs N's Signature Collection 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 Mr B and Mrs N were told by the Supplier that Signature Collection 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 Mr B and Mrs N the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But it is important to note at this stage that the fact that Signature Collection 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 <u>as an investment</u>. 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 Signature Collection. They just regulated how such products were marketed and sold.

To conclude, therefore, that Signature Collection membership was marketed or sold to Mr B and Mrs N as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an *investment, i.e. told them or led them to believe that Signature Collection membership offered them 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 Signature Collection membership was marketed and/or sold by the Supplier at the Times 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 Signature Collection as an 'investment' or quantifying to prospective purchasers, such as Mr B and Mrs N, 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 Signature Collection membership as an investment. So, I accept that it's equally possible that Signature Collection membership was marketed and sold to Mr B and Mrs N 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.

Was the credit relationship between the Lender and the Consumer rendered unfair?

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 such breaches had on the fairness of the credit relationships between Mr B and Mrs N 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 Mr B and Mrs N and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement is an important consideration.

But on my reading of the evidence before me, the prospect of a financial gain from Signature Collection membership was not an important and motivating factor when Mr B and Mrs N decided to go ahead with their purchase. That doesn't mean they weren'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 Mr B and Mrs N themselves don't persuade me that their purchase was motivated by their share in the Allocated Property and the possibility of a profit, I don't think breaches of Regulation 14(3) by the Supplier were likely to have been material to the decision Mr B and Mrs N ultimately made.

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

I've considered the chronology of the complaint including when Mr B and Mrs N/their PR complained to the Lender, the date they gave authority to the PR to represent them, and when they gave their 'witness statement'.

The PR sent the letter of complaint to the Lender on 22 March 2023 and set out, amongst other things, that it considered the timeshare had been sold as an investment; no witness statement was attached. Mr B and Mrs N provided authority for the PR to represent them on 14 April 2024 and I can see that the Lender, in its final response letter dated 24 April 2024, referred to having requested testimony from them and not having received it. Consequently, I think it is reasonable to assume that it was likely sometime after the middle of April 2024 that Mr B and Mrs N provided their undated witness statement. That is over a year after the dispute was first raised with the Lender and almost eight 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 Mr B and Mrs N.

Mr B and Mrs N's witness statement provides their chronological account about the two timeshare memberships they bought, of which the Signature Collection (the one which this complaint is about) was the second. And Mr B and Mrs N's account of the sale of the Signature Collection contains no mention that it was marketed and sold to them as an investment nor that membership offered them the prospect of financial gain. Indeed, their comment that, "We were told after some years we will get shares from the property…" appears to me to be no more than a description of how Signature Collection membership worked in practice. They say nothing in their statement about how the value of the property was meant to increase in value over time.

So firstly, not only does Mr B and Mrs N's witness statement post-date the judgment in Shawbrook & BPF v FOS - which established this Service's approach to these complaints – it also contains no mention that the Signature Collection was marketed and sold to them as an investment. But secondly, even had Mr B and Mrs N stated that the Supplier had marketed the Signature Collection to them in that way, I'm cognisant of the fact that the more time that passes between the event complained of and a complaint being made, the more risk there is of recollections being vague, inaccurate and influenced by discussions with others. In such circumstances, I am simply unable to rule out the latter or ignore the high risk that Mr B and Mrs N would likely have influenced by discussions they had with others. Put simply, I can't put enough weight on their account that would enable me to uphold this complaint.

Direct testimony from Mr B and Mrs N, in full and in their 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.

I have also borne in mind that in July 2017, Mr B and Mrs N were upgrading from their existing membership to the Signature Collection. This serves to underline their interest in the holiday benefits the membership offered, which leads me to think they would have gone ahead with the purchase even if it had not been presented to them as an investment opportunity.

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 Fractional Club membership as an investment. But this complaint isn't about Mr B and Mrs N's purchase of Fractional Club membership; it is about their purchase of Signature Collection membership. I accept that it is possible that the Supplier marketed and sold Signature Collection membership as an *investment but, as have explained here, it does not automatically follow that any such sales practises rendered the credit relationship between Mr B and Mrs N 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 and Mrs N's account such that I could reasonably uphold their complaint.*

On balance, therefore, even if the Supplier had marketed or sold the Signature Collection membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr B and Mrs N's decisions to purchase Signature Collection 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 relationships between Mr B and Mrs N and the Lender was unfair to them even if the Supplier had breached Regulation 14(3)."

In conclusion, given the facts and circumstances of this complaint, I did not think that the Lender acted unfairly or unreasonably when it dealt with Mr B and Mrs N's Section 75 claim, and I was not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them 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 Mr B and Mrs N.

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:

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

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]

<u>The FCA's Principles</u>

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 Mr B and Mrs N and the Lender was unfair. In particular, the PR has provided further comments in relation to whether the membership was sold to Mr B and Mrs N as an investment at the Time of Sale as well as comments about their 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 that the burden of proof falls on the Lender to disprove the allegation that its relationship with Mr B and Mrs N 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 Mr B and Mrs N to provide some evidence for the claim they are 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.

<u>The Supplier's alleged breach of Regulation 14(3) of the Timeshare regulations</u>

In its response to my PD, the PR has reasserted its view that the Supplier marketed the Signature Collection membership to Mr B and Mrs N as an investment and that this was a motivating factor in their decision.

I accepted in my PD that the membership may well have been marketed as an investment to Mr B and Mrs N 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 Signature Collection 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 Mr B and Mrs N 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 Mr B and Mrs N to proceed with their purchase. In short, I was not persuaded that their 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 Mr B and Mrs N in the course of their complaint. I recognise the PR has interpreted Mr B and Mrs N'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 that I had stated that in their witness statement Mr B and Mrs N were being vague, inaccurate and/or influenced by others when in fact their testimony had been provided to the best of their recollection and had included specific information. However, I think that the PR may have misinterpreted what I said in my PD. To be clear, I don't doubt that Mr B and Mrs N's witness statement was provided to the best of their recollection but I remain of the view that, given the passage of time between the Time of Sale and the witness statement being made, the greater the *risk* there is that recollections can be vague, inaccurate and/or influenced by others. As I said in my PD, I am simply unable to rule out and ignore the high risk that Mr B and Mrs N would likely have been influenced by discussions that they had with others – a possibility the PR itself acknowledged in its response to my PD. In short, I am still of the view that I am unable to put enough weight on Mr B and Mrs N's account that would allow me, in all reasonableness, to uphold this complaint.

And I've thought too about the PR's comment that despite their clear interest in the holiday aspect of the Signature Collection, the underlying reason underpinning Mr B and Mrs N's decision to upgrade their membership was because of the value attached to an actual property allocation and hence a return on their purchase at the end of the term. The PR says that the fact Mr B and Mrs N upgraded their membership to the Signature Collection means they were promised a higher return when the property was eventually sold. And it says that the fact they were interested in holidays does not mean that they weren't attracted by the investment element the contract offered them.

I don't disagree. As I said in my PD, I can't rule out the possibility that Mr B and Mrs N may have been interested in a share in their allocated property. But what I also said was that they themselves had not persuaded me that their purchase was motivated by their share in the Allocated Property and the possibility of a profit. And whilst I accept they said that *"We were told after some years we will get shares from the property which we thought will help us during our retirement…"* this appears to me to be no more than a description of how the Signature Collection membership worked. I cannot reasonably ignore that Mr B and Mrs N's witness statement says nothing about how the value of the property was meant to increase in value over time.

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 Mr B and Mrs N 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. I said that, in my view, Mr B and Mrs N were highly motivated by the holiday options offered by the Supplier – which was a factor in my overall conclusion in light of all the available evidence that they would, on balance, have pressed ahead with their 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 Mr B and Mrs N's decision to purchase Signature Collection membership.

<u>The provision of information by the Supplier at the Time of Sale</u>

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;
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;

[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').

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 Mr B and Mrs N in arguing that their credit relationship with the Lender was unfair to them for reasons relating to commission given the facts and circumstances of this complaint.

Based on what I've seen, 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 Mr B and Mrs N but as the supplier of contractual rights they 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 them when arranging the Credit Agreement and thus a fiduciary duty.

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 Mr B and Mrs N, 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 Mr B and Mrs N into a credit agreement that cost disproportionately more than it otherwise could have.

What's more, in stark contrast to the facts of Mr Johnson's case, as I understand it, no payment between the Lender and the Supplier, such as a commission, was paid when the Credit Agreement was arranged at the Time of Sale. And with that being the case, even if there were information failings at that time and regulatory failings as a result (which I make no formal finding on), I'm not currently persuaded that the commercial 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 Mr B and Mrs N.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr B and Mrs N's Section 75 claim, and I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them 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 Mr B and Mrs N.

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 Mr B and Mrs N to accept or reject my decision before 13 February 2026.

Claire Woollerson
Ombudsman