DRN-5447694

Financial Ombudsman Service

The complaint

Mr and Mrs B'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.

Background to the complaint

Mr and Mrs B purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 25 March 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,040 fractional points at a cost of £18,678 (the 'Purchase Agreement'). But after trading in their existing membership, they ended up paying £7,678 for it.

Fractional Club membership was asset backed – which meant it gave Mr and 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 their membership term ends.

Mr and Mrs B paid for their Fractional Club membership by taking finance of £7,678 from the Lender (the 'Credit Agreement'). The Lender paid the Supplier a commission of £767:80.

Mr and Mrs B – using a professional representative (the 'PR') – wrote to the Lender on 15 July 2024 (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 and Mrs B's concerns as a complaint and issued its final response letter on 1 August 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, rejected the complaint on its merits.

Mr and Mrs B disagreed with the Investigator's assessment and asked for an ombudsman's decision – which is why it was passed to me. I issued my provisional findings to the parties on 15 December 2025. In my provisional decision, I said the following:

> **My provisional decision**
>
> 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 and breaches of contract

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.

However, under the Limitation Act 1980 Mr and Mrs B had six years from the Time of Sale in which to bring a claim for misrepresentation. They did not do so until ten years later, and this gives the Lender a complete defence to their claim.

I can however still consider the alleged misrepresentations (but not the alleged breaches of contract) as potential grounds for finding unfairness under section 140A.

Mr and Mrs B say that they could not holiday where and when they wanted to. That was framed, in the Letter of Complaint, as part of their complaint about the fairness or otherwise of their credit relationship with the Lender under section 140A of the CCA. But section 140A does not make the Lender liable for things that the Supplier did after the Time of Sale. And although on my reading of the complaint, this allegation suggests that the Supplier was not living up to its end of the bargain, potentially breaching the Purchase Agreement, I can't consider that under section 75 either.

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

Having considered the entirety of the credit relationships between Mr and Mrs B 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 Times of Sale along with any relevant training material;
2. The provision of information by the Supplier at the Times of Sale, including the contractual documentation and disclaimers made by the Supplier;
3. Evidence provided by both parties on what was likely to have been said and/or done at the Times of Sale; and
4. The inherent probabilities of the sales given their circumstances.

I have then considered the impact of these on the fairness of the credit relationships between Mr and Mrs B and the Lender.

<u>Misrepresentation</u>

It was said in the Letter of Complaint that Fractional Club membership had been misrepresented by the Supplier at the Time of Sale because Mr and Mrs B were told by the Supplier that Fractional Club membership was an "investment" when that was not true.

However, that does not strike me as a misrepresentation even if such a representation had been made by the Supplier (which I make no formal finding on here). 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.

Mr and Mrs B say that they were told that membership was exclusive, and that this was also a misrepresentation. I've seen evidence that the Supplier's holiday resorts were not exclusive to its members. But I've not seen evidence (other than Mr and Mrs B's witness statement) that they were told that they were exclusive and not open to the public. The Supplier says that its resorts are not exclusive to members, although club members do receive *benefits* which are exclusive to members. As Mr and Mrs B wrote their witness statement more than ten years later, it's possible that their recollection of what they were told is no longer reliable. So I am not persuaded that the resorts were misrepresented as only being available to be booked by members.

So, while I recognise that Mr and Mrs B – and the PR – have concerns about the way in which Fractional Club membership was sold by the Supplier, when looking at the claim under section 140A of the CCA, I do not think this made the credit relationship with the Lender unfair.

<u>The Supplier's sales and marketing practices at the Time of Sale</u>

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

They include, for various reasons, the allegation that the Supplier misled Mr and Mrs B and carried on unfair commercial practices under regulations 5 and 6 of the CPUT regulations.[1] However, as regulations 5 and 6 state, commercial practices only amount to misleading actions or omissions if, in addition to satisfying one or more of the specific matters set out in those provisions, they cause or are likely to cause the average consumer to take a transactional decision they would not have taken otherwise. And as I haven't seen enough evidence to persuade me that, if there were any such actions or omissions at the Time of Sale (which I make no formal finding on), they led Mr and Mrs B to make the purchasing decision they did, I'm not persuaded that anything done or not done by the Supplier amounted to an unfair commercial practice for the purposes of those provisions.

The PR also alleges that the Supplier acted unfairly under regulation 7 Schedule 1 of the CPUT regulations. But given the limited evidence in this complaint, I am not persuaded that the Supplier did.

In addition, the PR also says that:
1. Mr and Mrs B were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale;
2. there was one, or more, unfair contract terms in the Purchase Agreement.

However, as things currently stand, neither of these strike me as reasons why this complaint should succeed.

[1] The Consumer Protection from Unfair Trading Regulations 2008.

I acknowledge that Mr and Mrs B may have felt weary after a sales process that went on for a long time. But they say very 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 – only that the sales process took a long time. 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, I am not satisfied that Mr and Mrs B made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

Overall, therefore, I don't think that Mr and Mrs B'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 why the PR now says the 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 a 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 Mr and 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 and Mr and Mrs B say that the Supplier did exactly that at the Time of Sale – saying, in summary, that they were 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 Mr and Mrs B 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 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 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 them as an investment, i.e. told them 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.

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 Mr and 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. For example, the Member's Declaration says in paragraph 5:

"We understand that the purchase of our Fraction is for the primary purpose of holidays and is not specifically for direct purposes of a trade in and that [the Supplier] *makes no representation as to the future price or value of the Fraction."*

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. The training materials the Supplier used to train its sales representatives suggest that this would have been mentioned during the presentation. And in their joint witness statement, which is dated 7 July 2024, Mr and Mrs B say that they were told they could sell the Allocated Property after 19 years for a profit. I have already said why, over ten years after the Time of Sale, their memories may not be reliable, but this matter is corroborated by the other evidence, so I accept that it may have been said. So, I accept that it's equally possible that Fractional Club membership <u>was</u> marketed and sold to Mr and 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.

Was the credit relationship between the Lender and Mr and Mrs B 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 that breach had on the fairness of the credit relationship between Mr and 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 Mr and Mrs B and the Lender that was unfair to them and warranted relief as a result, then an important consideration is whether the

Supplier's breach of regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement.[2]

But on my reading of the evidence before me, the prospect of a financial gain from Fractional Club membership was not a particularly important and motivating factor when Mr and Mrs B decided to go ahead with their purchase. They say very little about it in their witness statement. I did consider whether increasing the number of points by only forty points was indicative of being more interested in the investment aspect than the entitlement to holidays. But actually, the benefits they received by upgrading to membership of the Fractional Club (which they didn't have with their existing timeshare) included three years of points savings, two-for-one holidays and two free upgrades per year, dramatically increasing the holidays entitlement they had before.

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 and Mrs B themselves don't persuade me that their purchase was really motivated by their 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.

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 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 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 B and the Lender was unfair to them even if the Supplier had breached regulation 14(3).

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

The PR says that Mr and Mrs B were not given sufficient information at the Time of Sale by the Supplier about the ongoing costs of Fractional Club membership. The PR also says that the contractual terms governing the ongoing costs of membership and the consequences of not meeting those costs were unfair contract terms. And the PR complains that commission paid by the Lender to the Supplier was not disclosed.

As I've already indicated, the case law on section 140A makes it clear that it does not automatically follow that regulatory breaches create unfairness for the purposes of the unfair relationship provisions. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

I acknowledge that it is also possible that the Supplier did not give Mr and Mrs B sufficient information, in good time, on the various charges they could have been subject to as Fractional Club members in order to satisfy the requirements of regulation 12 of the Timeshare Regulations (which was concerned with the provision of 'key information'). But even if that was the case, I cannot see that the ongoing

[2] I find support for this causative approach in light of what the courts had to say in *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 at 51, and *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 Ltd* [2023] EWHC 1069 (Admin) at 185.

costs of membership were applied unfairly in practice. And as neither Mr and Mrs B nor the PR have persuaded me that they would not have pressed ahead with their purchase had the finer details of the Fractional Club's ongoing costs been disclosed by the Supplier in compliance with regulation 12, I cannot see why any failings in that regard are likely to be material to the outcome of this complaint given its facts and circumstances.

Unfair terms

As for the PR's argument that there were one or more unfair contract terms in the Purchase Agreement, I can't see that any such terms were operated unfairly against Mr and Mrs B in practice, nor that any such terms led them to behave in a certain way to their detriment. In particular, the PR says that the contractual terms setting out the Supplier's ability to terminate Mr and Mrs S's membership in the event of non-payment of management fees or other fees were unfair contract terms under the UTCCR, which prohibit *"requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation"*. In support of this argument, the PR relies on the case of *Wilson*.[3] In that case, the judge held that it was disproportionate to have a contractual term saying that fractional membership can be ended by the Supplier for non-payment of fees – however small the amount outstanding may be – without refunding any of what he paid for his purchase, because then the Supplier would not only receive a windfall (the purchase price paid for the timeshare) but can also re-sell the same allocated property to another consumer. The judge described this as *"wholly disproportionate and penal."*

I agree with that, but before I can accept that this means that the relationship between the creditor and the debtor thereby became unfair, as the judge went on to find in *Wilson,* I think I have to take into account how the clause has actually operated in practice in relation to Mr and Mrs S's agreements, not just how it could potentially operate hypothetically. The judge in *Wilson* said as much at paragraph [46] of his judgement:

"The fact that clause D can be regarded in the abstract as an unfair term is not however the end of the enquiry for the purposes of s.140A of the Act. In considering the fairness of the relationship, it is necessary to consider all other relevant matters, and (amongst other things) these necessarily include how the clause has been operated in practice."

In *Wilson* the clause had been used to terminate the defendant's timeshare. But Mr and Mrs S's membership has not been terminated, and they have not stopped paying the management fees. They have explained that the *potential* for the foreclosure clause to be implemented if they ever stop paying their fees (which they would like to do because they are no longer taking the holidays) is causing them stress. Nevertheless, they would still be legally obliged to pay those fees whether the foreclosure clause was there or not, and as that clause has not been invoked, I do not think that its mere existence, by itself, amounts to grounds to find that an unfair credit relationship exists.[4]

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[3] *Link Financial v Wilson* [2014] EWHC 252 (Ch).

[4] Even if I took a different view about that, the remedy would not be to unwind the purchase agreements and the credit agreements. Regulation 8 of the UTCCR says that an unfair term is not binding, but the rest of the contract shall continue to be binding if it is capable of continuing without the unfair term.

With that being the case, 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.

Commission

In November 2024 Mr and Mrs B's personal representative ("the PR") asserted on behalf of Mr and Mrs B that the payment of commission made the financial arrangement unfair. The PR didn't give a level of commission at which it considered unfairness arose, but its arguments included the following:

- Despite requests, there had been no disclosure of the actual amount of commission paid by the Lender to the Supplier;
- per the Court of Appeal's judgment in *Johnson*[5], the percentage of commission should be based upon "*the sum borrowed"*;
- the amount of the annual percentage rate of interest ("APR") is key and was unusually high, substantially increasing the total charge for credit;
- commission paid by the Supplier to its self-employed sales representatives should also be disclosed and taken into account in the calculation used to determine unfairness.

My reading of the Supreme Court's judgment in *Hopcraft, Johnson and Wrench* is that it sets out principles which can apply to credit brokers other than car dealer–credit brokers. So I've taken into account those principles when considering the allegations of undisclosed payments of commission in this complaint.

In *Hopcraft, Johnson and Wrench* the Supreme Court ruled that, in each of the three cases, commission payments made to car dealers by lenders were legal, as claims for the tort of bribery, or for 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 & others 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:

- 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";* [6]
- The failure to disclose the commission; and
- 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:

[5] The PR's submission references the Court of Appeal judgment (*Johnson v FirstRand Bank Limited, Wrench v FirstRand Bank Limited and Hopcraft v Close Brothers* [2024] EWCA Civ 1106 *("Johnson"*)). The Supreme Court has since handed down its judgment clarifying the position in law.
[6] *Hopcraft, Johnson and Wrench* (para 327).

- The size of the commission as a proportion of the charge for credit;
- The way in which commission is calculated (a discretionary commission arrangement, for example, may lead to higher interest rates);
- The characteristics of the consumer;
- 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
- Compliance with the regulatory rules.

After careful consideration, I don't think *Hopcraft, Johnson and Wrench* assists Mr and Mrs B 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.

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

I recognise 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 noted in my provisional decision, case law on section 140A makes clear that regulatory breaches do not automatically lead to an unfair credit relationship, and that such breaches and any consequences must be considered in the round rather than in a narrow or technical way.

With that being the case, even if the Lender and the Supplier failed to follow the relevant regulatory guidance at the Time of Sale, I'm not minded to think any such failure is itself a reason to find the credit relationship in question unfair to Mr and Mrs B. I say this for the following reasons.

In stark contrast to the facts in Mr Johnson's case, the amount of commission paid by the Lender to the Supplier for arranging Mr and Mrs B's Credit Agreement wasn't high. At £767:80, it was only 10% of the amount borrowed and even less than that (5.41%) as a proportion of the charge for credit, which is the calculation the Supreme Court used.

Had Mr and Mrs B known at the Time of Sale that the Supplier was going to be paid a flat rate of commission at this level, I'm not currently persuaded that they either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. After all, Mr and Mrs B wanted Fractional Club membership and had no obvious means of their own to pay for it. And at such a low level, the impact of commission on the cost of the credit they needed for a timeshare they wanted doesn't strike me as disproportionate. So, I think they would still have taken out the loan to fund their 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. As it wasn't acting as an agent of Mr and Mrs B 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 don't consider it necessary for me to take into account any commission the Supplier might have paid to its sales representatives, or that this should be disclosed or factored into any calculation used to determine unfairness. Even if any such arrangement was in place (and I make no finding in this respect), its disclosure and/or payment would be further removed from any obligations the Supplier might have held, and even less likely to have an impact on Mr and Mrs B's decision to enter into the Credit Agreement.

Overall, I'm don't intend to conclude 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 Mr and Mrs B.

So, given all of the factors I've looked at both here and in my provisional decision, and having taken all of them into account, I'm still not persuaded that the credit relationship between Mr and Mrs B and the Lender under the Credit Agreement and related Purchase Agreement was unfair to them. And as things currently stand, I don't think it would be fair or reasonable that I uphold this complaint on that basis.

Commission: alternative grounds of complaint

Although the PR's submissions expressed the view that payment of commission made the financial arrangements unfair, I'm conscious that there might be some alternative grounds that could constitute separate and freestanding complaints to Mr and Mrs B's allegation of an unfair credit relationship.

The first ground relates to whether the Lender is liable for the dishonest assistance of a breach of fiduciary duty by the Supplier because the Supplier took a payment of commission from the Lender without telling Mr and Mrs B (that is, secretly). But given I'm not persuaded the Supplier – when acting as credit broker – owed Mr and Mrs B a fiduciary duty, I can't see how I could properly uphold on this ground.

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 it and the Supplier. As I've said, it's possible that the Lender failed to follow the relevant regulatory guidance. But I don't think any such failure on the Lender's part leads to my awarding compensation to Mr and Mrs B because, for the reasons I also set out above, I think Mr and Mrs B would still have taken out the loan to fund their purchase at the Time of Sale had the commission arrangements been adequately disclosed at that time.

Conclusion

In conclusion, as things currently stand, I do not think that the Lender acted unfairly or unreasonably when it dealt with the relevant section 75 claim, I am not persuaded that the Lender was party to a credit relationship with Mr and Mrs B under the Credit Agreement that was unfair to them for the purposes of section 140A of the CCA – nor

do I see any other reason why it would be fair or reasonable to direct the Lender to compensate them.

Responses to my provisional findings

The Lender accepted my provisional decision. The PR didn't accept the proposed outcome. It made further submissions in support of Mr and Mrs B's position. Having received and reviewed these, I'm now proceeding with my final decision.

In doing so, I'm conscious that the PR has made a series of assertions surrounding the provision of information relating to commission arrangements. These include, among other things, expressing doubt that the Lender has provided key information, requesting that the information we have received be shared with it in full, and asking that we do not proceed with a decision before this is done and it has had an opportunity to make further submissions.

For reasons I will explain in the course of this decision, I've concluded that it's appropriate for me to proceed with my determination, the PR's submissions notwithstanding.

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[7] 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 (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, 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 B'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 PD relates mainly to the issue of the disclosure of documents to show the commission arrangements between the Lender to the Supplier, which it says led to an unfair credit relationship between the Lender and Mr and Mrs B.

[7] Financial Conduct Authority ("FCA") Handbook – DISP 3.6.4R ("R" denotes a rule).

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 and 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 Mr and Mrs B 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 B as an investment, in breach of regulation 14(3). I went on to explain that relevant case law[8] 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 B'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 *Shawbrook and BPF v FOS*[9] or previous decisions the PR has mentioned.

While the PR has referred me to Mr and Mrs B'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 B's purchase decision would have been any different, given the other motivational factors they had described. Having re-examined Mr and Mrs B's statement that remains my view, for the reasons previously given.

So as I said before, 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 B'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 B and the Lender was not rendered unfair to them for this reason.

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

While I appreciate that the PR would like to have full disclosure of all of the documents and information the Lender has provided, our rules do not require me to provide this when dealing with a complaint.

As the PR has been informed, 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). That is what I have done in my provisional decision. 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 see no reason to find that this prejudices any arguments the PR or Mr and Mrs B are able to make in support of Mr and Mrs B's position. The PR has demonstrated its ability to present Mr and Mrs B's case and has had sufficient time to consider and make any further arguments.

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[8] *Carney* and *Kerrigan*.

[9] Indeed, paragraph 185 of *Shawbrook and BPF v FOS* appears to endorse this approach.

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 B 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 B (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 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 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 B's section 75 claim. And I'm not persuaded that the Lender was party to a credit relationship with Mr and Mrs B 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 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 Mr B and Mrs B to accept or reject my decision before 13 March 2026.
Richard Wood
Ombudsman