DRN-5757921

## The complaint

Mr B and Mrs L'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 claims under Section 75 of the CCA.

## What happened

Mr B and Mrs L purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 7 January 2018 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,500 fractional points at a cost of £12,318 (the 'Purchase Agreement').

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

Mr B and Mrs L paid for their Fractional Club membership by taking finance of £12,318 from the Lender in their joint names (the 'Credit Agreement'), finance that was later repaid from finance secured by them from another lender.

A professional representative ('PR') – on behalf of Mr B and Mrs L – wrote to the Lender on 15 April 2021 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving Mr B and Mrs L a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. A breach of contract by the Supplier giving Mr B and Mrs L a claim against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of Section 140A of the CCA.
4. The decision to lend being irresponsible because (1) the Lender didn't carry out the right creditworthiness assessment and (2) the money lent to Mr B and Mrs L under the Credit Agreement was unaffordable for them.

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

The PR says that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. Told Mr B and Mrs L that Fractional Club membership had a guaranteed end date when that wasn't true.
2. Told Mr B and Mrs L that they were buying an interest in a specific piece of "real property" when that wasn't true.
3. Told Mr B and Mrs L that Fractional Club membership was an "investment" when that wasn't true.

4. Told Mr B and Mrs L that the Supplier's holiday resorts were exclusive to its members when that wasn't true.

The PR says that Mr B and Mrs L have a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to them.

(2) Section 75 of the CCA: the Supplier's breach of contract

The PR says that the Supplier breached the Purchase Agreement because there is no guarantee that Mr B and Mrs L will receive their share of the net sale proceeds of the Allocated Property.

The PR also says that Mr B and Mrs L found it difficult to book the holidays that they wanted, when they wanted.

As a result of the above, the PR says that Mr B and Mrs L have a breach of contract claim against the Supplier, and therefore, under Section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to them.

(3) Section 140A of the CCA: the Lender's participation in an unfair credit relationship

The Letter of Complaint sets out several reasons why the PR says that the credit relationship between Mr B and Mrs L and the Lender was unfair to them under Section 140A of the CCA. In summary, they include the following:

1. Fractional Club membership was marketed and sold to Mr B and Mrs L as an investment in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the 'Timeshare Regulations').
2. The contractual terms setting out (i) the duration of their Fractional Club membership and/or (ii) the obligation to pay annual management charges for the duration of Mr B and Mrs L's membership were unfair contract terms under the Consumer Rights Act 2015 ('CRA').
3. Mr B and Mrs L were pressured into purchasing Fractional Club membership by the Supplier.
4. The Supplier's sales presentation at the Time of Sale included misleading actions and/or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.
5. The money lent to Mr B and Mrs L under the Credit Agreement was unaffordable for them and the decision to lend was irresponsible because the Lender didn't carry out the right creditworthiness assessment.
6. The Supplier failed to provide sufficient information in relation to the Fractional Club's ongoing costs.

The Lender dealt with the PR's concerns as a complaint and issued its final response letter on 6 July 2021, rejecting it on every ground.

The PR then referred the complaint to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, upheld the complaint on its merits.

The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr B and Mrs L at the Time of Sale in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of that breach on their purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr B and Mrs L was rendered unfair to them for the purposes of section 140A of the CCA.

The Lender 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 July 2025. In my provisional decision, I said:

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

And having done that, I don't currently think this complaint should be upheld.

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

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

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

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

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

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

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

The PR also makes an allegation that the product was sold as an investment, which I address further below. For the reasons I'll explain, had Mr B and Mrs L been told Fractional Club membership was an investment (and I make no finding on that point here), that wouldn't have been untrue.

The PR also says that Mr B and Mrs L were told the Fractional Club had a guaranteed end date when that wasn't true.

It's my understanding that the Fractional Club Rules and other documentation explain the steps of the sales process, the duties that there are on the Trustees (such as using reasonable endeavours to obtain the most advantageous selling price) and that 'sale date' means the date on which the sale process for an Allocated Property begins.

There is nothing that makes me think that Mr B and Mrs L were given a guarantee that their Fractional Club membership would end and that they would be given their share of the net sales proceeds at a set date in the future. From what I know about the Supplier's sale process, I think it was more likely that Mr B and Mrs L were told that the Allocated Property would be placed for sale at a set time and that the proceeds of sale would then be divided up, not that there was a guaranteed date on which the Allocated Property would sell. And I think that fits with common sense because it would been impossible to guarantee that the Allocated Property would be sold at a specific date – making such a promise, in my view, unlikely. I think it's more likely that Mr B and Mrs L were simply told that the Allocated Property would be sold at the end of the contract period, and that they would be given their share of the net sale proceeds, which is a factual description of how Fractional Club membership worked.

The PR further says that the Supplier told Mr B and Mrs L that its holiday resorts were exclusive to its members when that wasn't true.

However I'm not persuaded this is what happened. I say this because reference to this misrepresentation is made by the PR in very generic terms (which I don't find persuasive) and such a misrepresentation is simply not supported by the documentation I understand Mr B and Mrs L were given.

What's more, as there's nothing else on file that persuades there were any false statements of existing fact made to Mr B and Mrs L by the Supplier at the Time of Sale, I don't think there was an actionable misrepresentation by the Supplier for the reasons the PR alleges.

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

**Section 75 of the CCA: the Supplier's breach of contract**

I've already summarised how Section 75 of the CCA works and why it gives Mr B and Mrs L a right of recourse against the Lender. So, it isn't necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, the Lender is also liable.

The PR says that Mr B and Mrs L couldn't holiday where and when they wanted to – which, on my reading of the complaint, suggests that they consider that the Supplier wasn't living up to its end of the bargain, and had breached the Purchase Agreement. Like any holiday accommodation, availability wasn't unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork signed by Mr B and Mrs L states, as I understand it, that the availability of holidays was/is subject to demand. It also looks like that Mr B and Mrs L only ever tried to make one booking which they were able to make. So with all this in mind I'm not persuaded that the Supplier had breached the terms of the Purchase Agreement.

The PR also says that the Supplier breached the Purchase Agreement because there is no guarantee that Mr B and Mrs L will receive their share of the net sale proceeds of the Allocated Property. I understand that what the PR is saying is that Mr B and Mrs L fear that, when the time comes for the Allocated Property to be sold, they will not receive their share of the sales proceeds. However, it would seem that any breach of contract (if that occurs) lies in the future and is currently uncertain.

Overall, therefore, from the evidence I've seen to date, I don't think the Lender is liable to pay Mr B and Mrs L any compensation for a breach of contract by the Supplier. And with that being the case, I don't think the Lender acted unfairly or unreasonably when it dealt with the Section 75 claim in question.

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

I've already explained why I'm not persuaded that the contract entered into by Mr B and Mrs L was misrepresented (or breached) by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But the PR also says that the credit relationship between Mr B and Mrs L and the Lender was unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales process at the Time of Sale that it has concerns about. It's those concerns that I explore here.

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

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

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

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

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

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

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

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

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

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

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

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

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

However, an assessment of unfairness under Section 140A isn't limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in *Patel* (which was recently approved by the Supreme Court in the case of *Smith*), that determining whether or not the relationship complained of was unfair had to be made *"having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination"* – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under Section 140A, therefore, is stark. But it isn't a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in *Plevin* (at paragraph 17):

*"Section 140A […] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with […] whether the creditor's relationship with the debtor was unfair."*

Instead, it was said by the Supreme Court in *Plevin* that the protection afforded to debtors by Section 140A is the consequence of all of the relevant facts.

I've considered the entirety of the credit relationship between Mr B and Mrs L and the Lender along with all of the circumstances of the complaint and 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've looked at:

1. The Supplier's sales and marketing practices at the Time of Sale – which includes training material that I think is likely to be relevant to the sale;
2. The provision of information by the Supplier at the Time 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 Time of Sale; and
4. The inherent probabilities of the sale given its circumstances.

I've then considered the impact of these on the fairness of the credit relationship between Mr B and Mrs L and the Lender.

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

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

They include the allegation that the Supplier misled Mr B and Mrs L and carried on unfair commercial practices which were prohibited under the CPUT Regulations. But given the limited evidence in this complaint, I'm not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.

The PR says that the right checks weren't carried out before the Lender lent to Mr B and Mrs L. 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 L was actually unaffordable before also concluding that they lost out as a result and then consider whether the credit relationship with the Lender was unfair to them for this reason. Again, from the information provided, I'm not satisfied that the lending was unaffordable for Mr B and Mrs L. If there is any further information on this (or any other points raised in this provisional decision) that Mr B and Mrs L wish to provide, I would invite them to do so in response to this provisional decision.

The PR says that Mr B and Mrs L were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. I acknowledge that Mr B and Mrs L may have felt weary after a sales process that went on for a long time. But very little is said about what was said and/or done by the Supplier during the sales presentation that made Mr B and Mrs L feel as if they had no choice but to purchase Fractional Club membership when they simply didn't want to. They were also given a 14-day cooling off period and a credible explanation for why they didn't cancel their membership during that time hasn't been provided. And with all of that being the case, there is insufficient evidence to demonstrate that Mr B and Mrs L made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

I'm not persuaded, therefore, that Mr B and Mrs L'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 Mr B and Mrs L's credit relationship with the Lender was unfair to them. And that's the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

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

The Lender doesn't dispute, and I'm satisfied, that Mr B and Mrs L's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

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

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

But the PR says that the Supplier did exactly that at the Time of Sale. So, that is what I've considered next.

The term "investment" isn't defined in the Timeshare Regulations. In *Shawbrook & BPF v FOS*, the parties agreed that, by reference to the decided authorities, *"an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit"* at [56]. I will use the same definition.

Mr B and Mrs L's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club membership included an investment element didn't, 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 didn't 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 B and Mrs L as an investment in breach of Regulation 14(3), I've 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's 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 B and Mrs L, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork as I understand it that state that Fractional Club membership was for the primary purpose of holidays and that the Supplier made no representations as to future price or value of the fractional asset. So, it's possible that Fractional Club membership wasn't marketed or sold to Mr B and Mrs L as an investment in breach of Regulation 14(3).

On the other hand, I acknowledge that the Supplier's training material left open the possibility that the sales representative may have positioned Fractional Club membership as an investment.

However, whether or not there was a breach of the relevant prohibition by the Supplier isn't ultimately determinative of the outcome in this complaint for reasons I will come on to shortly. And with that being the case, it isn't 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 B and Mrs L rendered unfair?

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

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

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

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

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

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

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

So, it seems to me that, if I'm to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr B and Mrs L and the Lender that was unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) which, having taken place during its antecedent negotiations with Mr B and Mrs L, is covered by Section 56 of the CCA, falls within the notion of "any other thing done (or not done) by, or on behalf of, the creditor" for the purposes of 140(1)(c) of the CCA and deemed to be something done by the Lender) lead them to enter into the Purchase Agreement and the Credit Agreement is an important consideration. Given the importance this implies as to Mr B and Mrs L's state of mind and motivations at the time they made their decision to go ahead with the purchase, I think direct testimony from them is likely to be key evidence in this case.

However, more than 7 years after the Time of Sale, we haven't received any testimony from Mr B and Mrs L in their own words, as to how the Supplier marketed Fractional Club membership to them, or why they decided to buy it. The Letter of Complaint from the PR is unfortunately somewhat generic in nature and I didn't find it very helpful in ascertaining the reasons for Mr B and Mrs L's purchase. Given all this, I don't think that even if the Supplier had breached Regulation 14(3) that there is sufficient evidence to allow me to conclude with any confidence that the Supplier's breaches were material to Mr B and Mrs L's decision-making process.

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'm not persuaded that Mr B and Mrs L'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). And for that reason, I don't think the credit relationship between Mr B and Mrs L and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

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

It's clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mr B and Mrs L when they purchased membership of the Fractional Club at the Time of Sale. But the PR says that the Supplier failed to provide Mr B and Mrs L with all of the information (in particular information regarding ongoing costs) that they needed to make an informed decision.

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

As I've already indicated, the case law on Section 140A makes it clear that it doesn't 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's possible that the Supplier didn't give Mr B and Mrs L 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 given the facts and circumstances of this complaint, I'm not persuaded that the Supplier's alleged breaches of regulation 12 of the Timeshare Regulations and the CRA in relation to the costs of membership, are likely to have prejudiced Mr B and Mrs L's purchasing decisions at the Time of Sale and rendered their credit relationship with the Lender unfair to them for the purposes of section 140A of the CCA. And that's because Mr B and Mrs L haven't provided any information or evidence which would lead me to believe that any potential breaches of regulation 12 of the Timeshare Regulations by the Supplier, or the inclusion of unfair terms in the Purchase Agreement, has led to any significant harm or unfairness to them arising in practice.

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

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

At the time of my provisional decision I deferred my conclusions on the matter of commission disclosure in order to review that issue further. I've since written to the parties setting out my thoughts on why I wasn't persuaded to uphold this aspect of the complaint either.

Applying the principles and factors set out in the Supreme Court judgment[2] handed down on 1 August 2025, I found nothing 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 L. Nor did I see anything that persuaded me that the commission arrangements between them gave the Supplier a choice over the interest rate which led Mr B and Mrs L into a credit agreement that cost disproportionately more than it otherwise could have.

---

[2] *Johnson v FirstRand Bank Ltd, Wrench v FirstRand Bank Ltd and Hopcraft v Close Brothers Ltd* [2025] UKSC 33 ("*Hopcraft, Johnson and Wrench*")

Further, the flat rate and amount of commission paid was such that it gave me no reason to think that any failure to disclose it to Mr B and Mrs L had a material impact on their decision to enter into the Credit Agreement. At £615.90 it was only 5% of the amount borrowed and even less than that (4.63%) as a proportion of the charge for credit. That didn't strike me as disproportionate; nor were the surrounding circumstances otherwise capable of rendering unfair the credit relationship between the Lender and Mr B and Mrs L such that the Lender needed to take any action in redress.

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

**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 B and Mrs L's position. Having received and reviewed these, I'm now proceeding with my final decision.

The PR has requested that it be supplied with everything I relied upon (including what I relied upon when assessing the irresponsible lending aspect of Mr B and Mrs L's complaint) in reaching my provisional decision. However, I'm satisfied it has already had sight of everything I relied upon.

I'm also 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 don't proceed with a decision before this is done and it has had an opportunity to make further submissions.

The PR's request in this respect has been addressed by us under separate correspondence. For reasons I will explain in the course of this decision, I've concluded that it's appropriate for me to proceed with this final decision.

**The legal and regulatory context**

The legal and regulatory context that I think is relevant to this complaint has been shared in several hundred published decisions on very similar complaints, as well as in previous correspondence with the parties. So there's no need for me to set this out again in detail here. I simply remind the parties that our rules[3] say that in considering what's 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 and my subsequent correspondence I find it offers no persuasive reason to depart from the conclusions I've previously set out. I'll explain why.

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

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

The PR's response to my provisional decision relates mainly to the issue of whether the credit relationship between Mr B and Mrs L and the Lender was unfair *per* section 140A of the CCA. In particular, the PR has provided more comment in relation to whether the membership was sold to Mr B and Mrs L as an investment at the Time of Sale. It has also submitted that I failed to mention in my provisional decision the *"crucial aspect"* of commission.

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

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 don't 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 didn't make a blanket finding that all products of the type Mr B and Mrs L 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 B and Mrs L as an investment, in breach of Regulation 14(3). I went on to explain that relevant case law[4] 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 B and Mrs L's decision whether to enter into the Purchase and Credit Agreement. It doesn't strike me that doing so flies in the face of either the handed down judgment or previous decisions the PR has mentioned.

The PR says it's concerned, for various reasons, that I failed to take into account the Supplier's training materials when reaching my provisional findings. But I can assure it that I did.

The PR says that I've discounted or placed very little weight on Mr B and Mrs L's testimony. But as I said in my provisional decision no testimony from Mr B and Mrs L was provided to our service prior to my provisional decision being issued. And although I note that the PR says the Letter of Complaint was prepared based on Mr B and Mrs L's instructions, I remain of the view that this letter is somewhat generic in nature and not very helpful in ascertaining the reasons for Mr B and Mrs L's purchase.

I note that in response to my provisional decision the PR has provided a statement from Mr B and Mrs L in which they say that during the sales process they were told by the Supplier that *"*[their purchase] *was an investment…which would earn* [them a] *profit..".*

Notwithstanding that Mr B and Mrs L don't say in this statement that being told by the Supplier that their purchase was an investment which would earn them a profit was an important and motivating factor in their purchasing decision, I'm not persuaded I can attach much, if any, weight to this statement given it was provided to our service in mid-2025.

[4] *Carney* and *Kerrigan*

I've noted the PR's request to be provided with everything I relied upon when assessing the irresponsible lending aspect of Mr B and Mrs L's complaint. But nothing was provided by the Lender in this respect and I didn't say it had been. What I said was I hadn't seen anything to persuade me that the right checks weren't carried out by the Lender before it lent to Mr B and Mrs L and more importantly I said:

*"…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 L was actually unaffordable before also concluding that they lost out as a result and then consider whether the credit relationship with the Lender was unfair to them for this reason. Again, from the information provided, I'm not satisfied that the lending was unaffordable for Mr B and Mrs L."*

I also gave the PR the opportunity to provide further information in support of this aspect of Mr B and Mrs L's complaint but it hasn't done so.

So taking everything into account I see no reason to depart from my provisional findings on this point.

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 B and Mrs L'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 B and Mrs L and the Lender wasn't rendered unfair to them for any of the reasons above.

The PR says that I failed to mention in my provisional decision the *"crucial aspect"* of commission, but I disagree. Towards the end of my provisional decision I acknowledged that one of Mr B and Mrs L's other concerns related to the alleged payment of commission by the Lender to the Supplier for acting as a credit broker and arranging the Credit Agreement and that I would address this concern once the Supreme court's judgement in *Johnson, Wrench and Hopcroft* had been handed down and its implications on Mr B and Mrs L's complaint considered (by me).

I would also like to reiterate that following my provisional decision I wrote to both parties to set out my thoughts on why I wasn't persuaded to uphold the commission aspect of Mr B and Mrs L's complaint.

The PR has asked for the documents the lender has provided to us to show the commission arrangements. While I appreciate the PR would like to have full disclosure of all of the documents and information the Lender has provided, our rules don't 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 did in my correspondence sent to both parties following 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 is able to make in support of Mr B and Mrs L's position. The PR has demonstrated its ability to present Mr B and Mrs L's case and has had sufficient time to consider and make any further arguments.

Although not specifically raised by the PR in response to my provisional decision and subsequent correspondence I'm aware that it may not agree with my view that the Lender need not pay redress because of an unfair credit relationship in connection with commission arrangements between it and the Supplier.

It's my understanding that in support of this position the PR might be of the view that:

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

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

The PR hasn't offered anything that leads me to think that, for the most part, any of the factors it has referenced were in fact at play in Mr B and Mrs L's case. It hasn't, for example, provided evidence to show the existence of commercial or contractual ties that were concealed from Mr B and Mrs L, any persuasive reasons to conclude that the Supplier's role was that of advisor to Mr B and Mrs L, or to show that any other conflict of interest arose from the roles the Supplier did perform.

For such a claim to be successful would require more than the bare assertions that have been made. I'm not persuaded that it's sufficient, as the PR seems to contend, simply to suggest unsubstantiated allegations of fact and require that the Lender disprove them else the credit relationship be deemed unfair. This issue was considered in the judgment in *Promontoria (Henrico) Ltd v. Gurcharn Samra* [2019] EWHC 2327 (Ch) ("*Samra*"), where HHJ David Cooke held (at para.26):

*"…the onus is on the claimant[5] to show, to the normal civil standard, that the relationship is not unfair because of any of the reasons set out in s 140A(1)(a)-(c). Whether it is so unfair is a matter for the court's overall judgment having regard to all the relevant circumstances and matters, including matters relating (i.e. personal) to the creditor and debtor. This onus on the claimant does not however mean, in my judgement…that where Mr Samra[6] makes allegations of fact on which he relies he does not have the burden of proving them to the normal civil standard. The onus placed on the creditor is as to the relationship between it and the debtor, and does not have the effect that factual allegations made by Mr Samra must be accepted unless they can be positively disproved by contrary evidence."*[7]

I'm satisfied the Lender has provided sufficient information in response to my enquiries to enable me to reach a conclusion about its commission arrangements with the Supplier. I've seen nothing in this case that leads me to think what the Lender has said about the commission arrangements is inaccurate. So there's no reason for me to reach a different finding over those commission arrangements.

The PR has emphasised the regulatory breaches connected with a failure to disclose commission payment. I've already set out why in my view this doesn't automatically lead to an unfair credit relationship for which the Lender needs to offer redress. While I've considered all that the PR has submitted, I remain of that view.

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 B and Mrs L (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 B and Mrs L 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've 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.

---

[5] In this case the creditor answering a claim of an unfair credit relationship arising out of an overdraft facility.

[6] In this case the borrower making an allegation that there was an unfair credit relationship.

[7] I further note that in *Wilson v Clydesdale Financial Services Ltd t/a Barclays Partner Finance* [2021] (Unreported), the court also took the view that the burden is on the debtor to prove on the balance of probabilities *the facts* that purportedly create the unfairness. It's then that the lender's burden of proof that requires it to prove *the relationship* wasn't unfair kicks in. While I don't suggest this offers legal precedent, the subject matter of that case was a fractional timeshare sale, and given the similarities seems to me an appropriate approach when considering the facts in this case.

## 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 B and Mrs L's section 75 claims. And I'm not persuaded that the Lender was party to a credit relationship with Mr B and Mrs L 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 B and Mrs L.

## 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 L to accept or reject my decision before 17 March 2026.

Peter Cook
**Ombudsman**