

## The complaint

Mr and Mrs H's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) being party to unfair credit relationships 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 and Mrs H were existing members of a timeshare, having made two previous purchases of fractional points in a membership called the Fractional Property Owners Club ('FPOC') from a timeshare provider (the 'Supplier') in 2013 and 2014<sup>1</sup>.

FPOC membership was asset backed – which meant it gave Mr and Mrs H more than just holiday rights. It also included a share in the net sale proceeds of a property named on each of their purchase agreements (the 'Allocated Property') after their membership terms end.

On 15 April 2015 (the 'Time of Sale 1') Mr and Mrs H purchased a further fractional membership (here on in known as the 'Signature Collection 1') from the Supplier. They entered into an agreement with the Supplier to buy 2,450 fractional points (the 'Purchase Agreement 1') and paid £21,058 for membership of the Signature Collection 1.

Like FPOC, Signature Collection 1 membership was asset backed, so gave Mr and Mrs H more than just holiday rights. It also included a share in the net sale proceeds of a property named on their Purchase Agreement 1 (the 'Allocated Property') after their membership term ends. But unlike FPOC, Signature Collection 1 also provided Mr and Mrs H with a guaranteed week's accommodation in their Allocated Property if they wished to use it. If not, they could use their points to book accommodation from the Supplier's portfolio of resorts.

Mr and Mrs H paid for their Signature Collection 1 membership by taking finance of £32,568 from the Lender in their joint names (the 'Credit Agreement 1'). This amount consolidated the outstanding balance of a previous loan from the Lender for their second FPOC purchase.

On 4 April 2016 (the 'Time of Sale 2') Mr and Mrs H made a purchase of a further fractional membership (the 'Purchase Agreement 2'). They bought 850 fractional points in a bi-annual membership ('Signature Collection 2'), for £10,966 which, like their existing memberships, was asset backed with a named property (the 'Allocated Property 2'). This membership also guaranteed them with a week's accommodation, every other year, in their Allocated Property 2, or they could use the fractional points towards accommodation from the Supplier's portfolio of resorts.

This Signature Collection 2 was paid for by Mr and Mrs H by taking further finance of £10,966 from the Lender in their joint names (the 'Credit Agreement 2').

As an incentive to make this last purchase, the Supplier gave Mr and Mrs H a free trial week of its 'Yacht Club' membership, and they went on to purchase a full membership of the Yacht

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<sup>1</sup> This purchase was funded by a loan from the Lender. A complaint about this purchase and the alleged unfairness of the associated credit relationship has been dealt with separately by this Service.

Club on 16 June 2016.

Mr and Mrs H – using a professional representative (the ‘PR’) – wrote to the Lender on 15 April 2021 (the ‘Letter of Complaint’) to complain, in general terms, about the sales of Signature Collection 1 and 2. They complained about:

1. Misrepresentations by the Supplier at the Time of Sale 1 & 2 giving them claims against the Lender under Section 75 of the CCA, which the Lender failed to accept and pay.
2. The Lender being party to unfair credit relationships under the Credit Agreements and related Purchase Agreements for the purposes of Section 140A of the CCA.
3. The decisions to lend being irresponsible because the Lender did not carry out the right creditworthiness assessment for either loan.

(1) Section 75 of the CCA: the Supplier’s misrepresentations at the Time(s) of Sale

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

- Told them that Signature Collection 1 & 2 memberships had a guaranteed end date, without the risk of passing any liability for the costs of the membership onto their descendants, when that was not true.
- Told them that they were investing in property, which would be sold in 15 years, at which time they would receive their share of the guaranteed profit, when that was not true.
- Told them that they could sell their share at any time and make a profit.
- Told them that Signature Collection 1 & 2 memberships would offer more availability and exclusivity, when that was not true.

Mr and Mrs H say that they have a claim for Time of Sale 1 & 2 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 like claims against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs H.

(2) Section 140A of the CCA: the Lender’s participation in unfair credit relationships

The Letter of Complaint set out several reasons why Mr and Mrs H say that both of the credit relationships being considered here, between them and the Lender, were unfair to them under Section 140A of the CCA. In summary, they include the following:

- Both Signature Collection memberships were marketed and sold to them as investments in breach of Regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the ‘Timeshare Regulations’).
- They were pressured into purchasing both Signature Collection memberships by the Supplier, and they were given insufficient time to read the contractual documentation prior to signing.
- The Lender paid the Supplier commission which was not disclosed to Mr and Mrs H.
- The Supplier’s sales presentation at the Time(s) 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.
- The decisions to lend were irresponsible because the Lender didn’t carry out the right

creditworthiness assessments.

- No alternative finance options were offered or explained.
- The Supplier failed to provide sufficient information in relation to the Signature Collection's ongoing costs.

The Lender dealt with Mr and Mrs H's concerns as a complaint. It issued its final response letter on 13 July 2021, rejecting it on every ground. This response considered Mr and Mrs H's concerns about Time of Sale 1 & 2, and their allegation of unfair credit relationships arising out of both Credit Agreement 1 and 2.

Mr and Mrs H then referred two separate complaints to the Financial Ombudsman Service, one about Time of Sale 1 and the other about Time of Sale 2. These complaints were assessed together as one by an Investigator who, having considered the information on file, thought it should be upheld.

The Investigator thought that the Supplier had marketed and sold both Signature Collection 1 & 2 memberships as investments to Mr and Mrs H at Time of Sale 1 & 2 in breach of Regulation 14(3) of the Timeshare Regulations. And given the impact of each breach on each of their purchasing decisions, the Investigator concluded that the credit relationships between the Lender and Mr and Mrs H were 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.

### **The provisional decision**

I considered the matter and issued a provisional decision (the 'PD') setting out my initial thoughts on the merits of Mr and Mrs H's complaint.

In the PD 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 do not currently think this complaint should be upheld.*

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

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

*As both sides may already know, a claim against the Lender under Section 75 essentially mirrors the claim Mr and Mrs H could make against the Supplier. Certain conditions must be met if this protection is engaged – which are set out in the CCA. The Lender does not dispute that the relevant conditions are met in this complaint, and I'm satisfied that they are.*

*This part of the complaint was made for several reasons that I set out at the start of this decision. Although set out as one complaint, the Letter of Complaint made clear that the alleged misrepresentations were made at both Time of Sale 1 and Time of Sale 2.*

*The Letter of Complaint states that both Signature Collection(s) were misrepresented to Mr*

*and Mrs H by the Supplier, because it told them that the memberships had a guaranteed end date, and this removed the risk of passing any liability for the costs of the membership onto their descendants, when that was not true. No evidence has been adduced to support this alleged misrepresentation, but in any event I can't actually see that what has allegedly been said here is untrue. I've not seen anything which makes me think that the Allocated Property(s) relating to Signature Collection 1 and 2 would not be able to be sold at the conclusion of the contract period. The Terms and Conditions set out that the title to each property is held by independent trustees, the sale of the allocated properties can only be carried out by the Trustees on or after the proposed sale date, and the property cannot be removed from the trust before that sale date. What's more, the sale date can only be delayed for up to two years by the unanimous written consent of all fractional owners, in which Mr and Mrs H are included. And as both Signature Collection memberships were standalone memberships, and did not involve the trading in of a previously held membership with, perhaps, a different length membership term, it seems that the reference to the removal of the risk of passing liabilities to descendants is somewhat erroneous.*

*The allegations include the suggestion that Signature Collection 1 & 2 memberships had been misrepresented by the Supplier because Mr and Mrs H were told that they were investing in property, and they would receive their share of a guaranteed profit when the property was sold. But telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr and Mrs H's share in both Allocated Property 1 & 2 was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.*

*And in relation to the allegation they were told that they would receive a guaranteed profit, I'm not persuaded that this is likely to have been said when such a promise would have been impossible to stand by given the inevitable uncertainty of selling property some way into the future. And as there's nothing else on file to support the PR's allegation, I'm not persuaded that there was a representation by the Supplier on the issue in question that constituted a false statement of fact.*

*As regards the allegation that the Supplier told Mr and Mrs H that Signature Collection 1 & 2 memberships would offer more availability and exclusivity, when that was not true, I can't actually see that what has been said is untrue. As I've said, Signature Collection, unlike their existing FPOC memberships, offered guaranteed availability of their allocated property on set weeks. And I've not seen any evidence to support the allegation that the Signature Collection properties were/are available to non-members. And Mr H, in his statement, has only expressed his concerns about availability and difficulty in making bookings in relation to their FPOC memberships, not either of the Signature Collection memberships, to which this complaint relates.*

*So, while I recognise that Mr and Mrs H have concerns about the way in which their Signature Collection 1 & 2 memberships were sold, they have not persuaded me that there was an actionable misrepresentation by the Supplier at the Time of Sale 1 or 2 for the reasons they allege.*

*What's more, there's nothing else on file that persuades me there were any false statements of existing fact made to Mr and Mrs H by the Supplier at the Time of Sale 1 or 2.*

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

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

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*I have already explained why I am not persuaded that either of the contracts entered into by Mr and Mrs H were misrepresented by the Supplier in a way that makes for a successful claim under Section 75 of the CCA and outcome in this complaint. But Mr and Mrs H also say that the credit relationships between them and the Lender were unfair under Section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier's sales processes at both the Time of Sale 1 & 2 that they have concerns about. It is those concerns that I explore here.*

*I have considered the entirety of the credit relationships between Mr and Mrs H and the Lender, along with all of the circumstances of the complaint, and I do not 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 Supplier's sales and marketing practices at the Time of Sale 1 & 2 – 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 1 & 2, 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 1 & 2; and*
- 4. The inherent probabilities of the sales given the circumstances.*

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

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

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

*They include that Mr and Mrs H say that they were pressured by the Supplier into purchasing Signature Collection 1 & 2 memberships. I acknowledge that they may have felt weary after a sales process that went on for a long time, but they say little about what was said and/or done by the Supplier during either of the sales presentations that made them feel as if they had no choice but to purchase Signature Collection 1 and/or 2 membership(s) when they simply did not want to. They were also given a 14-day cooling off period on each occasion and they have not provided a credible explanation for why they did not cancel their membership during that time if, as they now attest, they only made the purchase due to the pressure they were put under. Moreover, this was the third and fourth purchase they had made from the Supplier, so I think it is a fair assumption that they would have had an understanding of how the presentations and sales processes worked. And they did go on to make a further purchase from the Supplier – which I find difficult to understand if the reason they went ahead with the purchases in question was because they were pressured into them.*

*And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs H made the decision to purchase either or both Signature Collection 1 & 2 memberships because their ability to exercise that choice was significantly impaired by pressure from the Supplier.*

*The Letter of Complaint includes the allegation that the Supplier misled Mr and Mrs H and carried on unfair commercial practices which were prohibited under the CPUT Regulations.*

*But given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier at either Time of Sale 1 or 2 was prohibited under the CPUT Regulations.*

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

*The PR has also said that Mr and Mrs H weren't given a choice of creditor. But I haven't seen that the Supplier was acting in an advisory capacity here to Mr and Mrs H. I also can't see that Mr and Mrs H were prevented from arranging their own payment for the memberships if they had wished to. And I can see from their purchase history with the Supplier that they have used another lender, and also a credit card for their different purchases. But in any event, the PR hasn't explained why the point it has raised here made the credit relationships unfair in this particular case.*

*I'm not persuaded, therefore, that Mr and Mrs H's credit relationships with the Lender were rendered unfair to them under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why they say their credit relationships with the Lender were unfair to them. And that's the suggestion that the Signature Collection 1 & 2 memberships were marketed and sold to them as investments in breach of prohibition against selling timeshares in that way.*

#### *The Supplier's alleged breaches of Regulation 14(3) of the Timeshare Regulations*

*The Lender does not dispute, and I am satisfied, that both Signature Collection 1 & 2 memberships met the definition of a "timeshare contract" and were both 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 Signature Collection 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, in the Letter of Complaint, says that the Supplier did exactly that at the Time of Sale. So, that is what I have considered next.*

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

*Mr and Mrs H's share in both of Allocated Property 1 & 2 clearly, in my view, constituted investments as the share 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 Signature*

Collection 1 & 2 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 Signature Collection. They just regulated how such products were marketed and sold.

To conclude, therefore, that either or both Signature Collection 1 & 2 memberships were marketed or sold to Mr and Mrs H as investments 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 either membership to them as an investment, i.e. told them or led them to believe that the Signature Collection 1 and/or 2 membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of this complaint.

There is competing evidence in this complaint as to whether Signature Collection 1 and/or 2 membership was marketed and/or sold by the Supplier at the Time(s) 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 the membership as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs H, the financial value of their share in the net sales proceeds of the Allocated Property 1 and 2, along with the investment considerations, risks and rewards attached to them. There were, for instance, disclaimers in the contemporaneous paperwork for both sales that state that Signature Collection membership was not sold to Mr and Mrs H as an investment. So, it's possible that both Signature Collection 1 & 2 memberships weren't marketed or sold to them as investments 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 the memberships as an investment. So, I accept that it's equally possible that both Signature Collection 1 & 2 memberships were marketed and sold to Mr and Mrs H as investments 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 is not necessary to make a formal finding on that particular issue for the purposes of this decision.

Were either or both of the credit relationships between the Lender and Mr and Mrs H rendered unfair to them?

Having found that it was possible that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Times of Sale, I now need to consider what impact such breaches had on the fairness of the credit relationships between Mr and Mrs H and the Lender under the Credit Agreements and related Purchase Agreements 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, if I am to conclude that a breach of Regulation 14(3) led to credit relationships between Mr and Mrs H and the Lender that were unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreements and the Credit Agreements is an important consideration.

*And when considering what led Mr and Mrs H into either of the purchases, I am guided by what Mr H has said in his testimony. For simplicity, at this point I will deal with each purchase separately.*

*This is what he said about the sales process for Signature Collection 1:*

*“...we were told about the benefits of purchasing a unit at the Signature Collection with [the Supplier]. We were told that this fractional could be sold at a later date with a profit to be made. We expressed to the representatives that we found that we had trouble booking holidays making use of our timeshare with [the Supplier]. We were told that if we were to purchase a timeshare at the Signature Collection, we would be given a designated week each year to holiday, which would therefore guarantee us a holiday at a set time. As an incentive for making this purchase, we were also given a yacht club membership (prelude week).”*

*Here, Mr and Mrs H already hold two FPOC memberships, and as I've said, FPOC membership does not guarantee accommodation availability – it had to be booked in advance, and was limited, especially at peak times, like school holidays for instance. And from what Mr H says it seems they were unhappy with the lack of availability the FPOC was providing them. So it seems that the Supplier sold the Signature Collection 1 membership to Mr and Mrs H as a way to solve this particular problem, because it offered them guaranteed availability in their named property in their set week. I can see that Mr H has said that they were told about the sale of the Allocated Property 1, and he says they were told there was “...a profit to be made” but he has at no point said that this was a motivation for the purchase. From what he has said the motivation was the guaranteed availability of the accommodation.*

*And as regards the purchase of Signature Collection 2, Mr H says:*

*“...we were told about the benefits of purchasing a further timeshare with [the Supplier]. We were told that through purchasing a further unit at the Castillo del Ray collection, we would be entitled to a further week's holiday per year, as this would generate further points which would entitle us to further upgrades. We were told we could use this extra week as a points generator, which would allow us to take further holidays with [the Supplier] per year. We were told that this fractional was an investment with a profit to be made. Therefore, feeling that we would buy this timeshare without the intention of directly using it, we agreed to this purchase.”*

*Again, here it seems that Mr and Mrs H were buying the additional membership for the holiday options it provided. Mr H has said that they bought it as a 'points generator' and not to specifically stay in the Allocated Property 2. This seems to suggest to me that they would use the extra points the membership gave them to use to get further upgrades when taking holidays in other locations. And from information from the Lender, this appears to be how Mr and Mrs H have used their Signature Collection memberships. They have apparently taken ten holidays using their points between 2016 and 2021 in a variety of locations, some away from their properties, including the USA and Italy.*

*So, from what I've seen, and taking into account what Mr H has said about their purchases, I think he and Mrs H purchased Signature Collection 1 & 2 for the quality and availability of the accommodation they provided, which was above and beyond what they were able to get with their FPOC memberships. And even if the Supplier had sold and/or marketed the memberships to them in a way that breached Regulation 14(3), I'm not persuaded that their decision to purchase either Signature Collection 1 or 2 membership 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 purchases whether or not there had been a breach of*

Regulation 14(3). And for that reason, I do not think either credit relationship between Mr and Mrs H 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 is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mr and Mrs H when they purchased both memberships of the Signature Collection. But the PR says that the Supplier failed to provide them with all of the information they needed to make an informed decision, specifically that the Supplier failed to provide sufficient information in relation to the Signature Collection's ongoing costs.

One of the main aims of the Timeshare Regulations, the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR') and the Consumer Rights Act 2015 (the 'CRA')<sup>2</sup> was to enable consumers to understand the financial implications of their purchase so that they were/are put in the position to make an informed decision. And if a supplier's disclosure and/or the terms of a contract did not recognise and reflect that aim, and the consumer ultimately lost out or almost certainly stands to lose out from having entered into a contract whose financial implications they didn't fully understand at the time of contracting, that may lead to the Timeshare Regulations and the UTCCR/CRA being breached, and, potentially the credit agreement being found to be unfair under Section 140A of the CCA.

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

Given the facts and circumstances of this complaint, I am not persuaded that the Supplier's alleged breaches of the UTCCR (for Time of Sale 1) and the CRA (for Time of Sale 2) are likely to have prejudiced Mr and Mrs H's purchasing decision at either of the Time(s) of Sale and rendered either credit relationship with the Lender unfair to them for the purposes of section 140A of the CCA. And I say this because I cannot see that Mr and Mrs H would likely have been unaware of the requirement to pay annual management charges for each of their memberships. That requirement was set out in the contractual documentation, and they had been paying similar charges for their existing memberships. And they haven't said, either in the Letter of Complaint or in their testimony, what the Supplier told them in this regard. Nor have they said what they ended up paying, and how this was not what they were led to believe would be the case.

Moreover, as I haven't seen anything else to suggest that there are any other reasons why either of the credit relationships between the Lender and Mr and Mrs H were unfair to them because of an information failing by the Supplier, I'm not persuaded they were.

#### Mr and Mrs H's Commission Complaints

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I note that one of Mr and Mrs H's other concerns relates to alleged payments of commission by the Lender to the Supplier for acting as a credit broker and arranging the Credit Agreements. The Supreme Court's recent judgment *Johnson v FirstRand Bank Ltd, Wrench v FirstRand Bank Ltd and Hopcraft v Close Brothers Ltd* [2025] UKSC 33 ('*Johnson, Wrench and Hopcraft*') clarified the law on payments of commission – albeit in the context of car dealers acting as credit brokers. In my view, the Supreme Court's judgment sets out

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<sup>2</sup> The UTCCR was the applicable regulatory framework for Signature Collection 1 and the CRA for Signature Collection 2.

*principles which appear capable of applying to credit brokers other than car dealer–credit brokers. At present, I do not know enough about the relevant arrangements in place at the Times of Sale. So, once I know more, I will finalise my findings on this complaint.*

## *Conclusion*

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*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 claims, and if I put the issue of commission to one side for the time being, I am not persuaded that the Lender was party to credit relationships with Mr and Mrs H under the Credit Agreements that were 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.*

*But, as I've already said, it is necessary to wait for information on the relevant arrangements (considered in Johnson, Wrench and Hopcraft) between the Lender and Supplier before finalising my thoughts on the merits of this complaint.”*

The Lender responded to the PD and accepted it. The PR, on Mr and Mrs H's behalf, also responded but did not accept it, and provided some further comments and evidence that they wished to be considered.

Following this I also communicated to both sides how I was not persuaded that Mr and Mrs H's credit relationship with the Lender was unfair to them for reasons relating to the commission arrangements between it and the Supplier.

The PR responded to say it had nothing further to add in relation to the commission arrangements, but maintained that the complaint ought to be upheld for the reasons it set out following the PD.

Having received the relevant responses from both sides, I am now finalising my decision.

## **The legal and regulatory context**

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

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

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

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

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

## The FCA's Principles

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

- Principle 6
- Principle 7
- Principle 8

Included in the PR's response to my PD was a request to hold an oral hearing to determine the outcome to this complaint. Oral hearings are something that I can direct happen under DISP 3.5.5. However, the Financial Ombudsman Service is set up to decide complaints informally and it is for me as the decision maker to determine what evidence I think I need to determine what is a fair and reasonable outcome to a complaint. Having considered everything, I do not think I need to hold an oral hearing to fairly determine this complaint.

This is because both parties have already provided lengthy submissions. In this case, I have statements from Mr and Mrs H, other evidence, including the documents from the sale, and full submissions from the PR and the Lender to decide what I think was most likely to have happened. I'm satisfied I'm able to weigh up what Mr and Mrs H have said against the available evidence and arguments to determine what I think happened on the balance of probabilities without the need for an oral hearing. And as it's in everyone's interest to resolve this complaint as soon as possible, to grant a hearing at such a late stage would inevitably prolong the resolution of this case.

### **What I've decided – and why**

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

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

Again, my role as an Ombudsman isn't to address every single point which has been made to date, but to decide what is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, this doesn't mean I haven't considered it. Rather, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision.

The PR's further comments in response to the PD, in the main, relate to the issue of whether the credit relationships between Mr and Mrs H and the Lender were unfair. In particular, the PR has provided further comments in relation to whether the memberships were sold to Mr and Mrs H as investments at the Time(s) of Sale. But it has also reiterated that the Lender was liable under Section 75 of the CCA for the Supplier's misrepresentations at the Time(s) of Sale.

As outlined in my PD, the PR originally raised various other points of complaint, all of which I addressed at that time. But they didn't make any further comments in relation to those in their response to my PD. Indeed, they haven't said they disagree with any of my provisional conclusions in relation to those other points. And since I haven't been provided with anything more in relation to those other points by either party, I see no reason to change my

conclusions in relation to them as set out in my PD. So, I'll focus here on the PR's points raised in response.

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

In response to the PD, the PR highlighted the following sections of Mr and Mrs H's testimony which it says supports that misrepresentations were made by the Supplier:

*"We were told that this fractional would be sold within 19 years and would be bought back by [the Supplier] for a value between 5%-10% of purchase price."*

*"We were told that the one week worth of Fractionals we had was in fact not enough ... we were told that this fractional would be sold and be bought back by [the Supplier] with a profit."*

*"We were told that this fractional could be sold at a later date with a profit to be made."*

*"We were told that this fractional was an investment with a profit to be made."*

These statements all relate to the allegation that the Supplier told Mr and Mrs H at the Time(s) of sale that the memberships would provide them with a profit when they (or the Allocated Property) was sold. But it is important to note, that the first two statements above do not relate to the sales that have been complained about. They relate to the sales of their previous FPOC memberships which were significantly different to the Signature Collection memberships being considered here.

But as I said in the PD, and maintain now, I'm not persuaded that this alleged misrepresentation is likely to have been made, when such a promise would have been impossible to stand by given the inevitable uncertainty of selling property (and the price it might achieve) some way into the future. There is not enough colour and context in what has been said by Mr and Mrs H to persuade me that there was a representation by the Supplier on the issue in question that constituted a false statement of fact. And even if the Supplier's sales representatives went further (and I'm not persuaded that they did) and suggested that the share in question would increase in value, perhaps considerably so, that sounds like nothing more than a honestly held opinion as there isn't any accompanying evidence to persuade me that the relevant sales representative(s) said something that, while an opinion, amounted to a statement of fact that they did not hold or could not have reasonably held.

So, I do not think the Lender needs to do anything more in relation to Mr and Mrs H's claim under Section 75 of the CCA.

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

As I explained in my PD, although I found there was a possibility that the Supplier breached Regulation 14(3) at the Time(s) of Sale, whether or not there was a breach of the relevant prohibition by the Supplier is not ultimately determinative of the outcome in this complaint, so I didn't think it necessary to make a formal finding on that particular issue for the purposes of the decision. And that was because I didn't think that either of the credit relationships between Mr and Mrs H and the Lender would have been rendered unfair to them *even if* the Supplier had breached Regulation 14(3) of the Timeshare Regulations at the Time(s) of Sale, because I thought they would most likely have made the purchases anyway.

As part of its recent submissions, the PR has provided further testimony from Mr and Mrs H. This said:

*"We would like to reiterate that both purchases made with [the Supplier] in April 2015 and April 2016 were without doubt sold to us as a form of investment to provide for a fixed*

*period of holiday accommodation in the form of a regular week annually and then biannually to provide further points for other holiday destinations as so often there was not the availability for times we were wanting to book as they were selling the holidays outside of the [Supplier] Membership to holiday brokers. Our intention was to use the timeshare(s) and eventually pass it onto our children if we wished and for us, or them, to derive a profit at the end of the term as was explained to us in the original talks and presentations made to us by the sales staff.*

*In these meetings we were shown some example figures of how the [Supplier] Trustees would sell the fractions at the end of the term and all fractional owners would get a share of the profit which was held in trust. In my mind if you are entitled to a share of the profits then that is classed as an investment!”*

I accept that within the PR’s new submissions Mr and Mrs H have provided further evidence, stating that they bought both of the Signature Collection memberships as investments as well as for the holidays they could provide. However, with this evidence there is a real risk that Mr and Mrs H’s testimony has been coloured by what I said in the PD. And, on balance, the timing and way in which this evidence has been provided makes me conclude that I can place little weight on it, particularly as it contains assertions, in relation to their wish to pass the memberships on to their children, which weren’t present in their original statement.

The PR has also stated that I’ve been inconsistent with my approach compared to previous decisions issued by the Service and has provided examples it feels demonstrates this. But my decision is based on consideration of Mr and Mrs H’s specific circumstances. Each complaint turns on its own facts; an Ombudsman’s decision on how one timeshare sale occurred does not determine his, or any other Ombudsman’s, decisions about the facts of other sales at different times of different purchases.

The PR has also reiterated that the judgment handed down in *Shawbrook & BPF v FOS*<sup>3</sup> asserted that the disclaimers contained in the contractual sales documentation cannot override credible testimony of investment-based selling. But I haven’t based my decision on the disclaimers cited. Although I said that relevant disclaimers in the paperwork stated that the memberships were not sold to Mr and Mrs H as investments, I only considered this in relation to whether there was a breach of Regulation 14(3) – and as I’ve explained, I’ve not made a finding on that particular matter as I am satisfied it does not affect the outcome to this complaint.

So, ultimately, for the above reasons, along with those I already explained in my PD, I remain unpersuaded that any breach of Regulation 14(3) was material to Mr and Mrs H’s purchasing decisions.

So, as I said before, even if the Supplier had marketed or sold the membership as an investment in breach of Regulation 14(3) (which I still make no finding on here), I’m not persuaded Mr and Mrs H’s decisions to make the purchases were motivated by the prospect of a financial gain. So, I still don’t think either of the credit relationships between Mr and Mrs H and the Lender were unfair to them for this reason.

## **Conclusion**

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In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs H’s Section 75 claims,

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<sup>3</sup> *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin)

and I am not persuaded that the Lender was party to credit relationships with them under the Credit Agreement that were unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate Mr and Mrs H.

### **My final decision**

For all of the reasons set out above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H and Mrs H to accept or reject my decision before 8 January 2026.

Chris Riggs  
**Ombudsman**