DRN-5836660

The complaint

Mr C and the estate of Ms B's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA')..

What happened

Mr C and Ms B purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 1 April 2014 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 2,630 fractional points at a cost of £35,879 (the 'Purchase Agreement'). But after trading in their existing Vacation Club membership (which consisted of 2,501 points), they ended up paying £8,368 for membership of the Fractional Club.

Fractional Club membership was asset backed – which meant it gave Mr C and Ms B 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. Their percentage increase in points, which had the same value in terms of holiday purchasing power, from 2,501 Vacation Club points to 2,630 Fractional Points, was about 5%.

Mr C and Ms B paid for their Fractional Club membership by taking finance of £8,368 from the Lender (the 'Credit Agreement').

Mr C and Ms B – using a professional representative (the 'PR') – wrote to the Lender on 3 July 2018 (the 'Letter of Complaint') to complain about:

1. 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.

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

The Letter of Complaint set out Mr C and Ms B's allegation that the credit relationship between them and the Lender was unfair to them under Section 140A of the CCA. In summary they said this was the case for the following reasons:

A. The Lender paid commission to the Supplier without telling Mr C and Ms B about this or getting their informed consent to do so.

B. The Supplier pressured Mr C and Ms B to enter into the contract.

C. The Supplier misrepresented the Fractional Club to Mr C and Ms B by saying it was an investment with a guaranteed exit date when this was not true, because there is no guarantee the Allocated Property will be sold and so there will be no return on their investment.

D. The Supplier's conduct fell well below the standards expected in most relevant financial

codes of conduct.

While not highlighted specifically by the PR as a reason the relationship was unfair (other than that this was a misrepresentation), Mr C and Ms B did mention in their client statement and the Letter of Complaint that they were told by the Supplier that Fractional Club membership was an investment.

The Lender dealt with Mr C and Ms B's concerns as a complaint and issued its final response letter on 18 December 2018, rejecting it on every ground.

Mr C and Ms B then referred the complaint to the Financial Ombudsman Service. When doing so the PR added some additional reasons why it thought the relationship was unfair, being:

1. There was no proper assessment of Mr C and Ms B's ability to afford the Credit Agreement.

2. The Supplier used aggressive commercial practices to pressure Mr C and Ms B to enter into the Purchase Agreement and Credit Agreement.

The complaint 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 C and Ms B 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 C and Ms B 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. The Lender said that:

- *"Sales process does not lead customers to conclude that the [Fractional Club] was an investment. Reference in the customer testimony to the customer not wanting to hold onto a longer-term product and this being a motivation for purchase 'guarantee exit date of 2032'. In addition, the recollection of the fractional features 'we would get a percentage of the property price' and the 'potential of [recouping] some of the money' is correct but its incorrect to conclude this therefore means the product was sold as an investment. A share of sales proceeds is not an investment."*

The PR said that Mr C and Ms B agreed with the Investigator's assessment. After we shared the Lender's above comments with the PR it also responded to say, in summary, that:

- *"The sales representative told our client that this was an investment and that they would make a profit. We have made that clear in our correspondence and our client has made that clear in their client statements."*

- *"This client did not buy Fractional points for holidays."*

- *"Fractional points were sold to this client as an investment without any information about what that meant. Just that they would get something back."*

- *"Our client bought this product purely for the reason of it being an investment as highlighted above."*

I issued a provisional decision (and a follow-up email dealing with commission) explaining why I was not planning to uphold this complaint.

The Lender responded to say that it agreed with my provisional decision.

The PR disagreed and provided some further comments and evidence, which I discuss below.

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 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 here. But I would add that the following regulatory rules/guidance are also relevant:

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

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

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

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

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

- Principle 6
- Principle 7
- Principle 8

What I've decided – and why

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

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

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

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

START OF COPY OF MY PROVISIONAL FINDINGS

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

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

1. The standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Time of Sale along with any relevant training material;

2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;

3. The commission arrangements between the Lender and the Supplier at the Time of Sale and the disclosure of those arrangements;

4. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;

5. The inherent probabilities of the sale given its circumstances; and

6. Any existing unfairness from a related credit agreement.

I have then considered the impact of these on the fairness of the credit relationship between Mr C and Ms B and the Lender.

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

The PR says that the credit relationship between Mr C and Ms B 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 they have concerns about. It is those concerns that I explore here.

Pressure

The PR says that Mr C and Ms B were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. 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 their sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to.

Mr C and Ms B were also given a 14-day cooling off period and the PR has not provided a credible explanation for why they did not cancel their membership during that time. Moreover, they did go on to use their fractional points to take a number of holidays over the years before they made their complaint in 2018. And with all of that being the case, there is insufficient evidence to demonstrate that Mr C and Ms B made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

Misrepresented as being an investment with a guaranteed exit date

Mr C and Ms B say they were told Fractional Club membership was an investment with a guaranteed exit date, but that this wasn't true because there is no guarantee the Allocated Property will be sold.

I accept the possibility that the Supplier described Fractional Club membership as an investment (I discuss this further below), but I do not think this was untrue at the Time of Sale.

Mr C and Ms B's share in the Allocated Property clearly, in my view, could constitute an investment as it offered them the prospect of a financial return. But the PR says this was not true because there is no guarantee the Allocated Property will be sold.

As I understand it, under the relevant Fractional Club Rules, the sale of the Allocated Property could be postponed for up to two years, longer than that if there were problems selling and the fractional owners of that specific property agreed, or for an otherwise specified period provided there was unanimous agreement in writing from those owners.

So, while there was a mechanism for the sale to be postponed, there was also a way for fractional owners of the Allocated Property to ensure the sale went ahead, by withholding their consent for the sale to be delayed beyond two years.

Given how this worked, I think it is unlikely that the Supplier would've described the sale of the property as being guaranteed to happen on a certain date, although it may have discussed the Sale Date as set out in the Purchase Agreement, since that was the date the process of selling the Allocated Property was expected to begin. And I understand it would only be in exceptional circumstances (such as a significant downturn in the housing market) that the sale would be delayed.

Overall, I am not persuaded the alleged misrepresentation took place or that it would've created or contributed to any unfairness in Mr C and Ms B's relationship with the Lender.

Conduct below the expected standards

The PR has not specified what conduct it felt fell below the relevant standards, nor what those standards were. Having thought about the relevant codes of conduct in place at the time, and what Mr C and Ms B and the PR have said in this complaint alongside all the evidence in this case, there is nothing here that persuades me there was a breach of those codes such that an unfair relationship was created.

Affordability

The PR says that the right checks weren't carried out before the Lender lent to Mr C and Ms B. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that the Lender failed to do everything it should have when it agreed to lend (and I make no such finding), I would have to be satisfied that

the money lent to Mr C and Ms B was actually unaffordable before also concluding that they lost out as a result, and then consider whether the credit relationship with the Lender was unfair to them for this reason. From the information provided, I am not satisfied that the lending was unaffordable for Mr C and Ms B.

Aggressive commercial practices

Mr C and Ms B's complaint form says that the Supplier used aggressive commercial practices to pressure them. But this is not expanded on in the complaint form.

The client statement alludes to this by saying of the sales meeting, *"This was a long sales presentation and with very hard sales tactics."* But little or no information is given about how long the presentation was nor what the *"hard sales tactics"* were.

The client statement also says that Mr C and Ms B were told they *"need to make a decision on the day as these points would not sell at this price again. We felt under pressure to make a decision however, we thought this was the best action for our family circumstances."*

The Letter of Complaint includes the following:

- *"Our clients advise this was a very long, high pressured, sales presentation."*
- *"[The Supplier] advised our clients would need to sign and finance this purchase there and then. Our clients [felt] very pressured to purchase however, their main concern was the implications in the future to their family."*
- *"… our clients were pressured into entering the credit agreement."*
- *"[The Supplier] misrepresented the timeshare product, its benefits and pressured our clients into purchasing a product which was unsuitable and failed to provide the advantages promised."*

Overall, it seems that Mr C and Ms B's allegations here are about pressure being applied by virtue of them feeling that the price offered was only available to them if they entered into the Purchase Agreement during the meeting.

But the reasons given for Mr C and Ms B's decision to purchase suggest that although they felt they had to decide on the day, they ultimately decided to purchase because they felt that was the best decision for their family. Not because they felt they had no choice or didn't want to miss out on a special price. That suggests to me that they would've gone ahead regardless of how the price was presented to them, and any pressure they felt as a result.

I discussed above the reasons why I do not think it has been shown that Mr C and Ms B purchased Fractional Club membership because of pressure applied to them by the Supplier. And those comments apply here as well. They did not exercise their right to cancel and went on to make use of their membership to take holidays for several years before making their complaint. Had any aggressive commercial practices by the Supplier led to them entering into the Purchase Agreement and Credit Agreement when they otherwise would not have done so, I think it is likely they would have either cancelled within the 14 days or made a complaint much sooner.

As such, I'm not persuaded, therefore, that Mr C and Ms B's credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above.

But Mr C and Ms B's complaint includes an allegation that they were told Fractional Club membership was an investment, which implies there was a breach of the Timeshare Regulations. So, I must also consider that when determining whether their credit relationship with the Lender was unfair on them.

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

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling 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 PR 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*[1], 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 C and Ms B's share in the Allocated Property clearly, in my view, could constitute 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 did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.

To conclude, therefore, that Fractional Club membership was marketed or sold to Mr C and Ms B as an investment in breach of Regulation 14(3), I have to be persuaded that it was more likely than not that the Supplier marketed and/or sold membership to them as an investment, i.e. told them or led them to believe that Fractional Club membership offered them the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

---

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

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

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr C and Ms B, the financial value of their share in the net sales proceeds of the Allocated Property along with the investment considerations, risks and rewards attached to them.

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

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

In this case, Mr C and Ms B's description of what they were told about Fractional Club membership seems to do no more than describe how the Fractional Club membership worked. It does not persuade me that the possibility of a profit was in their mind when they decided to purchase, nor that this was material to their decision. In the client statement they said they were told:

> *"…we would be fractional owners of a property… With the purchase of this product we would have an investment in property and also a guaranteed exit date of 2032.*
>
> *On this date, the representatives advised, the property would be sold and that we would get a percentage of the property price and then have an opportunity to choose to reinvest or to terminate our contract with [the Supplier]. We thought this would be the best option for our children and with the potential of [recouping] some of the money we had invested over the years."*

So, it seems from this description that Mr C and Ms B remember being told:

- It was an investment.
- They would be fractional owners of the Allocated Property.
- The Allocated Property was due to be sold in 2032, when they would receive their share of the net sale proceeds.
- At that point, their membership would end (unless they made a new purchase).

From this Mr C and Ms B said their expectation was that they would recoup some of the money they had invested. So, while they recall Fractional Club membership being described as an investment, their recollections do not suggest they were given the hope or expectation of making a profit, given their expectation was, in their own words, of getting back only *"some"* of their investment.

The Letter of Complaint did not mention the Timeshare Regulations but said that Mr C and Ms B's complaint was about the possibility that the Allocated Property may not actually be sold, and they may get back nothing. But it, and the client statement, also set out other reasons why they entered into the purchase, specifically:

- They thought Fractional Club membership was the best option for their children and family circumstances (as opposed to keeping their Vacation Club membership) because:
    - They were concerned about their children inheriting a debt.
    - The earlier end date (compared to their existing Vacation Club membership) of 2032 gave them flexibility to either reinvest or terminate their contract with the Supplier.

In response to our investigator's assessment of the complaint and the Lender's additional comments, the PR was quite adamant that the Supplier had told Mr C and Ms B that Fractional Club membership was an investment and that they would make a profit and that they bought it solely as an investment, and not for holidays. But that is not what was said in the client statement or Letter of Complaint, which only indicated Mr C and Ms B expected to get some money back. They did not say that they remembered being told they would make a profit, nor that they expected to make a profit. So, I do not think it is clear that their recollections indicate Fractional Club membership was sold to them as an investment in line with the definition that I set out above, nor that if it was this was material to their decision to make the purchase.

Overall, while I acknowledge the possibility that Fractional Club membership was marketed or sold to Mr C and Ms B as an investment in breach of Regulation 14(3), in this case I do not think their recollection of what happened at the Time of Sale is sufficient for me to conclude that is what is most likely to have happened and that this was material to their decision to make the purchase. While they have used the word investment in describing what they were told, it seems they were left with the impression that they would get back only some of what they invested. Not that they had any hope or expectation that they would make a profit.

Was the credit relationship between the Lender and Mr C and Ms B rendered unfair?

As the Supreme Court's judgment in *Plevin* makes clear, it does not 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.

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

I am not persuaded that the investment potential of Fractional Club membership was material to Mr C and Ms B's decision to enter into the Purchase Agreement. This is because in the Client Statement they indicated that:

- They were very concerned about the long-term nature of their Vacation Club membership and didn't want to pass it onto their children. So, the earlier end date for Fractional Club ownership was appealing to them.

- Given the earlier end date and the ability to choose what to do then, including ending their relationship with the Supplier if they wanted to or making a new purchase, they thought moving to Fractional Club membership was the best option for them and their children.

The client statement went on to explain why they were dissatisfied with and wanted to give up their Fractional Club membership, being:

- Concerns about whether the Allocated Property would ever be sold or whether they would get any money back.

- Fractional Club membership was not exclusive in the way they expected, as non-members can take the same holidays with the Supplier for less than their annual maintenance fees.

- Problems with the availability of the holidays they were interested in taking.

At no point do Mr C and Ms B appear to have said that Fractional Club membership being sold to them as an investment, or the prospect of making a profit on their initial outlay, was a material factor in their decision to purchase. The PR made that claim, but only after our Investigator's assessment and in response to the Lender's comments, by which time the PR was aware that other complaints had been upheld where the Supplier had breached Regulation 14(3) and this was material to a consumer's decision to purchase a fractional timeshare.

Mr C and Ms B's recollections of the sale indicate there were other reasons why they entered into the Purchase Agreement, and on balance I think they would have done so regardless of whether or not the Supplier breached Regulation 14(3) of the Timeshare Regulations.

In summary, based on the evidence in this case, I am not convinced that Mr C and Ms B purchased Fractional Club membership because it was sold or marketed to them as an investment in breach of Regulation 14(3) of the Timeshare Regulations.

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

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

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

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

- The size of the commission (as a percentage of the total charge for credit). In Mr Johnson's case it was 55%. This was "so high" and "a powerful indication that the relationship…was unfair" (see paragraph 327);

- The failure to disclose the commission; and

- The concealment of the commercial tie between the car dealer and the lender.

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

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

- The way in which commission is calculated (a discretionary commission arrangement, for example, may lead to higher interest rates);

- The characteristics of the consumer;

- The extent of any disclosure and the manner of that disclosure (which, insofar as Section 56 of the CCA is engaged, includes any disclosure by a supplier when acting as a broker); and

- Compliance with the regulatory rules.

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

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

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

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

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

In stark contrast to the facts of Mr Johnson's case, the amount of commission paid by the Lender to the Supplier for arranging the Credit Agreement that Mr C entered into wasn't high. At £836.60, it was only 10% of the amount borrowed and even less than that (5%) as a proportion of the charge for credit. So, had Mr C known at the Time of Sale that the Supplier was going to be paid a flat rate of commission at that level, I'm not currently persuaded that he either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. After all, Mr C wanted Fractional Club membership and had no obvious means of his own to pay for it. And at such a low level, the impact of commission on the cost of the credit he needed for a timeshare he wanted doesn't strike me as disproportionate. So, I think he would still have taken out the loan to fund his purchase at the Time of Sale had the amount of commission been disclosed.

What's more, based on what I've seen so far, the Supplier's role as a credit broker wasn't a separate service and distinct from its role as the seller of timeshares. It was simply a means to an end in the Supplier's overall pursuit of a successful timeshare sale. I can't see that the Supplier gave an undertaking – either expressly or impliedly – to put to one side its commercial interests in pursuit of that goal when arranging the Credit Agreement. And as it wasn't acting as an agent of Mr C but as the supplier of contractual rights he obtained under the Purchase Agreement, the transaction doesn't strike me as one with features that suggest the Supplier had an obligation of 'loyalty' to him when arranging the Credit Agreement and thus a fiduciary duty.

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

Commission: The Alternative Grounds of Complaint

While I've found that Mr C credit relationship with the Lender wasn't unfair to him for reasons relating to the commission arrangements between it and the Supplier, two of the grounds on which I came to that conclusion also constitute separate and freestanding complaints to Mr C's complaint about an unfair credit relationship. So, for completeness, I've considered those grounds on that basis here.

The first ground relates to whether the Lender is liable for the dishonest assistance of a breach of fiduciary duty by the Supplier because it took a payment of commission from the Lender without telling Mr C (i.e., secretly). And the second relates to the Lender's compliance with the regulatory guidance in place at the Time of Sale insofar as it was relevant to disclosing the commission arrangements between them.

However, for the reasons I set out above, I'm not persuaded that the Supplier – when acting as credit broker – owed Mr C 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 him. And while it's possible that the Lender failed to follow the regulatory guidance in place at the Time of Sale insofar as it was relevant to disclosing the commission arrangements between it and the Supplier, I don't think any such failure on the Lender's part is itself a reason to uphold this complaint because, for the reasons I also set out above, I think he would still have taken out the loan to fund his purchase at the Time of Sale had there been more adequate disclosure of the commission arrangements that applied at that time.

The PR's request for compensation for distress and inconvenience

I note the PR's request for compensation to be awarded to Mr C and Ms B to reflect the distress and inconvenience caused by the way in which the Lender has dealt with the complaint.

When making such an award, I must consider how what the financial business did wrong has impacted on the individual consumers concerned, and I cannot make such an award to punish or penalise a financial business.

I have provisionally decided not to uphold this complaint. Given I have not found that the Lender has done anything wrong, I cannot make an award for distress and inconvenience.

END OF COPY OF MY PROVISIONAL FINDINGS

The PR's response to my provisional decision

The PR's further comments in response to the provisional decision relate to the issue of whether the credit relationship between Mr C and the Lender was unfair. In particular, the PR has provided further comments in relation to whether the membership was sold to Mr C as an investment at the Time of Sale.

As outlined in my provisional decision, 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 provisional decision. Indeed, they haven't said they disagree with any of my provisional findings 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 provisional decision, I'll focus here on the PR's points raised in response.

Included in the PR's response to my provisional decision was an oral hearing request along with the offer to produce sworn affidavits. Oral hearings are something that I can direct to 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 C, other evidence including the documents from the sale, and full submissions from PR and Lender to decide what I think was most likely to have happened. I'm satisfied I'm able to weigh up what Mr C has 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 complaint.

I understand that the PR also offers to have Mr C provide a sworn affidavit. But I must remind them that we don't have strict evidential requirements. We aren't expected to decide complaints only after receiving sworn evidence. And our jurisdiction is investigative rather than adversarial. I remain of the view that the information we have on file is enough to cover all the issues I need to consider to reach a fair decision. And as I've considered everything on file, including the specific points raised by the PR as part of its request, I'm of the view that a hearing request and/or sworn affidavits aren't required.

As I explained in my provisional decision, although I found there was a possibility that the Supplier breached Regulation 14(3) at the Time of Sale, I am not persuaded that the investment potential of Fractional Club membership was material to Mr C and Ms B's decision to enter into the Purchase Agreement. So, I wasn't persuaded that the evidence suggested that Mr C purchased Fractional Club membership in whole or in part down to any breach of Regulation 14(3).

And as I already said in my provisional decision, it seems from what Mr C has had to say that they were persuaded to purchase because:

- They thought Fractional Club membership was the best option for their children and family circumstances (as opposed to keeping their Vacation Club membership) because:
    - They were concerned about their children inheriting a debt.
    - The earlier end date (compared to their existing Vacation Club membership) of 2032 gave them flexibility to either reinvest or terminate their contract with the Supplier.

The PR has stated that I've been inconsistent with my approach compared to previous decisions issued by this service, and provided examples it feels demonstrates this. But my decision is based on consideration of Mr C'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.

The PR has also reiterated that the judgment handed down in *Shawbrook & BPF v FOS* asserted that the relevant question in this circumstance is whether the breach of regulation 14(3) was a material factor in the decision to purchase, not whether it was the only factor or principal one. It feels that the testimony Mr C has provided demonstrates that this was the case. But, as I explained in my provisional decision, I'm not persuaded from the testimony that Mr C has adequately demonstrated that the promise of a profit was a motivating factor to his decision to move ahead with the purchase – principal or otherwise.

I accept that within the PR's new submissions Mr C has provided further evidence, stating the Supplier informed him that Fractional Club membership was a *"fantastic investment opportunity"* and *"a great investment as property prices were increasing and that our investment would be a great opportunity for the future"*. However, with this evidence there is a real risk that Mr C's testimony has been coloured by the Investigator's view and/or the outcome in *Shawbrook & BPF v FOS* and/or my provisional decision. Even considering this, Mr C is still not clear in stating that the effect of the Supplier's alleged representations made him hope or expect to make a profit, nor that this was a factor in his decision to purchase (rather Mr C says he expected to recoup *"some of the money invested over the years"*). And, on balance, the timing in which this evidence has been provided makes me conclude that I can place little weight on it.

So, ultimately, for the above reasons, along with those I already explained in my provisional decision, I remain unpersuaded that any breach of Regulation 14(3) was material to Mr C's purchasing decision. This means that, 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 C's decision to make the purchase was motivated by the prospect of a financial gain. So, I still don't think the credit relationship between Mr C and the Lender was unfair to him for this reason.

Conclusion

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

My final decision

For the reasons I've explained, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C and the estate of Ms B to accept or reject my decision before 1 January 2026.

Phillip Lai-Fang
Ombudsman