DRN-5845931

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 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 and Mrs H were members of a timeshare provider (the 'Supplier') – having purchased a number of products from it over time. But the product at the centre of this complaint is their membership of a timeshare that I'll call the 'Fractional Club' – points in which Mr and Mrs H purchased on the dates below:

- 1750 fractional points on 30 August 2013 for £7,838 (Purchase Agreement 1)
- 2200 fractional points on 30 July 2015 for £7,409 – having traded in the first lot of 1750 fractional points. (Purchase Agreement 2)

(which, when appropriate, I'll simply refer to as the ''Purchase Agreements')

As this complaint is concerned with the purchases on 30 August 2013 and 30 July 2015, those are the 'Times of Sale' for the purposes of my decision.

Fractional Club 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 the relevant purchase agreement (which I'll refer to as the 'Allocated Property 1 and 2' or, when appropriate, the 'Allocated Properties') after their membership term ends.

Mr and Mrs H paid for their fractional points by taking the following amounts of finance from the Lender:

- £7,838 on 30 August 2013 (Credit Agreement 1)
- £7,409 on 30 July 2015 (Credit Agreement 2)

(which, when appropriate, I'll simply refer to as the ''Credit Agreements')

Mr and Mrs H – using a professional representative (the 'PR') – wrote to the Lender on 25 June 2019 (the 'Letters of Complaint') to raise a number of different concerns in relation to each sale. As those concerns haven't changed since they were first raised, and as both sides are familiar with them, it isn't necessary to repeat them in detail here beyond the summary above.

The Lender dealt with Mr and Mrs H's concerns as a complaint and issued its final response letter on 15 August 2019, rejecting it on every ground. The complaint was then referred to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, upheld the complaint. The Lender didn't agree. The investigator reviewed the case again and rejected the complaint in respect of Purchase Agreement 1 but upheld the complaint in respect of Purchase Agreement 2 on its merits. Mr and Mrs H disagreed with the Investigator's second assessment and asked for an Ombudsman's decision – which is why it was passed to me for review. I issued a provisional decision (PD) explaining why I didn't think Mr and Mrs H's concerns in respect of both sales should be upheld. Following my PD, I also communicated 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 didn't agree. It provided documentation in support of the complaint, and it set out the reasons why it didn't agree with my decision and why it requested an oral hearing. In relation to what I had said about commission, it said it didn't intend to challenge what I had said in respect of that issue. It also subsequently provided an addendum to its appeal with additional evidence. I'm now finalising my decision.

The legal and regulatory context

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

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

<u>The Office of Fair Trading's Irresponsible Lending Guidance – 31 March 2010</u>

The primary purpose of this guidance was to provide greater clarity for businesses and consumer representatives as to the business practices that the Office of Fair Trading (the 'OFT') thought might have constituted irresponsible lending for the purposes of Section 25(2B) of the CCA. Below are the most relevant paragraphs as they were at the relevant time:

- Paragraph 2.2
- Paragraph 2.3
- Paragraph 5.5

<u>The OFT's Guidance for Credit Brokers and Intermediaries - 24 November 2011</u>

The primary purpose of this guidance was to provide clarity for credit brokers and credit intermediaries as to the standards expected of them by the OFT when they dealt with actual or prospective borrowers. Below are the most relevant paragraphs as they were at the relevant time:

- Paragraph 2.2
- Paragraph 3.7
- Paragraph 4.8

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

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.

And having done that, I remain of the opinion that this complaint should not be upheld. I've set out my reasoning again below.

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

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

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

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender doesn't dispute that the relevant conditions are met. But for reasons I'll come on to below, it isn't necessary to make any formal findings on them here.

The PR said that Fractional Club membership had been misrepresented by the Supplier at the Times of Sale because Mr and Mrs H were:

(1) told by the Supplier that Fractional Club membership had a guaranteed end date when that was not true.
(2) told by the Supplier that Fractional Club membership was an "investment" when that was not true.

However, telling prospective members that they were investing their money because they were buying a fraction or share of one of the Supplier's properties was not untrue. After all, a share in an allocated property was, by its very nature, an investment. And while, as I understand it, the sale of an Allocated Property could be postponed in certain circumstances according to the Fractional Club Rules, Mr and Mrs H say little to nothing to persuade me that they were given a guarantee by the Supplier that the Allocated Properties would be sold on a specific date, 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.

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

Section 75 of the CCA: the Supplier's Breach of Contract

I have already summarised how Section 75 of the CCA works and why it gives consumers a right of recourse against a lender. So, it is not 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.

Mr and Mrs H say that they could not holiday where and when they wanted to – which, on my reading of the complaint, suggests that the Supplier was not living up to its end of the bargain, potentially breaching the Purchase Agreements.

Yet, like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork likely to have been signed by Mr and Mrs H states that the availability of holidays was/is subject to demand. It also looks like they made use of their fractional points to holiday on a number of occasions. I accept that they may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreements.

Regarding the lack of exclusivity of the accommodation, the contemporaneous documents I've seen relating to the other accommodation available through the membership, do not say that the resorts in the Supplier's portfolio were exclusive to members. Resorts owned by the Supplier were described as "mixed use", while other resorts were described as resorts in which the Supplier had "secured accommodation…under its control" or which were "available through [our] partnerships with other resorts". None of this appears to state or imply that the resorts within the portfolio could only be booked by members. While I've no doubt the Supplier would have taken the opportunity to promote the quality of its resorts and services, I've not seen evidence that it made specific false statements about them.

So, from the evidence I have seen, I do not think the Lender is liable to pay Mr and Mrs H any compensation for a breach of contract by the Supplier. And with that being the case, I do

not think the Lender acted unfairly or unreasonably in relation to this aspect of the complaint either.

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

I've already explained why I'm not persuaded that Fractional Club membership was actionably misrepresented by the Supplier at the Time of Sale. But there are other aspects of the sales process that, being the subject of dissatisfaction, I must explore with Section 140A in mind if I'm to consider this complaint in full – which is what I've done next.

Having considered the entirety of the credit relationship between Mr and Mrs H 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 in relation to Fractional Club membership**,** including the contractual documentation and disclaimers made by the Supplier;
3. The commission arrangements between the Lender and the Supplier at the Time of Sale and the disclosure of those arrangements;
4. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;
5. The inherent probabilities of the sale given its circumstances; and, when relevant
6. Any existing unfairness from a related credit agreement.

I have then considered the impact of these on the fairness of the credit relationship between Mr and Mrs H and the Lender given their circumstances at the Time of Sale.

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 and is made for several reasons.

The PR says, for instance, that:

1. the right checks weren't carried out before the Lender lent to Mr and Mrs H; and
2. Mr and Mrs H were pressured by the Supplier into purchasing Fractional Club membership at the Times of Sale.

However, none of these strike me as reasons why this complaint should succeed. I haven't seen anything to persuade me that the right checks weren't carried out by the Lender given this complaint's 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 with the Lender was unfair to them for this reason. But from the information provided, I am not satisfied that the lending was unaffordable for Mr and Mrs H.

I acknowledge that Mr and Mrs H may have felt weary after sales processes that went on for a long time. But they say little about what was said and/or done by the Supplier during their

sales presentations that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to. They were also given 14-day cooling off periods and they have not provided a credible explanation for why they did not cancel their membership during those times. Moreover, they did go on to upgrade their membership – 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 decisions to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

Overall, therefore, I don't think that Mr and Mrs H 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 the PR now says the credit relationships with the Lender were unfair to them. And that's the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of the prohibition against selling timeshares in that way.

The Supplier's alleged breach of Regulation 14(3) of the Timeshare Regulations

Included in the PR's response to my PD was an oral hearing request along with the offer to produce sworn affidavits. 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 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 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.

The PR has also offered to have Mr and Mrs H provide a sworn affidavit. But I must remind it that the Financial Ombudsman Service doesn'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 enable me 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.

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

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

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

But the PR says that the Supplier did exactly that at the Time of Sale.

Shares in the Allocated Properties clearly constituted investments as they offered Mr and Mrs H the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But it is important to note at this stage that the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

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

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

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

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club 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 Properties 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 and Mrs H as an investment in breach of Regulation 14(3).

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

Were the credit relationships between the Lender and Mr and Mrs H rendered unfair?

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 that, 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.

But on my reading of the evidence before me, the prospect of a financial gain from Fractional Club membership was not an important and motivating factor when Mr and Mrs H decided to go ahead with their purchases. I say this because in their letter of claim to the Lender and complaint form in respect of Purchase Agreement 1, there is no mention of the Fractional Club membership being positioned as an investment. The complaint points appear to be focussed on the issues of commission, a high-pressured sales environment, the alleged misrepresentations and the actions of the Supplier that the PR says rendered the credit relationship unfair, and the lack of a proper affordability assessment.

The letter of claim in respect of Purchase Agreement 2 does refer to the 2015 sale being positioned as an investment. But surprisingly like the 2013 sale, the complaint form for that sale does not refer to an investment or similar. After it's initial response to my PD, the PR provided additional evidence in support of the claim. It provided a rescission letter to the Supplier dated 25 June 2019, in respect of the Timeshare purchases Mr and Mrs H had made with the Supplier. And it said that this was relevant in summary, because it predated the complaint to the Lender and this service by several years, and it expressly recorded that the allegations that the product was sold as an investment, with representations of return of profit, prompting Mr and Mrs H's request for rescission.

In November 2023 (after the judicial review decision on such timeshares) this service received a statement dated 15 March 2018 from the PR, which we're told was from Mr H. In respect of Purchase Agreement 1, the statement surprisingly, gives a different reasoning for the Fractional Club membership purchase, in that it was marketed to Mr and Mrs H as an investment.

I accept that the letter to the Supplier references the Timeshares being sold as an investment. But these are submissions, not direct testimony from Mr and Mrs H in respect of the allegations made. And direct testimony from Mr and Mrs H is vitally important to help me to assess the credibility and consistency of the submissions made and to clearly understand what was supposedly said, and to know the context in which it was supposedly said. It's also important for me to be able to see that the Letters of Claim and any subsequent submissions genuinely reflect Mr and Mrs H's testimony.

And as I said in my PD, I find it difficult to reconcile the fact that a statement which was ostensibly taken in March 2018, and provided to this service in November 2023, wasn't included with the documents in support of both claims, when the complaints were referred to this service in October 2019. The covering letters to this service that set out the documentation provided in support of the claims, make no reference to a statement from Mr H. And I find it difficult to understand why, if a statement in support of the claims had been taken in 2018, why it wasn't provided with the supporting documentation when the complaint was made in 2019.

Although the letter of complaint in respect of Purchase 2 and the letter to the Supplier refer to the Fractional Club membership upgrade being positioned as an investment, I do have concerns about the weight I can apply to Mr H's statement. I say this because I can't discount the possibility that notwithstanding the statement is dated from March 2018, that taking into account it wasn't provided to this service until November 2023, that its content was possibly influenced by the outcome of the judicial review. Also, the Lender has provided details of its contact notes from the Time of the Sales. The contact note dated 2 August 2015 records:

"Will use most times as have booked for ½ term. Bought for luxury and guaranteed availability. Happy CLC customers but availability has been their main problem but have been able to get what they wanted this year."

And in the witness statement Mr H said:

"In July 2015, we were on holiday in Spain when we were approached an invited along to another meeting. At this meeting which lasted a few hours, we had been taken to view an apartment that we were told that we would have guaranteed availability every biannual year. This was another very high pressured and very persistent sales environment as the representatives just played on our concerns about the increasing maintenance fees. We were told that if we changed to the biannual agreement, we would reduce our maintenance fees and increase our profit once it was all sold."

I accept that whilst the statement also references Mr and Mrs H being told the purchases would provide them with a profit, the contact notes appear to support what they have said in respect of the second purchase, about being motivated by guaranteed availability. What I've said above are points that I made in my PD. And I'm surprised that the PR hasn't engaged with what I said about Mr and Mrs H's evidence or provided any explanation for why the statement wasn't provided when the complaint was first referred to this service.

I accept that within the PR's new submissions Mr and Mrs H provided a supplementary e-mail / statement in respect of their recollections of what happened. But in my opinion, it doesn't really add any further insight over and above what Mr H said in his original statement. And considering the PR seems to be suggesting that Mr H provided his original statement in 2018, I would have expected him to have provided his full recollections of what happened when preparing his statement at that time. So, I don't agree therefore that he's suffered any prejudice in providing his evidence.

For the reasons I've set out above, I remain of the opinion that I'm unable to place any significant weight on what Mr H has said in his statement and the statement/email provided in response to my provisional decision.

So, taking into account everything I've said above, I'm not persuaded that the prospect of a financial gain from Fractional Club membership was an important and motivating factor when Mr and Mrs H decided to go ahead with these purchases.

The PR has 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 the specific facts and circumstances of Mr and Mrs H's complaint. Each complaint turns on its own facts. An ombudsman's decision on how one timeshare sale occurred does not determine their, or any other ombudsman's decisions about the facts of other sales at different times regarding different purchases. And I am not bound to follow what other ombudsman colleagues have said in other cases, that may on the face of it, appear ostensibly similar.

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 believes that the statements Mr and Mrs H provided, demonstrate that the investment inducement was a material factor in their decision to purchase the Timeshares, and that I have treated it as immaterial. I don't agree, because as I've explained above, I have concerns as to the weight I can apply to what Mr and Mrs H have said in their statements. As a result, I'm not persuaded from all of the evidence provided, that I can safely conclude that the promise of profit was a motivating factor in Mr and Mrs H's decision to move ahead with the purchases – principal or otherwise.

That doesn't mean Mr and Mrs H weren't interested in a share in the Allocated Properties. After all, that wouldn't be surprising given the nature of the product at the centre of this

complaint.

But as Mr and Mrs H themselves don't persuade me that their purchases were motivated by their shares in the Allocated Properties and the possibility of a profit, I don't think breaches of Regulation 14(3) by the Supplier were likely to have been material to the decisions Mr and Mrs H ultimately made.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Mrs H's decisions to purchase Fractional Club membership at the Times of Sale were 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 the credit relationships between Mr and Mrs H and the Lender were unfair to them even if the Supplier had breached Regulation 14(3).

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

The PR says that Mr and Mrs H were not given sufficient information at the Times of Sale by the Supplier about the ongoing costs of Fractional Club membership.

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

I acknowledge that it is also possible that the Supplier did not give Mr and Mrs H sufficient information, in good time, on the various charges they could have been subject to as Fractional Club members in order to satisfy the requirements of Regulation 12 of the Timeshare Regulations (which was concerned with the provision of 'key information'). But even if that was the case, I cannot see that the ongoing costs of membership were applied unfairly in practice. And as neither Mr and Mrs H nor the PR have persuaded me that they would not have pressed ahead with their purchases had the finer details of the Fractional Club's ongoing costs been disclosed by the Supplier in compliance with Regulation 12, I cannot see why any failings in that regard are likely to be material to the outcome of this complaint given its facts and circumstances.

As for the PR's argument that there were one or more unfair contract terms in the Purchase Agreement 2, I can't see that any such terms were operated unfairly against Mr and Mrs H in practice, nor that any such terms led them to behave in a certain way to their detriment. And with that being the case, I'm not persuaded that any of the terms governing Fractional Club membership are likely to have led to an unfairness that warrants a remedy.

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

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

The Supreme Court ruled that, in each of the three cases, the commission payments made to car dealers by lenders were legal, as claims for the tort of bribery, or the dishonest assistance of a breach of fiduciary duty, had to be predicated on the car dealer owing a

fiduciary duty to the consumer, which the car dealers did not owe. A “disinterested duty”, as described in *Wood v Commercial First Business Ltd & ors and Business Mortgage Finance 4 plc v Pengelly [2021] EWCA Civ 471*, is not enough.

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

1.The size of the commission (as a percentage of the total charge for credit). In Mr Johnson’s case it was 55%. This was “so high” and “a powerful indication that the relationship…was unfair” (see paragraph 327);
2. The failure to disclose the commission; and
3. The concealment of the commercial tie between the car dealer and the lender.

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

1.The size of the commission as a proportion of the charge for credit;
2. The way in which commission is calculated (a discretionary commission arrangement, for example, may lead to higher interest rates);
3. The characteristics of the consumer;
4. The extent of any disclosure and the manner of that disclosure (which, insofar as Section 56 of the CCA is engaged, includes any disclosure by a supplier when acting as a broker); and
5. Compliance with the regulatory rules.

But I don’t think Hopcraft, Johnson and Wrench assists Mr and Mrs H in arguing that their credit relationship with the Lender was unfair to them for reasons relating to commission given the facts and circumstances of this complaint.

I haven’t seen anything to suggest that the Lender and Supplier were tied to one another contractually or commercially in a way that wasn’t properly disclosed to Mr and Mrs H, 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 and Mrs H 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.

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 and Mrs H entered into wasn’t high. At £783.80, it was only 9.91% of the amount borrowed and even less than that (5.41%) as a proportion of the charge for credit. So, had they 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 persuaded that they either wouldn’t have understood that or would have otherwise questioned the size of the payment at that time.

After all, Mr and Mrs H wanted Fractional Club membership and had no obvious means of their own to pay for it. And at such a low level, the impact of commission on the cost of the credit they needed for a timeshare they wanted doesn’t strike me as disproportionate.

So, I think they would still have taken out the loan to fund their purchase at the Time of Sale had the amount of commission been disclosed.

What's more, based on what I've seen so far, the Supplier's role as a credit broker wasn't a separate service and distinct from its role as the seller of timeshares. It was simply a means to an end in the Supplier's overall pursuit of a successful timeshare sale. I can't see that the

Supplier gave an undertaking – either expressly or impliedly – to put to one side its commercial interests in pursuit of that goal when arranging the Credit Agreement. And as it wasn't acting as an agent of Mr and Mrs H but as the supplier of contractual rights they obtained under the Purchase Agreement, the transaction doesn't strike me as one with features that suggest the Supplier had an obligation of 'loyalty' to them when arranging the Credit Agreement and thus a fiduciary duty.

Overall, therefore, I'm not 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 and Mrs H.

Section 140A: Conclusion

Given all of the factors I've looked at in this part of my decision, and having taken all of them into account, I'm not persuaded that the credit relationship between Mr and Mrs H and the Lender under the Credit Agreement and related Purchase Agreement was unfair to them. And I don't think it would be fair or reasonable that I uphold this complaint on that basis.

Commission: The Alternative Grounds of Complaint

While I've found that Mr and Mrs H credit relationship with the Lender wasn't unfair to them 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 and Mrs H'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 and Mrs H (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 and Mrs H 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 because, for the reasons I also set out above, 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.

The Supplier's alleged breach of Spanish Law and its implications on the Credit Agreement

The PR appears to argue that the Purchase Agreement 2 was unlawful under Spanish law,

and that I should treat that Agreement and the Credit Agreement as rescinded by Mr and Mrs H and award them compensation accordingly.

However, as the Lender wasn't party to any court proceedings in Spain, and as I can't see that the Supplier (i.e., company that entered into the Purchase Agreement) is the subject of a Spanish court judgment in Mr and Mrs H's favour, it seems to me that there is an argument for saying the Purchase Agreement is valid under English law as the Purchase Agreement is governed by English law.

So, it isn't at all clear that Spanish law would be held relevant if the validity of the Purchase Agreement were litigated between its parties and the Lender in an English court. For example, in *Diamond Resorts Europe and Others* (Case C-632/21), the European Court of Justice ruled that, because the claimant lived in England and the timeshare contract governed by English law, it was English law that applied, not Spanish, even though the latter was more favourable to the claimant in ways that resemble the matters seemingly relied upon by the PR.

What's more, as it appears Mr and Mrs H have gone some way to taking advantage of the Purchase and Credit Agreement, an English court might hesitate to uphold a claim for rescission of the Agreement because there are equitable reasons to do so.

Overall, therefore, in the absence of a successful English court ruling on a timeshare case paid for using a point-of-sale loan on similar facts to this complaint, I'm not persuaded that it would be fair or reasonable to uphold this complaint for this reason.

Overall 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 and Mrs H's Section 75 claims, and I am not persuaded that the Lender was party to a credit relationship with them under the Credit Agreement that was unfair to them for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

My final decision

For 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 5 March 2026.

Simon Dibble
Ombudsman