

## The complaint

Mrs A's complaint is, in essence, that Shawbrook Bank Limited (the 'Lender') acted unfairly and unreasonably by (1) being party to unfair credit relationships with her 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

Mrs A purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') – points in which Mrs A purchased on the dates below:

- 1,200 fractional points on 17 February 2016 for £16,585 ('Purchase Agreement 1')
- 1,620 fractional points on 10 April 2017 for £7,559 – having traded in the first lot of 1,200 fractional points. ('Purchase Agreement 2')

(both of which, where appropriate, I may simply refer to as the "Purchase Agreements")

As this complaint is concerned with two purchases on 17 February 2016 and 10 April 2017, those are the 'Times of Sale' for the purposes of my decision. However, if appropriate, I may refer to the 'Time of Sale 1' and 'Time of Sale 2' where there's a need to differentiate.

Mrs A did later trade in fractional points towards points in another Fractional Club membership. However, Mrs A funded that purchase from her own resources and, as a consequence, the Lender wasn't party to that transaction, which means that purchase doesn't form part of the complaint being considered here.

Fractional Club membership was asset backed – which meant it gave Mrs A more than just holiday rights. It also included a share in the net sale proceeds of properties named on the relevant purchase agreements (which I'll refer to as 'Allocated Property 1 and 2' or, when appropriate, the 'Allocated Properties') after their membership term ends.

Mrs A paid for her fractional points by taking the following amounts of finance from the Lender:

- £16,585 on 17 February 2016 ('Credit Agreement 1')
- £23,413<sup>1</sup> on 10 April 2017 ('Credit Agreement 2')

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

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<sup>1</sup> This included an amount of £15,854 to enable repayment of Credit Agreement 1.

Mrs A – using a professional representative (the ‘PR’) – wrote to the Lender on 6 March 2023 (the ‘Letters of Complaint’) to raise a number of different concerns. As those concerns haven’t changed since they were first raised, and as both sides are familiar with them, it isn’t necessary to repeat them in detail here beyond the summary above.

The Lender dealt with Mrs A’s concerns as a complaint and issued its final response letter on 25 April 2024, rejecting it on every ground.

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

Mrs A disagreed with the Investigator’s assessment and asked for an Ombudsman’s decision – which is why it was passed to me.

I considered the matter and issued a provisional decision (the ‘PD’). In that decision, I said:

### **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.

Furthermore, creditors can reasonably reject Section 75 claims that they are first informed about after the claim has been time-barred under the Limitation Act 1980 (the ‘LA’). The reason being that it wouldn’t be fair to expect creditors to look into such claims so long after the liability first arose and after a limitation defence would be available in court.

Having considered everything relating to Purchase Agreement 1, I think Mrs A’s claim for misrepresentation under it is likely to have been made too late under the relevant provisions of the LA, which means it would have been fair for the Lender to have turned down her section 75 claim for this reason

A claim under section 75 is a “like” claim against the creditor. It essentially mirrors the claim Mrs A could make against the Supplier. A claim for misrepresentation against the Supplier would ordinarily be made under Section 2(1) of the Misrepresentation Act 1967. And the limitation period to make such a claim expires six years from the date on which the cause of action accrued (see section 2 of the LA).

But a claim under section 75, like this one, is also “*an action to recover any sum by virtue of any enactment*” under section 9 of the LA. And the limitation period under that provision is also six years from the date on which the cause of action accrued.

The date on which the cause of action accrued here was the Time of Sale 1. I say this because Mrs A entered into that purchase of the Fractional Club membership at that time based upon the alleged misrepresentations of the Supplier – which Mrs A says she relied upon. And as Credit Agreement 1 with the Lender provided funding to help finance that purchase, it was when she entered into Credit Agreement 1 that they allegedly suffered the loss.

Mrs A first notified the Lender of her concerns in March 2023. Since this was more than six years after the Time of Sale, I don't think it was ultimately unfair or unreasonable of the Lender to reject their concerns about the Supplier's alleged misrepresentations at the Time of Sale 1.

In relation to Purchase Agreement 2, 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.

It was said in the Letters of Complaint that Fractional Club membership had been misrepresented by the Supplier at the Times of Sale because Mrs A was:

1. Told that she had purchased an investment that would "considerably appreciate in value".
2. Promised a considerable return on her investment because she was told that she would own a share in a property that would considerably increase in value.
3. Told that she could sell her Fractional Club membership to the Supplier or easily to third parties at a profit.
4. Made to believe that she would have access to "the holiday apartment" at any time all year round.

However, neither points 1 nor 2 strike me as misrepresentations even if such representations had been made by the Supplier (which I make no formal finding on). 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. And even if the Supplier's sales representatives went further 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 enough 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.

As for point 3 and 4, while it's *possible* that Fractional Club membership was misrepresented at the Time of Sale 2 for one or both of those reasons, I don't think it's *probable*. The PR and Mrs A have given little to none of the colour or context necessary to demonstrate that the Supplier made a false statement of existing fact and/or opinion. And as there isn't any other evidence on file to support the suggestion that Fractional Club membership was misrepresented for those reasons, I don't think it was.

So, while I recognise that Mrs A 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 140A of the CCA: did the Lender participate in one or more unfair credit relationships?**

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I've already explained why I'm not persuaded that Fractional Club membership was actionably misrepresented by the Supplier at the Time of Sale 2. But there are other aspects of the sales process for both purchases 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 relationships between Mrs A and the Lender along with all of the circumstances of the complaint, I don't think the credit relationships between them were likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. The standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Times of Sale along with any relevant training material;
2. The provision of information by the Supplier at the Times of Sale, including the contractual documentation and disclaimers made by the Supplier;
3. Evidence provided by both parties on what was likely to have been said and/or done at the Times of Sale;
4. The inherent probabilities of the sale given its circumstances; and, when relevant
5. Any existing unfairness from a related credit agreement.

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

### **The alleged misrepresentation in relation to Purchase 1**

In determining if the relationship is unfair under Section 140A, I think the alleged misrepresentations are relevant here. So, even though I think it likely they couldn't be considered under Section 75 due to the effects of the LA, I think they could still be considered under s.140A CCA<sup>2</sup>. So, in trying to establish whether I think a court would likely find that an unfair relationship existed, I've considered those alleged misrepresentations further in addition to the various other points raised in this complaint.

Having done so, I've reached the same conclusion for broadly the same reasons as I did in relation to Purchase Agreement 2 (as explained above). And that means that I can't reasonably conclude that the alleged misrepresentations resulted in an unfair credit relationship between the Lender and Mrs A under Section 140A.

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

Mrs A's complaint about the Lender being party to one or more unfair credit relationships was made for several reasons.

The PR says, for instance, that the right checks weren't carried out before the Lender lent to Mrs A. 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 Mrs A was actually unaffordable before also concluding that she lost out as a result and then consider whether the credit relationships with the Lender were unfair to her for this reason. But from the information provided, I am not satisfied that the lending was unaffordable for Mrs A.

Connected to this is the suggestion by the PR that the Credit Agreements were arranged by an unauthorised credit broker, the upshot of which is to suggest that the Lender wasn't permitted to enforce the Credit Agreements. However, it looks to me like Mrs A knew, amongst other things, how much she was borrowing and repaying each month, who she was borrowing from and that she was borrowing money to pay

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<sup>2</sup> See Scotland & Reast v. British Credit Trust Limited [2014] EWCA Civ 790

for Fractional Club membership. And as the lending doesn't look like it was unaffordable for her, even if the Credit Agreements were arranged by a broker that didn't have the necessary permission to do so (which I make no formal finding on), I can't see why that led to Mrs A suffering financial loss – such that I can say that the credit relationships in question were unfair on her as a result. And with that being the case, I'm not persuaded that it would be fair or reasonable to tell the Lender to compensate her, even if the loans weren't arranged properly.

Whilst not specifically mentioned within the Letters of Complaint, A statement from Mrs A includes the following recollections:

*“I felt worn down, tired and just wanted to go.”*

*“Feeling the pressure I agreed so a credit check was carried out.”*

I acknowledge that Mrs A may have felt weary after sales processes that went on for a long time. But she says little about what was said and/or done by the Supplier during the sales presentations that made her feel as if she had no choice but to purchase Fractional Club membership when she simply did not want to. She was also given a 14-day cooling off period on each occasion - but she has not provided a credible explanation for why she did not cancel her membership during that time. Moreover, she did later go on to upgrade her membership – which I find difficult to understand if the reason she went ahead with the purchases in question was because she was pressured into them. And with all of that being the case, there is insufficient evidence to demonstrate that Mrs A made the decision to purchase Fractional Club membership because her ability to exercise that choice was significantly impaired by pressure from the Supplier.

Overall, therefore, I don't think that Mrs A credit relationships with the Lender was rendered unfair to her under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why the PR says the credit relationships with the Lender was unfair to her. And that's the suggestion that Fractional Club membership was marketed and sold to her as an investment in breach of prohibition against selling timeshares in that way.

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

The Lender does not dispute, and I am satisfied, that Mrs A'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 Times of Sale – saying, in summary, that Mrs A was told by the Supplier that Fractional Club membership was the type of investment that would only increase in value.

The term “investment” is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and by reference to the decided authorities, an

investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit.

Shares in the Allocated Properties clearly constituted investments as they offered Mrs A the prospect of a financial return – whether or not, like all investments, that was more than she 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 Mrs A 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 her as an investment, i.e. told her or led her to believe that Fractional Club membership offered her 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 Mrs A, the financial value of her 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 Mrs A 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 the Consumer 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 Mrs A 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 Mrs A and the Lender that were unfair to her and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led her 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 Mrs A decided to go ahead with her purchases.

I have considered a statement provided by the PR which was presented as having been written by Mrs A, albeit it is unsigned and undated. The Lender's final response refers to it having seen Mrs A's recollections, so I have considered the contents of this document carefully.

In her statement, Mrs A provides a detailed account of the events and circumstances of her purchases. In particular, describing what she was told and shown. In relation to the Time of Sale 1, Mrs A recalls:

*"...the head of sales [...] set out the finances and convinced me of the value of purchasing a fraction with them. Lots of diagrams were used to set out how much cheaper it would be to holiday with them and kept referring to the computer to illustrate what a good proposition this was."*

*"Along with all this they would throw in a bonus week to use in the next year so my points could build up, 500 bonus points for the next 3 years, a discount voucher of 100% for use in Spain, Tenerife or the UK valid for 24 months in low season and 2 years membership of interval."*

Mrs A goes on to recall:

*"On return to England trying to book the bonus week was a nightmare as it had to be during school holidays and I also wanted a 3 bedroom apartment [...] I managed to get a week in the Easter holidays, April 2017..."*

In relation to the Time of Sale 2, Mrs A recalls:

*“[...] I was asked to attend a meeting the next day to review my experience with the club [...] a more senior rep came over to ask about our experience and if it could be enhanced in any way as they were continually making improvements [...] I then sat through a long session of diagrams and charts again to then be told what I had purchased already did not fit my needs and once again a senior sales person came over to show me that by adding another fraction I could improve my points and therefore increase my holidaying options.”*

Towards the end of her statement, Mrs A adds:

*“On all three occasions I was told that the ownership of fractions would be an investment and at the end of the contract could be sold, even back to the resort having made some money”.*

I acknowledge Mrs A's comment here. And as I've already said above, that wouldn't be untrue given that there was clearly an investment element to the Fractional Club product. However, Mrs A certainly makes no suggestion that she decided to purchase Fractional Club membership as an investment.

I don't think this is sufficient for me to be able to conclude that Mrs A was materially motivated by the prospect of a profit or financial gain when deciding to purchase and later upgrade her Fractional Club membership. Her statement doesn't say that. There is a real lack of detail or colour to that part of her testimony, which to me suggests Mrs A may not have particularly strong recollections of what happened or what was said on the subject at the Times of Sale. Of course, that's not her fault, but it's not a reasonable basis for me to arrive at any conclusions about her motivations at the Times of Sale.

The overriding theme of Mrs A's recollections seems to focus upon the holiday benefits associated with Fractional Club membership. Whether that be in terms of accommodation size, available dates, accommodation quality, additional benefits and incentives offered or her booking experience. And many of those requirements appear to have been driven by a desire to be able to enjoy holidays with other members of her family. I sense that upon each occasion, Mrs A was motivated by a desire to broaden and improve those holiday options. And I believe her decisions to purchase and then upgrade her membership – including a subsequent (self-funded) upgrade in April 2018 – were underpinned by that desire.

That doesn't mean she wasn'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 Mrs A herself doesn't persuade me that her purchases were motivated by the share 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 Mrs A 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 Mrs A'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 Mrs A and the Lender were unfair to them even if the Supplier had breached Regulation 14(3).

## **Insolvency of the Supplier and its implications under the Credit Agreement**

The PR argues that, because the Supplier, together with various associated businesses, entered into a liquidation procedure in December 2020, Mrs A is not able to recover any amount that is expected to be awarded by the Spanish court.

However, as the Lender hasn't been party to any court proceedings in Spain, and as I can't see that the Supplier (i.e., the company that entered into the Purchase Agreements) is itself the subject of a Spanish court judgment in Mrs A's favour, it seems to me that there is an argument for saying that the Purchase Agreements remains valid under English law for the purposes of the ruling set out in *Durkin v DSG Retail* [2014] UKSC 21.

I also note that the Purchase Agreements are governed by English law. So, it isn't at all clear that Spanish law would be held relevant if the validity of the Purchase Agreements were litigated between the 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 was 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.

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, and given the facts and circumstances of this complaint, I'm not persuaded that it would be fair or reasonable to uphold it for this reason.

In conclusion, given the facts and circumstances of this complaint, I did not think that the Lender acted unfairly or unreasonably when it dealt with Mrs A's Section 75 claim(s), and I was not persuaded that the Lender was party to a credit relationship with her under the Credit Agreement that was unfair to her for the purposes of Section 140A of the CCA. And having taken everything into account, I could see no other reason why it would be fair or reasonable to direct the Lender to compensate her.

The Lender responded to the PD and accepted it.

The PR also responded. It did not accept the PD and provided some further comments it wanted me to take into account.

Having received the relevant responses from both parties, 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 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

**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 only relate to the issue of whether the credit relationship between Mrs A and the Lender was unfair. In particular, the PR has provided further comments in relation to whether the membership was sold to Mrs A as an investment at the Time of Sale. It has also now argued for the first time that the payment of a commission by the Lender to the Supplier led to an unfair credit relationship.

As outlined in my PD, the PR originally raised various other points of complaint, all of which I addressed at that time. But it didn't make any further comments in relation to those in its response to my PD. Indeed, it hasn't said it disagrees 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 140A of the CCA: did the Lender participate in an unfair credit relationship?

The PR has highlighted under Section 140B (9) of the CCA, the burden of proof falls on the Lender to disprove the allegation that its relationship with Mrs A was unfair. I agree that this is correct, placing a burden on lenders during the process of litigation. That does not mean, though, that the Lender – or I – should take a claim at face value. There remains an onus on Mrs A to provide some evidence for the claim she is making, despite the overall burden of proof resting with the Lender, as was set out in the judgment in *Smith and another v Royal Bank of Scotland plc* [2023] UKSC 34 at paragraph 40. I also remind both parties that it is my role to make findings on what I consider to be fair and reasonable in all the circumstances of any given complaint.

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

In its response to my PD, the PR has reasserted its view that the Supplier marketed the Fractional Club membership to Mrs A as an investment and that this was a motivating factor in her decision.

I accepted in my PD that the membership may well have been marketed as an investment to Mrs A in breach of the prohibition in Regulation 14(3) of the Timeshare Regulations. I also explained that while the Supplier's sales processes left open the possibility that the sales representative may have positioned Fractional Club membership as an investment, it wasn't necessary for me to make a finding on this as it is not determinative of the outcome of the complaint. I explained that regulatory breaches do not automatically create unfairness and that such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way. The PR's response to my PD hasn't changed my view of this, and so whether the Supplier's breach of Regulation 14(3) led Mrs A to enter into the Purchase Agreement and the Credit Agreement remains an important consideration.

In my PD I explained the reasons why I didn't think any breach of Regulation 14(3) had led Mrs A to proceed with her purchase. In short, I was not persuaded that her decision was motivated by the prospect of a financial gain (i.e., a profit). In reaching that view, I took into account the testimony given by Mrs A in the course of her complaint. I recognise the PR has interpreted Mrs A's testimony differently to how I have, and I have carefully considered its further comments. Ultimately though, they have not led me to a different conclusion.

The PR objects to the approach I've taken in assessing this aspect of the complaint, believing that I have detracted from the judgment in *Shawbrook & BPF v FOS*<sup>3</sup> and the case law that contributed to it, by requiring Mrs A to have been "primarily or mainly motivated" by the investment element in order to uphold the complaint. But I did not make such a finding. I said that, in my view, Mrs A was highly motivated by the holiday options offered by the Supplier – which was a factor in my overall conclusion in light of all the available evidence that she would, on balance, have pressed ahead with her purchase of the Fractional Club membership even if there had been a breach of Regulation 14(3).

The PR points to a small section within Mrs A's witness statement in which she said:

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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) ('Shawbrook & BPF v FOS').

*“On all three occasions I was told that the ownership of fractions would be an investment and at the end of the contract could be sold, even back to the resort having made some money”.*

In my PD I acknowledged this, explained my findings and my reasons for them. The PR’s comments have not persuaded me to vary from those findings, and I remain of the view that Mrs A’s purchasing decisions were ultimately driven by an apparent desire to broaden and improve her holiday options under Fractional Club membership.

So, for the reasons given in my PD and above, I still do not think that any breach of Regulation 14(3), if there was one, was material to Mrs A’s decision to purchase the Fractional Club membership.

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

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

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.

From my reading of the Supreme Court's judgment in *Hopcraft, Johnson and Wrench*, it sets out 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, *Hopcraft, Johnson and Wrench* 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 *Hopcraft, Johnson and Wrench* assists Mrs A in arguing that her credit relationship with the Lender was unfair to her 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 Mrs A, nor have I seen anything that persuades me that the commission arrangements between them gave the Supplier a choice over the interest rate that led Mrs A into credit agreements that cost disproportionately more than they 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 each 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 each Sale, it is for the reasons set out below that I don't think any such failure is itself a reason to find the credit relationship in question unfair to Mrs A.

In stark contrast to the facts of Mr Johnson's case, as I understand it, the Lender didn't pay the Supplier any commission at the Time of Sale 1 (in February 2016). And the amount of commission paid by the Lender to the Supplier for arranging Credit Agreement 2 that Mrs A entered into (in April 2017) wasn't high. At £1,170.65, it was only 5% of the amount borrowed and even less than that (4.63%) as a proportion of the charge for credit. So, had she 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 she either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. After all, Mrs A wanted Fractional Club membership and had no obvious means of her own to pay for it. And at such a low level, the impact of commission on the cost of the credit she needed for a timeshare she wanted doesn't strike me as disproportionate. So, I think she would still have taken out the loan to fund her purchase at the Time of Sale 2 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 Agreements. And as it wasn't acting as an agent of Mrs A but as the supplier of contractual rights she obtained

under the Purchase Agreements, the transactions don't strike me as ones with features that suggest the Supplier had an obligation of 'loyalty' to her when arranging the Credit Agreements 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 Mrs A.

### S140A 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 Mrs A and the Lender under the Credit Agreement and related Purchase Agreement was unfair to her. So, I don't think it is fair or reasonable that I uphold this complaint on that basis.

### **Commission: The Alternative Grounds of Complaint**

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While I've found that Mrs A's credit relationship with the Lender wasn't unfair to her 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 Mrs A'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 Mrs A (i.e., secretly). And the second relates to the Lender's compliance with the regulatory guidance in place at the Time of Sale 2 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 Mrs A 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 her. And while it's possible that the Lender failed to follow the regulatory guidance in place at the Time of Sale 2 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 she would still have taken out the loan to fund her purchase at the Time of Sale had there been more adequate disclosure of the commission arrangements that applied at that time.

### **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 Mrs A's Section 75 claims, and I am not persuaded that the Lender was party to a credit relationship with her under the Credit Agreement that was unfair to her 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 her.

### **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 Mrs A to accept or reject my decision before 9 April 2026.

Dave Morgan  
**Ombudsman**