DRN-5902623

The complaint

Mr and Mrs M'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 a claim under Section 75 of the CCA.

Mr and Mrs M are represented in their complaint by a professional representative ('PR').

What happened

I issued a provisional decision on Mr and Mrs M's complaint on 24 July 2025, in which I set out the background to the case and my provisional findings on it. A copy of that provisional decision is appended to, and forms a part of, this final decision, so it's not necessary to go over the details again. However, in very brief summary:

- Mr and Mrs M bought a timeshare from a timeshare provider (the "Supplier") on 30 October 2015 (the "Time of Sale"), for £27,484 (reduced to £24,489 after the trade in of an existing "Trial" timeshare). This was financed by a loan of £26,569 from the Lender (the "Credit Agreement"), which also consolidated existing debt relating to the Trial timeshare.

- The timeshare was a type of asset-backed timeshare which entitled Mr and Mrs M to more than holiday rights. It also entitled them to a share in the proceeds of a property named on their purchase agreement (the "Allocated Property") after their contract came to an end.

- Mr and Mrs M later complained, via a professional representative ("PR"), to the Lender about a number of concerns which included misrepresentations by the Supplier giving them a claim against the Lender under Section 75 of the CCA, and matters giving rise to an unfair credit relationship between them and the Lender. Mr and Mrs M also argued that the Credit Agreement should be treated as rescinded due to a Spanish Court declaring their timeshare purchase null and void.

- The Lender rejected the complaint and it was then referred to the Financial Ombudsman Service for an independent assessment.

In my provisional decision I said I didn't think the complaint should be upheld. Again, my full findings can be found in the appended provisional decision, but in very brief summary:

- The Lender had not been unfair or unreasonable in declining Mr and Mrs M's Section 75 claim for misrepresentation because the claim had been time-barred under the Limitation Act 1980 at the time it had been notified to the Lender.

- The Lender had not participated in a credit relationship with Mr and Mrs M that was unfair to them because:

    - Regardless of whether the Lender had carried out appropriate checks before

lending to Mr and Mrs M, there was a lack of evidence the loan had been unaffordable for them at the time.

- The regulatory status of the credit broker which had arranged the Credit Agreement had no bearing on the fairness of the credit relationship between Mr and Mrs M, and the Lender. There was no evidence of any detriment having been caused to Mr and Mrs M if indeed the credit broker had not been regulated (which I made no finding on).

- There was insufficient persuasive evidence that Mr and Mrs M had only signed up for the timeshare because their ability to make a choice had been significantly impaired by pressure from the Supplier.

- While unfair terms within the Purchase Agreement had been referred to by PR, I couldn't see that these terms had been operated in an unfair way with respect to Mr and Mrs M or caused them to behave to their detriment.

- It was possible the Supplier had breached Regulation 14(3) of the Timeshare Regulations by marketing the timeshare to Mr and Mrs M as an investment, but in the circumstances, I was unable to conclude that, if this had happened, it had rendered the credit relationship between them and the Lender unfair to them. This was because:

    - I could not attach enough weight to Mr and Mrs M's testimony, as I had concerns over how late it had been received in the complaints process, after events which could have influenced their recollections.

    - I considered that, at any rate, Mr and Mrs M's recollections did not strongly support them having made their purchase because they had been motivated by the prospect of the timeshare being an investment.

- While it may have been the case that a Spanish court had ruled Mr and Mrs M's timeshare purchase contract null and void, it didn't necessarily follow that this had any impact on the Credit Agreement. I noted there was an argument the purchase contract had been valid under English law, and in the absence of some English legal precedent to support the arguments made by Mr and Mrs M, I didn't think it was fair and reasonable to uphold their complaint for this reason.

I invited the parties to the complaint to respond to my provisional decision. The Lender accepted the provisional decision. PR didn't agree with the provisional decision, and asked me to consider various additional points relating to the alleged sale of the timeshare as an investment, but also relating to the alleged non-disclosure of a commission paid by the Lender to the Supplier for arranging the Credit Agreement, and the matter of Mr and Mrs M's Spanish court case against the Supplier. The case has now been returned to me to decide.

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 3.7.3R
- CONC 4.5.3R
- CONC 4.5.2G

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.

PR's comments in response to the provisional decision relate chiefly to the issue of whether the credit relationship between Mr and Mrs M and the Lender was unfair. In particular, PR has provided further comments in relation to whether the membership was sold to Mr and Mrs M as an investment at the Time of Sale, and the impact of this on their purchasing decision. 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, and has provided some further comments on the matter of the Spanish legal case between Mr and Mrs M and the Supplier and its impact on the Credit Agreement.

As outlined in my provisional decision, PR originally raised various other points of complaint. But it didn't make any further comments in relation to those in its response to my provisional decision. Indeed, it hasn't said it disagrees with any of my provisional conclusions in relation to those other points, and in light of that I intend to focus here on PR's points raised in relation to the sale of the timeshare to Mr and Mrs M as an investment, and the alleged payment of a commission.

That said, having reviewed the case again I do need to clarify a point around Mr and Mrs M's concerns about the Supplier's alleged misrepresentations – which they had attempted to find

the Lender liable for under Section 75 of the CCA. In my provisional decision I found that Mr and Mrs M's Section 75 claim for misrepresentation had been brought outside of the period allowed under the Limitation Act 1980, meaning it was time-barred.

Misrepresentations are also a relevant factor when considering whether or not a credit relationship has been rendered unfair. So while Mr and Mrs M's misrepresentation concerns were not something which could give rise to a valid claim against the Lender under Section 75 of the CCA, they could be considered as part of their claim that their credit relationship was rendered unfair to them. PR hasn't commented further on the question of the Supplier's alleged misrepresentations, but for the avoidance of doubt I don't think these rendered the credit relationship between Mr and Mrs M and the Lender unfair to them. I say this because:

- Some of the alleged false statements appear to have been statements of opinion, rather than fact, and it would be difficult to determine that those statements were not honestly held by the Supplier's representatives. This would include, for example, the statement that the Allocated Property would "considerably increase in value".
- The rest of the alleged false statements are too vague and lacking in colour or context to be able to conclude an actionable misrepresentation had been made.

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

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

PR says it hadn't shared the Investigator's assessment on this complaint with Mr and Mrs M, saying this was done in order not to influence their recollections. PR said Mr and Mrs M were also unaware about the judgment handed down in *Shawbrook and BPF v FOS*[1]. PR said this means their recollections have not been influenced by either the Investigator's assessment or the judgment.

Part of my assessment of Mr and Mrs M's testimony was to consider *when* it was written, and whether it may have been affected by external factors such as the widespread publication of the outcome of *Shawbrook and BPF v FOS*.

I have thought about what PR has said, but on balance, I don't find it a credible explanation of the contents of Mr and Mrs M's evidence. Here, PR responded to our Investigator's assessment to say that Mr and Mrs M alleged that the timeshare had been sold to them as an investment and it provided evidence from Mr and Mrs M to that effect. I fail to understand how Mr and Mrs M disagreed with the assessment on the basis that the timeshare was sold as an investment if they didn't know our Investigator's conclusions. It follows, in my view, that Mr and Mrs M did know about our Investigator's assessment before their evidence was provided.

So, I maintain that there is a risk that Mr and Mrs M's testimony was coloured by later events such as our Investigator's assessment and/or the outcome in *Shawbrook & BPF v FOS*. And, on balance, the way in which the evidence has been provided makes me conclude that I have to treat it with considerable caution and can place little weight on it.

PR has also said it disagrees with my analysis of the content of Mr and Mrs M's testimony. I

[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*').

noted in my provisional decision that an investment motivation hadn't come across in their statement, but what had come across was that they'd signed up on the day to escape the sales process. PR essentially argues that it isn't credible that someone would sign up for something due to pressure alone. In their testimony, Mr and Mrs M said: *"In desperation to get away and get back to our family we finally signed up…"* Apart from this, they don't say anything about the *reasons* why they made the purchase. While I do understand PR's point, I remain of the view that Mr and Mrs M's testimony doesn't really make the case that PR thinks it does, on top of the serious difficulties associated with the timing of their evidence.

PR has also made a number of more general points about how the Supplier sold timeshares, which I have read, but without enough credible and persuasive evidence that Mr and Mrs M's purchase was materially motivated by the prospect of their timeshare being an investment in the sense of something that they hoped or expected to make them a financial gain or profit, then I'm unable to say that any breach by the Supplier of Regulation 14(3) led to a credit relationship with Mr and Mrs M that was unfair to them.

The implications of the Spanish court judgment

PR disagrees with my assessment of the implications of the Spanish court judgments. It argues that the judgment of the European Court of Justice ("ECJ") I referred to involved a different timeshare provider and therefore isn't applicable to Mr and Mrs M's scenario.

It also argues that the choice of law clause in Mr and Mrs M's contract (which chose English law – the law of Mr and Mrs M's country of residence) was an unfair term.

Furthermore, PR argues it was open to the Spanish courts to apply Spanish timeshare laws even in scenarios, like Mr and Mrs M's, where the law chosen in the contract was English law.

I'm not convinced that the fact the ECJ judgment involved a different timeshare provider means the principles set out in that judgment cannot be applied to analogous situations where the same choice of law issues are relevant.

Regarding the fairness of the choice of law clause – I note the ECJ commented on this in a judgment referred to by PR, C-821/21, which involved the Supplier.

The ECJ did not say that such clauses were objectionable, unless there was a failure to inform the consumer that they would also enjoy the protection of the law of their country of habitual residence, so they are not "led into error" about this. The court did not say that the Supplier's choice of law clause in that case was objectionable, observing that the law selected under the clause was the same as that of the consumer's country of habitual residence.

I cannot see that the Supplier informed Mr and Mrs M in this case that they would enjoy the protection of the laws of their place of habitual residence, but I fail to see what difference that would have made given the laws chosen in the contract and the laws of their place of habitual residence would have been the same.

Finally, PR's argument that the Spanish courts are free to apply Spanish laws in circumstances where a contract contains a choice of law clause selecting English law, doesn't appear to be supported by the case PR has cited. While it appears that this is something which is technically possible, the ECJ did not answer the question in its judgment insofar as it related to the choice of law clauses in timeshare contracts. The ECJ ruled that the question was inadmissible for want of detail.

Given what I've said above, I'll repeat what I said in my provisional decision, which is that 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, I'm still not persuaded it would be fair or reasonable to uphold it for the reasons PR has articulated relating to the Spanish court judgments.

The provisional 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 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 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 Mr and Mrs M 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.

Based on what I've seen, 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 M 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.

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 M, 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 them into a credit agreement that cost disproportionately more than it otherwise could have.

What's more, in stark contrast to the facts of Mr Johnson's case, as I understand it, no payment between the Lender and the Supplier, such as a commission, was payable when the Credit Agreement was arranged at the Time of Sale. And with that being the case, even if there were information failings at that time and regulatory failings as a result (which I make no formal finding on), I'm not currently persuaded that the commercial 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 M.

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

My final decision

For the reasons explained above, and in my appended provisional decision, I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs M to accept or reject my decision before 30 January 2026.

Will Culley
Ombudsman

COPY OF PROVISIONAL DECISION

I've considered the relevant information about this complaint.

Having done so, I've arrived at broadly the same conclusions as our Investigator, but I've explained my reasons in more detail, so I have decided to give the parties to the complaint a further opportunity to make submissions before I make my decision final.

The deadline for both parties to provide any further comments or evidence for me to consider is **7 August 2025**. Unless the information changes my mind, my final decision is likely to be along the following lines.

If I don't hear from Mr and Mrs M, or if they tell me they accept my provisional decision, I may arrange for the complaint to be closed as resolved without a final decision.

The complaint

Mr and Mrs M'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 a claim under Section 75 of the CCA.

What happened

Mr and Mrs M purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 30 October 2015 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,820 fractional points at a cost of £27,484 (the 'Purchase Agreement'). A previous 'Trial' membership held by Mr and Mrs M was traded in against this price, leaving £23,489 to pay.

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

Mr and Mrs M paid for their Fractional Club membership by taking finance of £26,569 from the Lender (the 'Credit Agreement'). The loan was larger than the price of the timeshare, because it consolidated some existing debt relating to the Trial membership. I understand the loan was settled in October 2018.

Mr and Mrs M – using a professional representative (the 'PR') – wrote to the Lender on 17 November 2021 (the 'Letter of Complaint') to raise a number of different concerns. As those concerns haven't fundamentally 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 failed to respond to the complaint, and in March 2022 the matter was 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.

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

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 ombudsman decisions on very similar complaints. And with that being the case, it is not necessary to set it out here.

What I've provisionally decided – and why

I I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. And having done that, I do not think this complaint should be upheld.

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 Time of Sale

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

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.

It was said in the Letter of Complaint that Fractional Club membership had been misrepresented by the Supplier at the Time of Sale because Mr and Mrs M were:

1. Told that they had purchased an investment that would "considerably appreciate in value".

2. Promised a considerable return on their investment because they were told that they would own a share in a property that would considerably increase in value.

3. Told that they could sell their Fractional Club membership to the Supplier or easily to third parties at a profit.

4. Made to believe that they would have access to "the holiday apartment" at any time all year round.

As a general rule, I think it's reasonable for creditors to reject Section 75 claims that they are first informed about after the claim has become time-barred under the Limitation Act 1980 ("LA"), as it wouldn't be fair to expect creditors to look into such claims so long after the

liability arose and after a limitation defence would have been available in court. So, it is relevant to consider whether Mr and Mrs M's Section 75 claim was time-barred under the LA *before* PR put the claim to the Lender on their behalf.

A claim under Section 75 is a "like claim". This means it mirrors the claim Mr and Mrs M could have made 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.

Any claim against a lender under Section 75 is also "an action to recover any sum by virtue of any enactment" under Section 9 of the LA. Such claims *also* have a time limit of six years from the date the cause of action accrued.

In claims for misrepresentation, the cause of action accrues at the point a loss is incurred. In Mr and Mrs M's case, that's when they entered the agreement to purchase the timeshare, and the related Credit Agreement, on 30 October 2015. This would be mirrored in the claim against the Lender.

Mr and Mrs M first notified the Lender of their Section 75 claim in November 2021, more than six years after the cause of action accrued in relation to their claims for misrepresentation. So I don't think it would have been unfair or unreasonable of the Lender to decline the part of the claim relating to the Supplier's alleged misrepresentations.

So, while I recognise that Mr and Mrs M - and the PR - have concerns about the way in which Fractional Club membership was sold by the Supplier, I think any misrepresentation claims arising from these concerns were time-barred under the LA by the time Mr and Mrs M made the Lender aware of them. 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 an unfair credit relationship?

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

4. The inherent probabilities of the sale given its circumstances.

I have then considered the impact of these on the fairness of the credit relationship between Mr and Mrs M and the Lender.

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

Mr and Mrs M's complaint about the Lender being party to an unfair credit relationship was made for several reasons.

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

Connected to this is the suggestion by the PR that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that the Lender wasn't permitted to enforce the Credit Agreement. However, it looks to me like Mr and Mrs M knew, amongst other things, how much they were borrowing and repaying each month, who they were borrowing from and that they were borrowing money to pay for Fractional Club membership. So, even if the Credit Agreement was 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 how that led to Mr and Mrs M incurring financial loss – such that I can say that the credit relationship in question was unfair on them 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 them, even if the loan wasn't arranged properly.

The PR also says that there was one or more unfair contract terms in the Purchase Agreement. But as I can't see that any such terms were operated unfairly against Mr and Mrs M in practice, nor that any such terms led them to behave in a certain way to their detriment, 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.

After our Investigator issued their assessment on Mr and Mrs M's case, PR produced a witness statement from them dated 16 May 2024. In this they said, among other things, that the Supplier had put them under a lot of pressure to purchase Fractional Club membership, keeping them for hours, after which *"In desperation to get away and get back to our family we finally signed up and we were finally left alone."*

I acknowledge that Mr and Mrs M may have felt worn down by a sales process that went on for a long time. I'm aware the Supplier's sales presentations, tours and meetings could go on for some hours. But they say little about what specifically was said 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. They were also given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel their membership during that time. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs M made the decision 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 M's credit relationship with the Lender was rendered unfair to them under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why the PR says the credit relationship with the Lender was unfair to them. And that's the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs M'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 – saying, in summary, that Mr and Mrs M were 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.

A share in the Allocated Property clearly constituted an investment as it offered Mr and Mrs M 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 M 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 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, through the use of disclaimers and declarations in its contractual paperwork, to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs M, 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 and Mrs M 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.

Was the credit relationship 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 Time of Sale, I now need to consider what impact that breach had on the fairness of the credit relationship between Mr and Mrs M and the Lender under the Credit Agreement and related Purchase Agreement 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 a credit relationship between Mr and Mrs M 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.

But on my reading of the evidence before me, I'm unable to conclude that the prospect of a financial gain from Fractional Club membership was an important and motivating factor when they decided to go ahead with their purchase. I'll explain why.

First of all, I think it's important to point out that we have had no witness statement or direct testimony from Mr and Mrs M until recently, more than eight years after the Time of Sale, following an unfavourable assessment from our Investigator, and with the judgment in the 2023 case of *Shawbrook & BPF v FOS* having given some public indication of what might make for a successful claim in cases involving alleged mis-selling of timeshares. This doesn't mean that the witness statement we've received does not represent Mr and Mrs M's honest recollections of what they were told by the Supplier at the Time of Sale, but bearing in mind the judgment in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), and what this has to say about the unreliability of human memory and especially how memories can be influenced by the process of preparing for litigation (or other dispute resolution procedures), I am inclined to treat their memories this far down the line with considerable caution, and this limits the weight I can give to their recent witness statement.

Turning to the content of the statement, Mr and Mrs M mention being told they would get money from the sale of the fractional asset multiple times. They recall this, in different parts of the statement, in different ways. They say they were told they "could profit", that they'd "get money back / profit in the long run", that they'd "walk away…with at least our money back", and that they'd "receive a share and that this could be worth several thousand". If this is accurate (and I note the descriptions are not entirely consistent with one another), then it does appear likely the Supplier marketed or sold the Fractional Club membership as an investment in the sense that they promoted the potential for making a financial gain from the sale of the fractional asset as being a good reason to buy it. But I don't get from the witness statement much of an impression that a motivation to make a financial gain or profit was material to Mr and Mrs M's purchasing decision on the day. What seems to come across quite clearly is that they signed the agreement in order to escape the sales environment, but I've already explained why I don't think any pressure by the Supplier to purchase the product rendered the credit relationship between Mr and Mrs M, and the Lender, unfair to them.

That doesn't mean they weren't interested at all in a share in the Allocated Property. After all, that wouldn't be surprising given the nature of the product at the centre of this complaint. But overall, bearing in mind the limited weight I can give to Mr and Mrs M's recollections, and the lack in any event of a clear motivation of a financial gain or profit which emerges from those recollections, I'm not minded to conclude that any breach by the Supplier of Regulation 14(3) of the Timeshare Regulations was material to their purchasing decision.

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 M's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). And for that reason, I do not think the credit relationship between Mr and Mrs M and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

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

The PR argues that, because the Purchase Agreement was unlawful under Spanish law in light of certain information failings by the Supplier, I should treat that Agreement and the Credit Agreement as rescinded by Mr and Mrs M and award them compensation accordingly – in keeping with the judgment of the UK's Supreme Court in *Durkin v DSG Retail* [2014] UKSC 21 ('*Durkin*').

However, the Lender hasn't been party to any court proceedings in Spain, and while the Supplier (i.e., the company that entered into the Purchase Agreement) does appear to be the subject of a Spanish court judgment in Mr and Mrs M's favour, it seems to me that there is an argument for saying that the Purchase Agreement is valid under English law for the purposes of *Durkin*.

I also note that 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 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.

What's more, as Mr and Mrs M went some way to taking advantage of the Purchase and Credit Agreements[2], an English court might hesitate to uphold a claim for rescission of either 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, 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.

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 M Section 75 claim, 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 provisional decision

For the reasons explained above, I'm not minded to uphold Mr and Mrs M's complaint.

I now invite the parties to let me have any new submissions they would like me to consider, by **7 August 2025**. I will then review the case again.

Will Culley
Ombudsman

[2] It appears, for example, that they took four holidays using the Purchase Agreement between 2016 and 2017.