

The complaint

Mr S's complaint is, in essence, that Clydesdale Financial Services Limited trading as Barclays Partner Finance ('BPF') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with him 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 S and his wife, Mrs S, 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 'Signature Collection' – which they bought on 4 November 2015 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,660 fractional points at a cost of £16,289 (the 'Purchase Agreement').

Signature Collection membership was asset backed – which meant it gave Mr and Mrs S 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.

To fund the purchase, Mr S took out a loan of £16,289 from BPF (the 'Credit Agreement').

As only Mr S was named on the Credit Agreement, only he is able to refer a complaint about it to our Service. For ease I will refer to Mr S only from here on, even where he and Mrs S may have been acting jointly or the matter is otherwise applicable to either or both of them.

Mr S – using a professional representative ('PR1') – wrote to BPF on 15 November 2022 (the 'Letter 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.

BPF dealt with Mr S's concerns as a complaint and issued its final response letter on 12 March 2024, rejecting it on every ground.

The complaint was then referred to the Financial Ombudsman Service, with Mr S now being assisted by a different professional representative ('PR2'). The complaint was assessed by an Investigator who, having considered the information on file, did not recommend that it be upheld.

As Mr S disagreed with the Investigator's assessment, the complaint was passed to me to decide.

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

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

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

There are, though, certain time limits that apply – and I think these mean Mr S's claim would've been time-barred.

The Limitation Act 1980 sets out limitation periods, or time limits, for bringing various types of legal claim. For a claim based on contract, it's not generally possible to start court action more than six years after the cause of action arose. If a claim is brought too late, the respondent is likely to have a complete defence to the claim on that basis.

For claims relating to misrepresentation, the time limit would typically be six years from the date the claimant suffers damage as a result of the misrepresentation. For example, entering into a contract – and incurring liabilities – when they would otherwise not have done.

Mr S's claim under Section 75 is that but for the Supplier's various alleged misrepresentations, he wouldn't have entered into the Purchase Agreement (and, therefore, the Credit Agreement). So it is the date on which he entered into those agreements that his cause of action arose, meaning he had six years from that date within which to bring this claim.

Mr S entered into the Purchase Agreement and Credit Agreement on 4 November 2015. He raised his claim under Section 75 within the Letter of Complaint dated 15 November 2022 – more than six years later.

That being the case, I don't think BPF acted unfairly or unreasonably in declining the claim. However, I have later considered whether these alleged misrepresentations could have been something that caused an unfair credit relationship.

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

I've already explained why I'm not persuaded that Signature Collection 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 S and BPF 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;
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 relationship between Mr S and BPF.

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

Mr S's complaint about BPF being party to an unfair credit relationship was made for several reasons.

I have firstly considered whether the misrepresentations he alleges were made by the Supplier in the context of Mr S's Section 75 claim could have caused any unfairness for the purposes of Section 140A.

In the Letter of Complaint, PR1 said that the Signature Collection membership was misrepresented by the Supplier as an investment, through which Mr S would have a share of a property and obtain a "*considerable return*". As I'll come on to in more detail below, I consider that the acquisition of a share in the Allocated Property did amount to an investment – as it offered the prospect of a financial return. Presenting the timeshare as an investment would not, therefore, have amounted to a misrepresentation – albeit there are other considerations when it comes to the marketing and selling of a timeshare contract as an investment that I explore below.

The amount of money Mr S receives on his investment will only be known after the membership term ends, when the Allocated Property is sold. So even if I were to accept that any such comments were made by the Supplier in this regard (and I make no firm finding on that), I cannot say they would amount to a misrepresentation as there is no evidence that this was not simply the salesperson's honestly held opinion.

It is also said in the Letter of Complaint that Mr S was told that he could sell the timeshare back to the resort. No such option was available. This was clearly set out in an Information Statement that Mr S was given, which he signed, at the Time of Sale. I do not find it likely that the Supplier would've suggested something so starkly contradictory to not only its standard practice, but to the terms and conditions that were provided to Mr S.

The Letter of Complaint also stated that Mr S was "*made to believe that [he] would have access to the holiday's apartment at any time all around the year*". I understand this to mean that Mr S thought he would be able to stay at the Allocated Property whenever he wanted, which was not the case. But he did have a preferential right to stay at the Allocated Property, in a specified week of the year on a bi-annual basis. The Purchase Agreement that Mr S signed explained this clearly. I find it unlikely that the Supplier would've made promises of the type suggested in the Letter of Complaint.

So, while I recognise that Mr S and his representatives have concerns about the way in which Signature Collection membership was sold by the Supplier, I do not think this

caused any unfairness in Mr S's credit relationship with BPF such that it warrants a remedy.

Turning to the points specifically raised in relation to the potential unfairness of the relationship between Mr S and BPF, PR1 said in the Letter of Complaint that the right checks weren't carried out before BPF lent to Mr S. 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 BPF 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 S was actually unaffordable before also concluding that he lost out as a result and then consider whether the credit relationship with BPF was unfair to him for this reason. But from the information provided, I am not satisfied that the lending was unaffordable for Mr S.

Connected to this is the suggestion that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that BPF wasn't permitted to enforce the Credit Agreement. However, it looks to me like Mr S knew, amongst other things, how much he was borrowing and repaying each month, who he was borrowing from and that he was borrowing money to pay for Signature Collection membership. And as the lending doesn't look like it was unaffordable for him, 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 why that led to Mr S suffering a financial loss – such that I can say that the credit relationship in question was unfair on him as a result. And with that being the case, I'm not persuaded that it would be fair or reasonable to tell BPF to compensate him, even if the loan wasn't arranged properly.

Overall, therefore, I don't think that Mr S's credit relationship with BPF was rendered unfair to him under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why Mr S's representatives say the credit relationship with BPF was unfair to him. And that's the suggestion that Signature Collection membership was marketed and sold to him 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

BPF does not dispute, and I am satisfied, that Mr S's Signature Collection 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 Signature Collection 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 Mr S's representatives say that the Supplier did exactly that at the Time of Sale – saying, in summary, that Mr S was told by the Supplier that Signature Collection 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 S the prospect of a financial return – whether or not, like all investments, that was more than what he first put into it. But it is important to note at this stage that the fact that Signature Collection membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

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

To conclude, therefore, that Signature Collection membership was marketed or sold to Mr S 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 him as an investment, i.e. told him or led him to believe that Signature Collection membership offered him the prospect of a financial gain (i.e., a profit) given the facts and circumstances of *this* complaint.

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

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Signature Collection as an 'investment' or quantifying to prospective purchasers, such as Mr S, 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 Signature Collection membership as an investment. So, I accept that it's equally possible that Signature Collection membership was marketed and sold to Mr S 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 BPF and Mr S 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 S and BPF 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 S and BPF that was unfair to him and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led him to enter into the

Purchase Agreement and the Credit Agreement is an important consideration.

To help me decide this point, I've carefully considered what Mr S has said in the course of his complaint about how the membership was sold to him and his motivation for taking it out.

As noted above it was said within the Letter of Complaint that Mr S was told that he had purchased an investment and could expect a profit. There was no further detail underpinning these statements within the Letter of Complaint, which are rather generic in nature. In fact, such assertions are made in an identical fashion by PR1 in a number of other complaints.

When referring the complaint to us, PR2 included a statement in Mr S's own words. And in response to our Investigator's assessment, they highlighted that within this statement Mr S said:

"I was told after the contract ended that the apartment would be sold and I would get some money back according to my share".

I've also noted that, of relevance to the point at issue here, Mr S said:

*"This was the same process each time we went on holiday they would state that they had information for us then the hard sell would start, more points, better accommodation, **better resale after the contract was up** and more benefits by upgrading." (my emphasis)*

Mr S's statement overall is rather brief, and lacks any real detail about how the Supplier presented the membership as an investment and how that appealed to him. He also says little about expecting to make a profit, with the return of "some money back" not necessarily equating to a financial gain.

Moreover, Mr S's statement talks in general terms about his purchase of several products from the Supplier, with no comments that specifically relate to the Signature Collection he purchased in November 2015 that's at the centre of this complaint. So it is hard to discern whether Mr S has any clear memories of this specific sale, and in turn makes it more difficult for me to place much weight upon them.

In any event, accepting Mr S's comments at face value, they do little more than support the allegation that the Supplier marketed the membership to him as an investment. As I set out above, I accept the possibility that may have happened. What I am considering here, though, is whether any such positioning of the membership in this way was material to Mr S's decision to purchase it (and in turn, therefore, to enter into the Credit Agreement). Mr S's comments do not lead me to think that it was.

Mr S does not really say anything about what motivated him into the purchase. He notes the prospect of better accommodation and more benefits, alongside other things including "better resale" which I take to mean a higher return. But he does not attribute any priority to one over the other as factors in his decision to purchase Signature Collection membership.

Mr S was evidently interested in the holidays offered by the Supplier, given his numerous purchases over the years prior to the Time of Sale. He retained an existing membership (a fractional club membership which also gave him a share in the net sale proceeds of a property). The Signature Collection offered him additional benefits, most notably by way of a higher standard of accommodation and the exclusive use of the

Allocated Property.

This, alongside the fact that he does not mention the possibility of a profit or attribute any weight to this in his recollection, lead me to think he would always have proceeded with the purchase even if the Supplier had not marketed the membership as an investment. That's not to say Mr S wasn't interested 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 as Mr S himself doesn't persuade me that the purchase was motivated by a share in the Allocated Property and the possibility of a profit, I don't think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decision he ultimately made.

On balance, therefore, even if the Supplier had marketed or sold the Signature Collection membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr S's decision to purchase Signature Collection membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests he would have pressed ahead with the purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr S and BPF was unfair to them even if the Supplier breached Regulation 14(3).

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

PR1 said in the Letter of Complaint that Mr S was not given sufficient information at the Time of Sale by the Supplier about the ongoing costs of Signature Collection membership. They also say that the contractual terms governing the ongoing costs of membership and the consequences of not meeting those costs were unfair contract terms.

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 S sufficient information, in good time, on the various charges he could have been subject to as a Signature Collection member 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 S nor his representatives have persuaded me that he would not have pressed ahead with his purchase had the finer details of the Signature Collection'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 fact and circumstances.

As for the argument that there were one or more unfair contract terms in the Purchase Agreement, I can't see that any such terms were operated unfairly against Mr S 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 Signature Collection membership are likely to have led to an unfairness that warrants a remedy.

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

Agreement

PR1 argued that, because the Purchase Agreement was unlawful under Spanish law in light of certain information failings by the Supplier, that Agreement and the Credit Agreement should be treated as rescinded by Mr S and he should be awarded compensation accordingly – in keeping with the judgment of the UK's Supreme Court in *Durkin v DSG Retail* [2014] UKSC 21 ('*Durkin*').

However, as I can't see that BPF has been party to any court proceedings in Spain, or that the Supplier (i.e. the company that entered into the Purchase Agreement) is itself the subject of a Spanish court judgment in Mr S'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 BPF 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 PR1.

What's more, as Mr S has gone some way to taking advantage of the Purchase and Credit Agreements, 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.

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

BPF responded to the PD and accepted it.

PR2 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.

PR2's further comments in response to the PD in the main relate to the issue of whether the credit relationship between Mr S and BPF was unfair. In particular, PR2 has provided further comments in relation to whether the membership was sold to Mr S as an investment at the Time of Sale. It has also now argued for the first time that the payment of a commission by BPF to the Supplier led to an unfair credit relationship.

As outlined in my PD, PR2 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 their 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 PR2's points raised in response.

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

PR2 has highlighted under Section 140B (9) of the CCA, the burden of proof falls on BPF to disprove the allegation that its relationship with Mr S was unfair. I agree that this is correct, placing a burden on lenders during the process of litigation. That does not mean, though, that BPF – or I – should take a claim at face value. There remains an onus on Mr S to provide some evidence for the claim he is making, despite the overall burden of proof resting with BPF, 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, PR2 has reasserted its view that the Supplier marketed the Signature Collection membership to Mr S as an investment and that this was a motivating factor in his decision.

I accepted in my PD that the membership may well have been marketed as an investment to Mr S 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 Signature Collection 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. PR2's response to my PD hasn't changed my view of this, and so whether the Supplier's breach of Regulation 14(3) led Mr S 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 Mr S to proceed with his purchase. In short, I was not persuaded that his 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 Mr S in the course of his complaint. I recognise PR2 has interpreted Mr S'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.

PR2 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*¹ and the case law that contributed to it, by requiring Mr S 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, Mr S was highly motivated by the holiday options offered by the Supplier – and, in particular, the higher standard of accommodation and the exclusive use of the Allocated Property available through his upgrade to Signature Collection membership – which was a factor in my overall conclusion in light of all the available evidence that he would, on balance, have pressed ahead with his purchase even if there had been a breach of Regulation 14(3).

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 Mr S's decision to purchase the Signature Collection membership.

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

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').

PR2 says that a payment of commission from BPF 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 S in arguing that his credit relationship with BPF was unfair to him for reasons relating to commission given the facts and circumstances of this complaint.

I haven't seen anything to suggest that BPF and Supplier were tied to one another contractually or commercially in a way that wasn't properly disclosed to Mr S, 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 S into a credit agreement that cost disproportionately more than it otherwise could have.

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

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

In stark contrast to the facts of Mr Johnson's case, the amount of commission paid by BPF to the Supplier for arranging the Credit Agreement that Mr S entered into wasn't high. At £276.91, it was only 1.7% of the amount borrowed and 2.53% as a proportion of the charge for credit. So, had he known at the Time of Sale that the Supplier was going to be paid a flat rate of commission at that level, I'm not currently persuaded that he either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. After all, Mr S wanted Signature Collection membership and had no obvious means of his own to pay for it. And at such a low level, the impact of commission on the cost of the credit he needed for a timeshare he wanted doesn't strike me as disproportionate. So, I think he would still have taken out the loan to fund his purchase at the Time of Sale had the amount of commission been disclosed.

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

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

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 S and BPF under the Credit Agreement and related Purchase Agreement was unfair to him. So, I don't think it is fair or reasonable that I uphold this complaint on that basis.

Commission: The Alternative Grounds of Complaint

While I've found that Mr S's credit relationship with BPF wasn't unfair to him for reasons relating to the commission arrangements between it and the Supplier, two of the grounds on which I came to that conclusion also constitute separate and freestanding complaints to Mr S'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 BPF is liable for the dishonest assistance of a breach of fiduciary duty by the Supplier because it took a payment of commission from BPF without telling Mr S (i.e., secretly). And the second relates to BPF'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 S a fiduciary duty. So, the remedies that might be available at law in relation to the payment of secret commission aren't, in my view, available to him. And while it's possible that BPF 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 BPF's part is itself a reason to uphold this complaint because, for the reasons I also set out above, I think he would still have taken out the loan to fund his purchase at the Time of Sale had there been more adequate disclosure of the commission arrangements that applied at that time.

Conclusion

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

My final decision

For the reasons I've explained, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 5 February 2026.

Ben Jennings
Ombudsman