

## **The complaint**

Mr and Mrs S complain that, in essence, 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.

## **Background**

In 2007, Mr and Mrs S purchased membership of a timeshare from a timeshare provider (“the Supplier”). Shawbrook was not involved with that purchase.

In April 2013 Mr and Mrs S exchanged their membership for a fractional timeshare (“the Fractional Club 1”). They traded in their existing points for 2,988 fractional points, and they also paid £9,998, which was financed by a loan from a third party.

Then on 11 February 2014 (“the Time of Sale”), Mr and Mrs S entered into an agreement with the Supplier to buy 3,080 fractional points at a cost of £42,718 (“the Purchase Agreement”). This was also a fractional timeshare (“the Fractional Club 2”). After trading more points, the balance outstanding was £9,850. That was financed by a fixed sum loan from Shawbrook (“the Credit Agreement”), which also consolidated the 2013 loan. The total amount of credit provided by Shawbrook was £19,979. Shawbrook paid the Supplier a commission payment of £1,990:40.

Fractional Club memberships were asset backed – which meant they gave Mr and Mrs S more than just holiday rights. They also included a share in the net sale proceeds of a property named on their Purchase Agreements (“the Allocated Property 1 and 2”) after their membership terms ended.

On 4 February 2019, Mr and Mrs S – using a professional representative (“the PR”) – wrote to the Lender (“the Letter of Complaint”) to complain about 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. Being dissatisfied with the Lender’s response, they brought this complaint to our Service.

I issued my provisional findings to the parties on 23 September 2025. In my provisional decision, I said the following:

### **My provisional decision**

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 currently think this complaint should be upheld.

But 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.

What is more, I have made my decision on the balance of probabilities – which means I have based it on what I think is more likely than not to have happened given the available evidence and the wider circumstances.

### **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.

In short, a claim against the Lender under section 75 essentially mirrors the claim Mr and Mrs S could make against the Supplier.

Certain conditions must be met if the protection afforded to consumers is engaged. One of these is that section 75 does not apply to a purchase of something with a cash price that exceeds £30,000, which is the case here. So section 75 does not apply to Mr and Mrs S’s purchase of their Fractional Club 2 membership in 2014. And since the Lender was not a party to the 2013 credit agreement, it has no liability under section 75 in relation to that agreement.

I will however consider the alleged misrepresentations in the context of section 140A.

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

Mr and Mrs S say that the credit relationship between them and the Lender was unfair under section 140A of the CCA, when looking at all the circumstances of the case, including parts of the Supplier’s sales process at the Time of Sale that they have concerns about. It is those concerns that I explore here.

As section 140A of the CCA is relevant law, I do have to consider it. So, in determining what is fair and reasonable in all the circumstances of the case, I will consider whether the credit relationship between the Mr and Mrs S and the Lender was unfair.

Under section 140A of the CCA, a debtor-creditor relationship can be found to have been or to be unfair to the debtor because of one or more of the following: the terms of the credit agreement itself; how the creditor exercised or enforced its rights under the agreement; and any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement): s.140A(1) CCA. Such a finding may also be based on the terms of any related agreement (which here, means the Purchase Agreement) and, when combined with section 56 of the CCA, on anything done (or not done) by the supplier on the creditor’s behalf before the making of the credit agreement or any related agreement.

“Related agreement” sometimes includes an earlier credit agreement which was consolidated by the credit agreement in question (s.140C(4)(a)), but only if the

parties to the earlier agreement included the parties to the later agreement (s.140C(7)). That is not the case here, so the 2013 credit agreement, to which the Lender was not party, is not related to the Lender's 2014 Credit Agreement. Therefore the Lender is not responsible for the 2013 Credit Agreement. But it is responsible for the related Purchase Agreement in 2014 (s.140C(4)(b)), and for anything done or said by the Supplier at the Time of Sale by virtue of section 56 of the CCA.

Section 56 plays an important role in the CCA because it defines the terms "antecedent negotiations" and "negotiator". As a result, it provides a foundation for a number of provisions that follow it. But it also creates a statutory agency in particular circumstances. And while section 56(1) sets out two of them, the most relevant to this complaint are negotiations conducted by the supplier in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement.

A debtor-creditor-supplier agreement is defined by section 12(b) of the CCA as "*a restricted-use credit agreement which falls within section 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier [...]*". And section 11(1)(b) of the CCA says that a restricted-use credit agreement is a regulated credit agreement used to "*finance a transaction between the debtor and a person (the 'supplier') other than the creditor [...]*" and "*restricted-use credit shall be construed accordingly.*"

The Lender doesn't dispute that there was a pre-existing arrangement between it and the Supplier. So, the negotiations conducted by the Supplier during the sale of Mr and Mrs S's membership of the Fractional Club were conducted in relation to a transaction financed or proposed to be financed by a debtor-creditor-supplier agreement as defined by section 12(b). That made them antecedent negotiations under section 56(1)(c) – which, in turn, meant that they were conducted by the Supplier as an agent for the Lender as per section 56(2). And such antecedent negotiations were "any other thing done (or not done) by, or on behalf of, the creditor" under s.140(1)(c) CCA.

Antecedent negotiations under section 56 cover both the acts and omissions of the Supplier, as Lord Sumption made clear in *Plevin*, at paragraph 31:

*"[Section] 56 provides that [when] antecedent negotiations for a debtor-creditor-supplier agreement are conducted by a credit-broker or the supplier, the negotiations are "deemed to be conducted by the negotiator in the capacity of agent of the creditor as well as in his actual capacity". The result is that the debtor's statutory rights of withdrawal from prospective agreements, cancellation and rescission may arise on account of the conduct of the negotiator whether or not he was the creditor's agent.' [...] sections 56 and 140A(3) provide for a deemed agency, even in a case where there is no actual one. [...] These provisions are there because without them the creditor's responsibility would be engaged only by its own acts or omissions or those of its agents."*

And this was recognised by Mrs Justice Collins Rice in *Shawbrook & BPF v FOS* at paragraph 135:

*"By virtue of the deemed agency provision of s.56, therefore, acts or omissions 'by or on behalf of' the bank within s.140A(1)(c) may*

*include acts or omissions of the timeshare company in 'antecedent negotiations' with the consumer".*

In the case of *Scotland & Reast*, the Court of Appeal said, at paragraph 56, that the effect of section 56(2) of the CCA meant that “*negotiations are deemed to have been conducted by the negotiator as agent for the creditor, and that is so irrespective of what the position would have been at common law*” before going on to say the following in paragraph 74:

*“[...] there is nothing in the wording of s.56(2) to suggest any legislative intent to limit its application so as to exclude s.140A. Moreover, the words in s.140A(1)(c) "any other thing done (or not done) by, or on behalf of, the creditor" are entirely apposite to include antecedent negotiations falling within the scope of s.56(1)(c) and which are deemed by s.56(2) to have been conducted by the supplier as agent of the creditor. Indeed the purpose of s.56(2) is to render the creditor responsible for such statements made by the negotiator and so it seems to me wholly consistent with the scheme of the Act that, where appropriate, they should be taken into account in assessing whether the relationship between the creditor and the debtor is unfair.”<sup>1</sup>*

So, the Supplier is deemed to be Lender’s statutory agent for the purpose of the pre-contractual negotiations.

However, an assessment of unfairness under section 140A isn’t limited to what happened immediately before or at the time a credit agreement and related agreement were entered into. The High Court held in *Patel* (which was recently approved by the Supreme Court in the case of *Smith*), that determining whether or not the relationship complained of was unfair had to be made “*having regard to the entirety of the relationship and all potentially relevant matters up to the time of making the determination*” – which was the date of the trial in the case of an existing credit relationship or otherwise the date the credit relationship ended.

The breadth of the unfair relationship test under section 140A, therefore, is stark. But it isn’t a right afforded to a debtor simply because of a breach of a legal or equitable duty. As the Supreme Court said in *Plevin* (at paragraph 17):

*“Section 140A [...] does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with [...] whether the creditor’s relationship with the debtor was unfair.”*

Instead, it was said by the Supreme Court in *Plevin* that the protection afforded to debtors by section 140A is the consequence of all of the relevant facts.

I have considered the entirety of the credit relationship between Mr and Mrs S and the Lender along with all of the circumstances of the complaint and I do not 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 Supplier’s sales and marketing practices at the Time of Sale – which

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<sup>1</sup> The Court of Appeal’s decision in *Scotland* was recently followed in *Smith*.

- includes training material that I think is likely to be relevant to the sale; and
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.

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

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

Mr and Mrs S's complaint about the Lender being party to an unfair credit relationship was made for several reasons, all of which I set out at the start of this decision.

They include the allegation that the Supplier misled Mr and Mrs S and carried on unfair commercial practices which were prohibited under the CPUT Regulations for the same reasons they gave for their section 75 claim for misrepresentation. But given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations. I will explain why below, under the heading "*Was the Fractional Club membership misrepresented?*"

The PR says that the right checks weren't carried out before the Lender lent to Mr and Mrs 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 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 S 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. Again, from the information provided so far, I am not satisfied that the lending was unaffordable for Mr and Mrs S. If there is any further information on this (or any other points raised in this provisional decision) that Mr and Mrs S wish to provide, I would invite them to do so in response to this provisional decision.

The PR says that Mr and Mrs S were pressured by the Supplier into purchasing Fractional Club 2 membership at the Time of Sale. Mr and Mrs S have not said this in their witness statement, except to mention how many hours each sales meeting lasted. I acknowledge that they may have felt weary after a sales process that went on for a long time. But I don't accept that it wasn't possible to leave. I also note that at the Time of Sale, they had been to such meetings before. And there was a 14-day cooling-off period in which they could withdraw from the purchase, but they didn't exercise that right; this has not been explained, if they only agreed to the purchase because they were under pressure.

Mr and Mrs S also say that they were told that they could buy the Fractional Club 2 membership at a special price that would only be available that day, and that this put them under pressure to buy it there and then. But that is what the cooling-off period is for – it's time that can be used to reflect on the decision, read the sales documents, and change one's mind. The decision to buy was not final on the day. Mr and Mrs S have not provided a satisfactory explanation for why they did not cancel their membership during that time.

Saying that a product will only be available at a particular price for a limited time is only an automatically unfair term if it is false (CPUT, Schedule 1, paragraph 7). I have not seen evidence that it was untrue.

I'm not persuaded, therefore, that Mr and Mrs 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 why their credit relationship with the Lender may have been unfair to them. And that's the suggestion that Fractional Club 2 membership was marketed and sold to them as an investment in breach of prohibition against selling timeshares in that way.

#### Was the Fractional Club membership misrepresented?

One of the ways in which a relationship between debtor and creditor can be unfair is if it was entered into as a result of misrepresentations made on behalf of the creditor.

This part of the complaint was made for several reasons that I set out at the start of this decision. They include the suggestion that Fractional Club 2 membership had been misrepresented by the Supplier because Mr and Mrs S were told that they were buying an interest in a specific piece of "real property" when that was not true. However, telling prospective members that they were buying a fraction or share of one of the Supplier's properties was not untrue. Mr and Mrs S share in the Allocated Property was clearly the purchase of a share of the net sale proceeds of a specific property in a specific resort. And while the PR might question the exact legal mechanism used to give them that interest, it did not change the fact that they acquired such an interest.

As for the rest of the Supplier's alleged pre-contractual misrepresentations, while I recognise that Mr and Mrs S have concerns about the way in which their Fractional Club membership was sold, they have not persuaded me that there was a misrepresentation by the Supplier at the Time of Sale that led to an unfair credit relationship for the other reasons they allege. I say that for the following reasons.

Mr and Mrs S were told that the Allocated Property would be sold after about 19 years (the sale date given was 31 December 2032 or as soon as could be achieved afterwards), and they would then receive a share of the proceeds of the sale, in proportion to their share of ownership of the property. Their PR has argued that this was a misrepresentation because it actually might never be sold. Two reasons have been advanced for this. One reason is that a sale requires the unanimous consent of all of the other fractional owners, but I am entirely satisfied that that is not correct. On the contrary, rule 9.1 of the Management Agreement states that the unanimous consent of the owners is required to *postpone* the sale. Otherwise the property "shall" be sold. And rule 9.2.8 says:

*"Each Owner agrees to the sale of the Property after the Sale Date and shall sign whatever documentation is necessary to be signed by Owners for such sale, at their cost, to achieve the sale of the Property."*

The second reason given was that the Supplier has no incentive to sell it, because until it is sold the Supplier can continue to charge annual management fees and also rental proceeds, under rules 9.2.9 and 9.2.12. But as I've already said, I can't see that the Supplier has the ability to stop the sale proceeding, and the sale is to be handled by an independent trustee and not the Supplier.

The maximum extent to which the Supplier is empowered to interfere with the sale is that under rule 9.1, the Supplier (or a business linked to the Supplier involved in the running of the scheme) can unilaterally delay the sale by up to two years. However, I do not think that changes the fact that the property will still be sold. If it is sold after 21 years instead of 19 years, I don't think that is enough to show that telling Mr and Mrs S that the property would be sold and that they would receive their share of the proceeds was really a misrepresentation.

Another misrepresentation alleged by the PR is that the Supplier told Mr and Mrs S that "this is a good investment" and "property value only goes up". These statements were included in the Supplier's Letter of Complaint as phrases used by the Supplier when selling both Fractional Clubs 1<sup>2</sup> and 2. However, neither of these phrases, or similar ones, appear in the statement provided by Mr and Mrs S, so I do not think they were used. In more general terms, if they were told Fractional Club 2 membership was an investment, for the reasons I will now explain, that wouldn't have been a misrepresentation.

There's nothing else on file that persuades there were any false statements of existing fact made to Mr and Mrs S by the Supplier at the Time of Sale.

Was Fractional Club membership marketed and sold at the Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations?

The Lender does not dispute, and I am satisfied, that Mr and Mrs S Fractional Club 2 membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling membership of the Fractional Club 2 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 our investigator says that the Supplier did exactly that at the Time of Sale. And regulation 14(3) is relevant law. So that is what I have considered next.

The term "investment" is not defined in the Timeshare Regulations. In *Shawbrook & BPF v FOS*, the parties agreed that, by reference to the decided authorities, "an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit" (at paragraph 56). I will use the same definition.

Mr and Mrs S's share in the Allocated Property clearly, in my view, constituted an investment as it offered them the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But the fact that Fractional Club 2 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

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<sup>2</sup> Although the Lender is not responsible for the sale of Fractional Club 1, our service does not have rules of evidence, so I can still take into account evidence of that sale if it is relevant to the sale of Fractional Club 2 – for example, if it is probative about how the Supplier is likely to have conducted its business at the later sale.

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 2. They just regulated how such products were marketed and sold.

To conclude, therefore, that Fractional Club 2 membership was marketed or sold to Mr and Mrs 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 them as an investment, *i.e.* told them or led them to believe that Fractional Club 2 membership offered them the prospect of a financial gain (*i.e.*, a profit) given the facts and circumstances of *this* complaint.

There is evidence in this complaint that the Supplier made efforts to avoid specifically describing membership of the Fractional Club 2 as an “investment” or quantifying to prospective purchasers, such as Mr and Mrs 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. There were, for instance, disclaimers in the contemporaneous paperwork that state that Fractional Club 2 membership was not sold to Mr and Mrs S as an investment.

With that said, I acknowledge that the Supplier’s training material left open the possibility that the sales representative may have positioned Fractional Club 2 membership as an investment. And while that was not alleged by either Mr and Mrs S nor their PR when they first complained about a credit relationship with the Lender that was unfair to them (other than as an alleged misrepresentation in the context of a section 75 claim), I accept that it’s *possible* that Fractional Club membership was marketed and sold to them as an investment in breach of regulation 14(3), given the difficulty the Supplier was likely to have had in presenting a share in the net sales proceeds of the Allocated Property as an important feature of Fractional Club 2 membership without breaching the relevant prohibition.

So I think the disclaimers in the sales paperwork are evidence to take into account when deciding what happened, but they are not conclusive. They do not operate to prevent the membership from being sold or marketed as an investment if in fact that is how they were sold or marketed at the sales presentation.

However, for the reasons I will explain, even if I were to find that the sale of Fractional Club 2 to Mr and Mrs S breached regulation 14(3), I am not currently persuaded that would make a difference to the outcome in this complaint.

Was the credit relationship between the Lender and Mr and Mrs S rendered unfair?

As the Supreme Court’s judgment in *Plevin* makes clear, it does not automatically follow that regulatory breaches create unfairness for the purposes of section 140A. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

I am also mindful of what HHJ Waksman QC (as he then was) and HHJ Worster had to say in *Carney* and *Kerrigan* (respectively) on causation.

In *Carney*, HHJ Waksman QC said the following in paragraph 51:

*“[...] In cases of wrong advice and misrepresentation, it would be odd if any relief could be considered if they did not have at least some*

*material impact on the debtor when deciding whether or not to enter the agreement. [...] in a case like the one before me, if in fact the debtors would have entered into the agreement in any event, this must surely count against a finding of unfair relationship under s140A. [...]*

And in *Kerrigan*, HHJ Worster said this in paragraphs 213 and 214:

*[...] The terms of section 140A(1) CCA do not impose a requirement of “causation” in the sense that the debtor must show that a breach caused a loss for an award of substantial damages to be made. The focus is on the unfairness of the relationship, and the court's approach to the granting of relief is informed by that, rather than by a demonstration that a particular act caused a particular loss. Section 140A(1) provides only that the court **may** make an order **if** it determines that the relationship is unfair to the debtor. [...]*

*[...] There is a link between (i) the failings of the creditor which lead to the unfairness in the relationship, (ii) the unfairness itself, and (iii) the relief. It is not to be analysed in the sort of linear terms which arise when considering causation proper. The court is to have regard to all the relevant circumstances when determining whether the relationship is unfair, and the same sort of approach applies when considering what relief is required to remedy that unfairness. [...]*

So 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 S and the Lender that was unfair to them and warranted relief as a result, then an important consideration is whether the Supplier's breach of regulation 14(3) (having regard to section 56) led them to enter into the Purchase Agreement and the Credit Agreement. So I have considered their own evidence of to determine this issue.

Mr and Mrs S described the sales presentation for Fractional Club 1 membership in their witness statement. They said that they were told that:

*“This was an investment in property and that the property would be sold in 2031.”*

(I think that his memory of that must not be quite correct because, as I've said, the date at which the property was to be placed for sale was 31 December 2032.)

With respect to the sale of Fractional Club 2 membership, they said:

*“We complained about having to pay the user charge every time we booked a holiday and [the salesperson] told us that if we converted our [2013 product to the 2014 product] we would not have to pay the user charge anymore.*

*We were told again that our property would be sold in 19 years and “we would get our money back” if not make a profit. ...*

*We signed up because we would not have to pay the user charge anymore and that “we would get all our money back in 19 years”. ...*

*We have paid over £13,000 in membership fees since we first purchased. ...*

*We wish to relinquish our timeshare because we are paying maintenance fees every year for holidays we cannot take.”*

It's clear from the above that Mr and Mrs S have identified their desire to stop paying booking fees/user charges as being their main motivation in taking out Fractional Club 2. And although they have said that they were told they might make a profit, they have said it was the ability to avoid paying user charges, alongside the fact that they would get “all their money back”, that was the reason they took out Fractional Club 2 membership. But at no point have they said that it was the prospect or hope of a potential profit or financial gain that was an important factor in their purchasing decision, instead they have pointed to the possibility of getting back what they put in. So I am simply not able to say that any breach of regulation 14(3) led to their decision to purchase Fractional Club 2 membership.

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 S'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). On the contrary, I think the evidence suggests they would have pressed ahead with their 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 and Mrs S and the Lender was unfair to them even if the Supplier had breached regulation 14(3).

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

It is clear from the submissions of everyone involved in this complaint that there was a lot of information passed between the Supplier and Mr and Mrs S when they purchased membership of the Fractional Club at the Time of Sale. But the PR says that the Supplier failed to provide them with all of the information they needed to make an informed decision. Specifically, that they failed to properly explain to them the effect of rule 9 of the Management Agreement. The PR argues that this was a misleading omission under the CPUT.

However, as I've said before, the Supreme Court made it clear in *Plevin* that it does not automatically follow that regulatory breaches create unfairness for the purposes of section 140A of the CCA. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

In this instance, even if I accepted that rule 9 was not explained at the sales presentation, I don't think that Mr and Mrs S were caused any real prejudice by that. The rule's true meaning and effect (which I have already explained above) was more favourable to Mr and Mrs S than what they thought it said.

So I am not persuaded that the Supplier's alleged breach of the CPUT Regulations (and I make no finding those regulations were breached) are likely to have prejudiced Mr and Mrs S's purchasing decision at the Time of Sale and rendered their credit relationship with the Lender unfair to them for the purposes of section 140A.

## **Commission**

I note that one of the PR's other concerns relates to alleged payments of commission by the Lender to the Supplier for acting as a credit broker and arranging the Credit Agreement. The Supreme Court's recent judgment in *Johnson v FirstRand Bank Ltd, Wrench v FirstRand Bank Ltd and Hopcraft v Close Brothers Ltd* [2025] UKSC 33 ('*Johnson, Wrench and Hopcraft*') clarified the law on payments of commission – albeit in the context of car dealers acting as credit brokers. In my view, the Supreme Court's judgment sets out principles which appear capable of applying to credit brokers other than car dealer–credit brokers. So, once the implications of that judgment become clear, I will finalise my findings on this complaint.

## **Section 140A: Conclusion**

In conclusion, therefore, given all of the facts and circumstances of this complaint, I am not persuaded that the credit relationship between the Lender and Mr and Mrs S was unfair to them for the purposes of section 140A. And taking everything into account, I think it's fair and reasonable to reject this aspect of the complaint on that basis.

## **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 Mr and Mrs S's section 75 claim, nor am I 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 (if I put the issue of commission to one side for the time being). 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 addendum provisional decision**

At the time of my provisional decision I deferred my conclusions on the matter of commission disclosure in order to review that issue further. I've since written to the parties setting out my thoughts on why I wasn't persuaded to uphold this aspect of the complaint.

Applying the principles and factors set out in the Supreme Court judgment<sup>3</sup> handed down on 1 August 2025, I found nothing 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 S. Nor did I see anything that persuaded me that the commission arrangements between them gave the Supplier a choice over the interest rate which led Mr and Mrs S into a credit agreement that cost disproportionately more than it otherwise could have.

Further, the flat rate and amount of commission paid was such that it gave me no reason to think that any failure to disclose it to Mr and Mrs S had a material impact on their decision to enter into the Credit Agreement. At £1,990:40, it was only 9.96% of the amount borrowed and even less than that (5.46%) as a proportion of the charge for credit. That didn't strike me as disproportionate; nor were the surrounding circumstances otherwise capable of rendering unfair the credit relationship between the Lender and Mr and Mrs S such that the Lender needed to take any action in redress.

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<sup>3</sup> *Johnson v FirstRand Bank Ltd, Wrench v FirstRand Bank Ltd and Hopcraft v Close Brothers Ltd* [2025] UKSC 33 ("*Hopcraft, Johnson and Wrench*")

I didn't find any of the arguments put forward demonstrated that the credit agreement between Mr and Mrs S and the Lender was unfair to them under section 140A of the CCA. Absent any other reason why it would be fair or reasonable to direct the Lender to compensate Mr and Mrs S, I said I didn't propose to uphold the complaint.

### **Responses to my provisional findings**

The Lender accepted my provisional decision. The PR didn't accept the proposed outcome. It submitted further comments and evidence in support of Mr and Mrs S's position. Having received and reviewed these, I'm now proceeding with my final decision.

In doing so, I'm conscious that the PR has made a series of assertions surrounding the provision of information relating to commission arrangements. These include, among other things, expressing doubt that the Lender has provided key information, requesting that the information we have received be shared with it in full, and asking that we do not proceed with a decision before this is done and it has had an opportunity to make further submissions.

For reasons I will explain in the course of this decision, I've concluded that it's appropriate for me to proceed with my determination, the PR's submissions notwithstanding.

### **The legal and regulatory context**

The legal and regulatory context that I think is relevant to this complaint has been shared in several hundred published decisions on very similar complaints, as well as in previous correspondence with the parties. So there's no need for me to set this out again in detail here. I simply remind the parties that our rules<sup>4</sup> say that in considering what is fair and reasonable in all the circumstances of the complaint, I will 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.

### **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.

After considering the case afresh and having regard for what's been said in response to my provisional decision and in my subsequent correspondence, I find it offers no persuasive reason to depart from the conclusions I've previously set out. I'll explain why.

The PR originally raised various points of complaint, such as those giving rise to Mr and Mrs S's section 75 claim, which I addressed in my provisional decision. In its response, it hasn't made any further comments in relation to most of its original points, or said anything that leads me to think it disagrees with my provisional conclusions in relation to those points. So I'll focus here on the points the PR *has* made in response.

The PR's response to my provisional decision relates mainly to the issue of whether the credit relationship between Mr and Mrs S and the Lender was unfair *per* section 140A of the CCA. In particular, the PR has provided more comment in relation to whether the membership was sold to Mr and Mrs S as an investment at the Time of Sale. It has also made further submissions in support of its position that the payment of a commission by the

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<sup>4</sup> Financial Conduct Authority ("FCA") *Handbook* – DISP 3.6.4R ("R" denotes a rule).

Lender to the Supplier led to an unfair credit relationship between the Lender and Mr and Mrs S.

### **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**

The PR has questioned whether my provisional conclusions run contrary to precedent decisions issued by my ombudsman colleagues and the judgment handed down in *Shawbrook and BPF v FOS*. I don't believe they do. However, for the avoidance of doubt, other decisions issued by other ombudsmen do not have a precedent effect like some court judgments might, and each ombudsman must determine each case on its own specific facts. Further, the judgment referred to did not make a blanket finding that all products of the type Mr and Mrs S purchased were mis-sold in the way the PR appears to be suggesting.

I remind the PR that in my provisional decision I accepted the possibility that Fractional Club membership was marketed and/or sold to Mr and Mrs S as an investment, in breach of regulation 14(3). I went on to explain that relevant case law<sup>5</sup> indicates that in considering the question of relief for any resultant unfairness in the credit relationship, I needed to take into account any material impact of such a breach on Mr and Mrs S's decision whether to enter into the Purchase and Credit Agreements. It doesn't strike me that doing so flies in the face of either *Shawbrook and BPF v FOS*<sup>6</sup> or previous decisions the PR has mentioned.

While the PR has referred me to Mr and Mrs S's recollections and the Supplier's training materials, I have already considered these and what was said. And I set out in my provisional decision the reasons why I didn't find that evidence sufficiently persuasive that Mr and Mrs S's purchase decision would have been any different, given the other motivational factors they had described. Having re-examined Mr and Mrs S's statement that remains my view, for the reasons previously given.

So as I said before, whether or not the Supplier marketed or sold Fractional Club membership as an investment in breach of regulation 14(3), I'm not persuaded Mr and Mrs S's decision to make the purchase was materially impacted by the prospect of a financial gain. It follows that I find the credit relationship between Mr and Mrs S and the Lender was not rendered unfair to them for this reason.

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

The PR has asked for the documents the lender has provided to show the commission arrangements. While I appreciate the PR would like to have full disclosure of all of the documents and information the Lender has provided, our rules do not require me to provide this when dealing with a complaint.

As the PR will be aware, under DISP 3.5.9R I may, where I consider it appropriate, accept information in confidence (so that only an edited version, summary or description is disclosed to the other party). I'm satisfied that agreements between the Lender and the Supplier are commercially sensitive and that the summary information on commission arrangements we've already shared with the PR is appropriate in this case.

As I've noted, the PR has disagreed with my provisional conclusions on whether the Lender should pay redress because of an unfair credit relationship arising in connection with commission arrangements between the Lender and the Supplier. The PR says, in summary,

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<sup>5</sup> *Carney and Kerrigan*

<sup>6</sup> Indeed, paragraph 185 of *Shawbrook and BPF v FOS* appears to endorse this approach.

that when the overall circumstances of those arrangements are considered in the round, the credit relationship was plainly unfair. In support of this position the PR has expressed, among other things, that:

- The provisional decision doesn't properly apply the Supreme Court's judgment in *Hopcraft, Johnson and Wrench*, which concluded a range of factors informed whether a credit relationship between a consumer and a lender was unfair;
- A conflict of interest existed on the part of the Supplier, who provided neither independent nor competent explanation of the credit;
- Failure to disclose payment of commission – irrespective of the size of any payment – was a regulatory breach that goes to the heart of fairness.

I appreciate the time the PR has taken to put together its submissions on behalf of Mr and Mrs S. But I don't find what it has said offers persuasive grounds for me to reach a different conclusion on this issue.

I've previously set out my thoughts on any impact the Supreme Court's conclusions in *Hopcraft, Johnson and Wrench* have on Mr and Mrs S's arguments that their credit relationship with the Lender was unfair to them for reasons relating to commission given the facts and circumstances of this complaint.

The PR's response doesn't offer anything that leads me to think that, for the most part, any of the factors it has referenced were in fact at play in Mr and Mrs S's case. It hasn't, for example, provided evidence to show the existence of commercial or contractual ties that were concealed from Mr and Mrs S, any persuasive reasons to conclude that the Supplier's role was that of advisor to Mr and Mrs S, or to show that any other conflict of interest arose from the roles the Supplier did perform.

For such a claim to be successful would require more than the bare assertions that have been made in this case. I'm not persuaded that it is sufficient, as the PR seems to contend, simply to suggest unsubstantiated allegations of fact and require that the Lender disprove them else the credit relationship be deemed unfair. This issue was considered in the judgment in *Promontoria (Henrico) Ltd v. Gurcharn Samra* [2019] EWHC 2327 (Ch), where HHJ David Cooke held (at paragraph 26):

*"...the onus is on the claimant<sup>7</sup> to show, to the normal civil standard, that the relationship is not unfair because of any of the reasons set out in s 140A(1)(a)-(c). Whether it is so unfair is a matter for the court's overall judgment having regard to all the relevant circumstances and matters, including matters relating (i.e. personal) to the creditor and debtor. This onus on the claimant does not however mean, in my judgement...that where Mr Samra<sup>8</sup> makes allegations of fact on which he relies he does not have the burden of proving them to the normal civil standard. The onus placed on the creditor is as to the relationship between it and the debtor, and does not have the effect that factual allegations made by Mr Samra must be accepted unless they can be positively disproved by contrary evidence."<sup>9</sup>*

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<sup>7</sup> In this case the creditor answering a claim of an unfair credit relationship arising out of an overdraft facility.

<sup>8</sup> In this case the borrower making an allegation that there was an unfair credit relationship.

<sup>9</sup> I note that in *Wilson v Clydesdale Financial Services Ltd t/a Barclays Partner Finance* [2021] (unreported), the court also took the view that the burden is on the debtor to prove on the balance of probabilities *the facts* that purportedly create the unfairness. It is then that the lender's burden of proof that requires it to prove *the relationship* was not unfair kicks in. While I do not suggest this offers legal precedent, the subject matter of that case was a fractional timeshare sale, and given the similarities I have taken the same approach when considering the facts in this case.

I'm satisfied the Lender has provided sufficient information in response to my enquiries to enable me to reach a conclusion about its commission arrangements with the Supplier. I've seen nothing in this case that leads me to think what the Lender has said about the commission arrangements is inaccurate. So there's no reason for me to reach a different finding over those commission arrangements.

In its correspondence the PR has emphasised the regulatory breaches connected with a failure to disclose commission payment. I have already set out why in my view this doesn't automatically lead to an unfair credit relationship for which the Lender needs to offer redress. While I've considered all that the PR has submitted, I remain of that view.

### 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 remain unpersuaded that the credit relationship between Mr and Mrs S and the Lender under the Credit Agreement and related Purchase Agreement was unfair to them such that it warrants the Lender offering any redress.

### **Commission: the alternative grounds of complaint**

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In my previous correspondence I mentioned that some of the grounds for complaint about the fairness or otherwise of the credit relationship could also constitute separate and freestanding complaints. I'll reiterate my findings here.

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

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

### **Conclusion**

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After careful reconsideration of the facts and circumstances of this complaint, I adopt my provisional conclusions as part of my final decision. For the reasons I've given above and in my earlier correspondence I've mentioned, I don't think the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs S's section 75 claim. And I'm not persuaded that the Lender was party to a credit relationship with Mr and Mrs S that was unfair to them for the purposes of section 140A of the CCA. Having taken everything into account, I see no other reason why it would be fair or reasonable for me to direct the Lender to compensate Mr and Mrs S.

### **My final decision**

For the reasons set out above, my final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S and Mr S to accept or reject my decision before 18 February 2026.

Richard Wood  
**Ombudsman**