

## **The complaint**

Mr and Mrs K's complaint is, in essence, that Shawbrook Bank Limited acted unfairly and unreasonably by (1) being party to an unfair credit relationship with them under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying claims under Section 75 of the CCA.

## **What happened**

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

- 1,360 fractional points on 3 September 2018 for £7,368, after trading in an existing membership ('Purchase Agreement 1')
- 1,920 fractional points on 29 October 2018 for £32,353 – having traded in their existing 1,360 fractional points ('Purchase Agreement 2')

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

As this complaint is concerned with the purchases on 3 September 2018 and 29 October 2018 those are the 'Times of Sale' for the purposes of my decision.

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

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

- £7,368 on 3 September 2018 ('Credit Agreement 1')
- £21,427 on 29 October 2018 ('Credit Agreement 2')

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

Mr and Mrs K – using a professional representative ('PR1') – wrote to Shawbrook on 4 October 2022 and 30 January 2023 (the 'Letters of Complaint') to raise a number of different concerns about each of the Purchase Agreements and related Credit Agreements. 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.

Shawbrook dealt with Mr and Mrs K's concerns as a complaint and issued its final response letter on 9 April 2024, rejecting it on every ground.

The complaint was then referred to the Financial Ombudsman Service, by which time Mr and Mrs K were assisted by a different professional representative ('PR2'). It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

Mr and Mrs K disagreed with the Investigator's assessment and asked for an Ombudsman's decision, so their complaint was passed to me.

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

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

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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. Shawbrook doesn't dispute that the relevant conditions are met. But for reasons I'll come on to below, it isn't necessary to make any formal findings on them here.

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

1. Told that they had purchased an investment that would "considerably appreciate in value" when that was not true.
2. Told that they would own a share in a property that would increase in value during the membership terms when that was not true.
3. Told that they could sell the timeshare back to the resort or easily sell it at a profit.
4. Made to believe that they would have access to "the holiday apartment" at any time all year round when that was not true.

However, neither points 1 nor 2 strike me as misrepresentations even if such representations had been made by the Supplier (which I make no formal finding on). Telling prospective members that they were investing their money because they were buying a fraction or share of one of the Supplier's properties was not untrue. And even if the Supplier's sales representatives went further and suggested that the share in question would increase in value, perhaps considerably so, that sounds like nothing more than a honestly held opinion as there isn't enough evidence to persuade me that the relevant sales representative(s) said something that, while an opinion, amounted to a statement of fact that they did not hold or could not have reasonably held.

As for points 3 and 4, while it's *possible* that Fractional Club membership was misrepresented at the Times of Sale for either or both of these reasons, I don't think it's *probable*. Neither allegation is given the colour or context I consider necessary to demonstrating that the Supplier made a false statement of existing fact and/or opinion. The documentation that Mr and Mrs K were given (and signed) at the Times of Sale made it clear that the Supplier did not run a "resale" programme. With regard to Purchase Agreement 1, the paperwork made it clear that Mr and Mrs K were depositing their Fractional Rights – the rights of exclusive use of the Allocated Properties – in exchange for their Fractional Points, to exchange for the booking of other holiday resorts. And in respect of Purchase Agreement 2, Mr and Mrs K *did*

acquire the right to stay in Allocated Property 2 – and the documentation made it clear that this was only at a specified time of the year. I find it unlikely that the Supplier would've made promises of the type suggested in the Letters of Complaint, which would have been so starkly contradictory to the contractual paperwork and demonstrably false.

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

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

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I've already explained why I'm not persuaded that Fractional Club membership was actionably misrepresented by the Supplier at the Times 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 relationships between Mr and Mrs K and Shawbrook along with all of the circumstances of the complaint, I don't think the credit relationships between them were likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

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

I have then considered the impact of these on the fairness of the credit relationships between Mr and Mrs K and Shawbrook.

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

Mr and Mrs K's complaint about Shawbrook being party to one or more unfair credit relationships was made for several reasons.

PR1 said, for instance, that the right checks weren't carried out before Shawbrook lent to Mr and Mrs K. 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 Shawbrook 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 K was actually unaffordable before also concluding that they lost out as a result and then consider whether the credit relationships with Shawbrook were unfair to them for this reason.

But from the information provided, I am not satisfied that the lending was unaffordable for Mr and Mrs K.

Connected to this is the suggestion by that the Credit Agreements were arranged by an unauthorised credit broker, the upshot of which is to suggest that Shawbrook wasn't permitted to enforce the Credit Agreements. However, it looks to me like Mr and Mrs K 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. And as the lending doesn't look like it was unaffordable for them, even if the Credit Agreements were arranged by a broker that didn't have the necessary permission to do so (which I make no formal finding on), I can't see why that led to Mr and Mrs K suffering a financial loss such that I can say that the credit relationships in question were 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 Shawbrook to compensate them, even if the loans weren't arranged properly.

Overall, therefore, I don't think that either of Mr and Mrs K's credit relationships with Shawbrook were rendered unfair to them under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why Mr and Mrs K's representatives say the credit relationships with Shawbrook 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

Shawbrook does not dispute, and I am satisfied, that Mr and Mrs K'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 Mr and Mrs K's representatives say that the Supplier did exactly that at the Times of Sale – saying, in summary, that Mr and Mrs K 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.

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

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

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs K, the financial value of their share in the net sales proceeds of the Allocated Properties along with the investment considerations, risks and rewards attached to them.

On the other hand, I acknowledge that the Supplier's sales process left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mr and Mrs K as an investment in breach of Regulation 14(3).

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

#### Were the credit relationships between Shawbrook and Mr and Mrs K rendered unfair?

Having found that it was possible that the Supplier breached Regulation 14(3) of the Timeshare Regulations at the Times of Sale, I now need to consider what impact such breaches had on the fairness of the credit relationships between Mr and Mrs K and Shawbrook under the Credit Agreements and related Purchase Agreements as the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

Indeed, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to credit relationships between Mr and Mrs K and Shawbrook that were unfair to them and warranted relief as a result, whether the Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreements and the Credit Agreements is an important consideration.

To help me decide this point, I've carefully considered what Mr and Mrs K have said in the course of their complaint about how Fractional Club membership was sold to them and their motivation for taking it out.

Within the Letters of Complaint, it is said that Mr and Mrs K were told that they had purchased an investment and could expect a profit. There was no further detail

underpinning these statements within the Letters 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 provided a statement from Mr and Mrs K in their own words. And they highlight that within this, Mr and Mrs K said:

*“We had been informed at one or more of the meetings we had been present at, that the membership lasted for 19 years and then the property would be sold, but with only some of the value (profit?) from the sale passing back to us.”*

Mr and Mrs K purchased a number of products from the Supplier and it seems they recall the possibility of some money back being mentioned during one – but not necessarily all – of the Supplier’s sales pitches. Even accepting that Mr and Mrs K’s recollection applied specifically to the Times of Sale at issue within this complaint and the Supplier did tell him, as they recall, that the Allocated Properties would be sold at the end of the term and some of the “value” – proceeds of sale – would be returned to him at that time, that to me seems a largely factual description of how Fractional Club ownership operated.

In any event, as I’ve set out above I accept the possibility that the Fractional Club membership was marketed and sold to Mr and Mrs K as an investment. What I am considering here though is whether the Supplier’s positioning of the membership in that way was material to Mr and Mrs K’s decision to proceed with their purchases. And I don’t think it was. Mr and Mrs K do not go any further than describing the investment element in broadly factual terms, with little to indicate that this was of particular interest or appeal to them on either occasion.

By contrast, the thrust of Mr and Mrs K’s statement speaks, to my mind, of their interest in the holiday options that Fractional Club membership offered. They already held a fractional club membership with the Supplier and describe each of their purchases as a means of better meeting their holiday needs and preferences. In respect of Purchase Agreement 1, they say:

*“We sat at one of the workstations and underwent another persuasive sales presentation and discussion during which we were informed that our previous acquisition of 910 points would probably be insufficient for our holiday needs. Therefore, we were persuaded to upgrade to 1360 points ...”*

And in respect of Purchase Agreement 2, they say:

*“In being persuaded that the 1360 points we owned were inadequate for our holiday needs we consented to yet another upgrade, this time for 1920 points ... We were told that we would be pleased with the fractional ownership of this apartment in this resort as it was of much greater value than [Allocated Property 1].”*

While there is mention of the greater value of Allocated Property 2, it is not cited as a motivating factor for the upgrade. By contrast, there is explicit reference to Mr and Mrs K considering (even if after some persuasion by the Supplier) that their existing level of points was not sufficient to meet their “holiday needs”. So irrespective of the investment element and indeed the increased share that they went on to acquire through Purchase Agreement 2, I think Mr and Mrs K would always have proceeded

with each purchase in order to obtain the standard of holiday they desired. I also note that Purchase Agreement 2 was for the Supplier's "Signature Collection", through which Mr and Mrs K obtained access to a higher standard of accommodation along with the right to stay in Allocated Property 2 – aspects which would also have better served Mr and Mrs K's holiday needs.

Weighing all of this up, I do not think the prospect of a financial gain from Fractional Club membership was an important and motivating factor when Mr and Mrs K decided to go ahead with their purchases. That doesn't mean they weren't interested in a share in the Allocated Properties. After all, that wouldn't be surprising given the nature of the product at the centre of this complaint. But as Mr and Mrs K themselves don't persuade me that their purchases were motivated by their shares in the Allocated Properties and the possibility of a profit, I don't think breaches of Regulation 14(3) by the Supplier were likely to have been material to the decisions Mr and Mrs K ultimately made.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mr and Mrs K's decisions to purchase Fractional Club membership at the Times of Sale were motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with their purchases whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationships between Mr and Mrs K and Shawbrook were unfair to them even if the Supplier had breached Regulation 14(3).

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

PR1 said that Mr and Mrs K were not given sufficient information at the Times of Sale by the Supplier about the ongoing costs of Fractional Club membership. They also said 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 and Mrs K sufficient information, in good time, on the various charges they could have been subject to as Fractional Club members in order to satisfy the requirements of Regulation 12 of the 2010 Timeshare Regulations (which was concerned with the provision of 'key information'). But even if that was the case, I cannot see that the ongoing costs of membership were applied unfairly in practice. And as neither Mr and Mrs K nor their representatives have persuaded me that they would not have pressed ahead with their purchases had the finer details of the Fractional Club's ongoing costs been disclosed by the Supplier in compliance with Regulation 12, I cannot see why any failings in that regard are likely to be material to the outcome of this complaint given its fact and circumstances.

As for the argument that there were one or more unfair contract terms in the Purchase Agreements, I can't see that any such terms were operated unfairly against Mr and Mrs K in practice, nor that any such terms led them to behave in a certain way to their detriment. And with that being the case, I'm not persuaded that any of the terms

governing Fractional Club membership are likely to have led to an unfairness that warrants a remedy.

In conclusion, given the facts and circumstances of this complaint, I did not think that Shawbrook acted unfairly or unreasonably when it dealt with Mr and Mrs K's Section 75 claim, and I was not persuaded that Shawbrook was party to a credit relationship with them under either of the Credit Agreements that was unfair to them 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 Shawbrook to compensate them.

Shawbrook 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.

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

As outlined in my PD, the PR originally raised various other points of complaint, all of which I addressed at that time. But it didn't make any further comments in relation to those in 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 the PR's points raised in response.

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

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

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

In its response to my PD, the PR has reasserted its view that the Supplier marketed the Fractional Club memberships to Mr and Mrs K as an investment and that this was a motivating factor in their decision to purchase them.

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

changed my view of this, and so whether the Supplier's breach of Regulation 14(3) led Mr and Mrs K to enter into the Purchase Agreements and the Credit Agreements 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 and Mrs K to proceed with either of their purchases. In short, I was not persuaded that either 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 and Mrs K in the course of their complaint. I recognise the PR has interpreted Mr and Mrs K's testimony differently to how I have, and I have carefully considered its further comments. Ultimately though, they have not led me to a different conclusion.

The PR objects to the approach I've taken in assessing this aspect of the complaint, believing that I have detracted from the judgment in *Shawbrook & BPF v FOS*<sup>1</sup> and the case law that contributed to it, by requiring Mr and Mrs K 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 and Mrs K were highly motivated by the holiday options offered by the Supplier – which was a factor in my overall conclusion in light of all the available evidence that they would, on balance, have pressed ahead with their purchase of the Fractional Club membership 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 and Mrs K's decision to purchase the Fractional Club memberships.

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

The PR says that a payment of commission from Shawbrook 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);

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<sup>1</sup> R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service [2023] EWHC 1069 (Admin) ('*Shawbrook & BPF v FOS*').

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 K in arguing that their credit relationship with Shawbrook was unfair to them for reasons relating to commission given the facts and circumstances of this complaint.

I haven't seen anything to suggest that Shawbrook and Supplier were tied to one another contractually or commercially in a way that wasn't properly disclosed to Mr and Mrs K, nor have I seen anything that persuades me that the commission arrangement between them gave the Supplier a choice over the interest rate that led Mr and Mrs K into a credit agreement that cost disproportionately more than it otherwise could have.

I acknowledge that it's possible that Shawbrook 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 Shawbrook 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 and Mrs K.

In stark contrast to the facts of Mr Johnson's case, the amount of commission paid by Shawbrook to the Supplier for arranging the Credit Agreement that Mr and Mrs K entered into wasn't high.

In fact, in respect of Credit Agreement 1, as I understand it, Shawbrook didn't pay the Supplier any commission 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 persuaded that the commission arrangements between the Supplier and Shawbrook were likely to have led to a sufficiently extreme inequality of knowledge that rendered that credit relationship unfair to Mr and Mrs K.

In respect of Credit Agreement 2, the amount of commission was £1,071.35. That equates to just 5% of the amount borrowed, and 7.42% as a proportion of the charge for credit. So, had Mr and Mrs K 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 they either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. After all, Mr and Mrs K wanted Fractional Club membership and had no obvious means of their own to pay for it. And at such a low level, the impact of commission on the cost of the credit they needed for a timeshare they wanted doesn't strike me as disproportionate. So, I think they would still have taken out the loan to fund their purchase at the Time of Sale had the amount of commission been disclosed.

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

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

#### Section 140A: conclusion

Given all of the factors I've looked at in this part of my decision, and having taken all of them into account, I'm not persuaded that the credit relationship between Mr and Mrs K and Shawbrook 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.

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

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While I've found that Mr and Mrs K's credit relationship with Shawbrook wasn't unfair to them for reasons relating to the commission arrangements between it and the Supplier, two of the grounds on which I came to that conclusion also constitute separate and freestanding complaints to Mr and Mrs K'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 Shawbrook is liable for the dishonest assistance of a breach of fiduciary duty by the Supplier because it took a payment of commission from Shawbrook without telling Mr and Mrs K (i.e., secretly). And the second relates to Shawbrook's compliance with the regulatory guidance in place at the Time of Sale insofar as it was relevant to disclosing the commission arrangements between them.

However, for the reasons I set out above, I'm not persuaded that the Supplier – when acting as credit broker – owed Mr and Mrs K 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 Shawbrook 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 Shawbrook's part is itself a reason to uphold this complaint because, for the reasons I also set out above, I think they would still have taken out the loan to fund their purchase at the Time of Sale had

there been more adequate disclosure of the commission arrangements that applied at that time.

## **Conclusion**

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In conclusion, given the facts and circumstances of this complaint, I do not think that Shawbrook acted unfairly or unreasonably when it dealt with Mr and Mrs K's Section 75 claim, and I am not persuaded that Shawbrook 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 Shawbrook to compensate them.

## **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 and Mrs K to accept or reject my decision before 4 February 2026.

Ben Jennings  
**Ombudsman**