DRN-5982056

The complaint

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

Background to the complaint

Mr and Mrs S purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') on 15 August 2013 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,500 fractional points at a cost of £17,998 (the 'First Purchase Agreement').

Fractional Club 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 their Purchase Agreement ("the Allocated Property") after their membership term ends.

Mr and Mrs S paid for their Fractional Club membership by jointly taking finance of £17,998 from the Lender in both their names (the 'First Credit Agreement'). They settled that loan in January 2014 by taking out a cheaper loan with a third party.

On 6 April 2014 (also the 'Time of Sale'), Mr and Mrs S bought another 1,820 points. The price was £35,221, but after trading in their existing timeshare and after a discount, they ended up paying £5,289 (the 'Second Purchase Agreement'). This was funded by another loan from the Lender, this time only in Mr S's name (the 'Second Credit Agreement'). That loan was settled in September 2015 using proceeds from the sale of their home.

Mr and Mrs S – using a professional representative (the 'PR') – wrote to the Lender on 1 July 2019 (the 'Letter of Complaint') to complain about:

1. Misrepresentations by the Supplier at the Time of Sale giving them a claim against the Lender under section 75 of the CCA, which the Lender failed to accept and pay.
2. A breach of contract by the Supplier giving them a claim against the Lender under section 75 of the CCA, which the Lender failed to accept and pay.
3. The Lender being party to an unfair credit relationship under the Credit Agreement and related Purchase Agreement for the purposes of section 140A of the CCA.
4. Failing to disclose whether commission had been paid to the Supplier.
5. The decision to lend being irresponsible because (1) the Lender did not carry out the right creditworthiness assessment and (2) the money lent to them under the Credit Agreement was unaffordable for them, as demonstrated by the fact that they had had to borrow from a third party to repay the first loan.

(1) Section 75 of the CCA: the Supplier's misrepresentations at the Time of Sale

Mr and Mrs S say that the Supplier made a number of pre-contractual misrepresentations at the Time of Sale – namely that the Supplier:

1. told them that Fractional Club membership had a guaranteed end date when that was not true.
2. told them that they were buying an interest in a specific piece of “real property” when that was not true.
3. told them that Fractional Club membership was an “investment” when that was not true because it is worthless.
4. told them that the Supplier’s holiday resorts were exclusive to its members when that was not true.

Mr and Mrs S say that they have a claim against the Supplier in respect of one or more of the misrepresentations set out above, and therefore, under section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs S.

(2) Section 75 of the CCA: the Supplier’s breach of contract

Mr and Mrs S say that they found it difficult to book the holidays they wanted, when they wanted. They say that when they brought this up with the Supplier, they were told that they would have to book 24 months in advance. In practice, they often found they had to book their holidays elsewhere.

As a result of the above, Mr and Mrs S say that they have a breach of contract claim against the Supplier, and therefore, under section 75 of the CCA, they have a like claim against the Lender, who, with the Supplier, is jointly and severally liable to Mr and Mrs S.

(3) Section 140A of the CCA: the Lender’s participation in an unfair credit relationship

The Letter of Complaint set out several reasons why Mr and Mrs S say that the credit relationship between them and the Lender was unfair to them under section 140A of the CCA. In summary, they include the following:

1. The contractual terms setting out the Supplier’s ability to terminate their membership in the event of non-payment of management fees or other fees were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the ‘UTCCR’).
2. They were pressured into purchasing Fractional Club membership by the Supplier.
3. The decision to lend was irresponsible because the Lender didn’t carry out the right creditworthiness assessment and the loan was unaffordable.

The Lender dealt with Mr and Mrs S’s concerns as a complaint and issued its final response letter on 9 September 2019, rejecting it on every ground.

Mr and Mrs S then referred the complaint to the Financial Ombudsman Service, repeating the points listed above (other than the point about commission). It was assessed by an Investigator who, having considered the information on file, upheld the complaint on its merits.

The Investigator thought that the Supplier had marketed and sold Fractional Club membership as an investment to Mr and Mrs S at the Time of Sale in breach of regulation 14(3) of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (the ‘Timeshare Regulations’). And given the impact of that breach on their purchasing decision, the Investigator concluded that the credit relationship between the Lender and Mr and Mrs S was rendered unfair to them for the purposes of section 140A of the CCA.

The Lender disagreed with the Investigator’s assessment, and so this case was passed to me. I wrote a provisional decision which read as follows.

The legal and regulatory context

In considering what is fair and reasonable in all the circumstances of the complaint, I am required under an FCA regulation (specifically rule DISP 3.6.4R) to take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; (iii) codes of practice; and (iv) where appropriate, what I consider to have been good industry practice at the relevant time.

I will refer to and set out several regulatory requirements, legal concepts and guidance in this decision, but I am satisfied that of particular relevance to this complaint is:

- The CCA (including sections 56, 75 and 140A to 140C);
- The law on misrepresentation;
- The Timeshare Regulations;
- The UTCCR;
- The CPUT Regulations;
- Case law on section 140A of the CCA – including, in particular:
    - The Supreme Court's judgment in *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 ("*Plevin"*) (which remains the leading case in this area);
    - *Scotland v British Credit Trust [2014] EWCA Civ 790 ("Scotland and Reast")*
    - *Patel v Patel* [2009] EWHC 3264 (QB) (*"Patel"*);
    - The Supreme Court's judgment in *Smith v Royal Bank of Scotland Plc* [2023] UKSC 34 (*"Smith"*);
    - *Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 (*"Carney"*);
    - *Kerrigan v Elevate Credit International Ltd* [2020] EWHC 2169 (Comm) (*"Kerrigan"*);
    - *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"*);
    - *Link Financial v Wilson* [2014] EWHC 252 ("*Wilson*").

Good industry practice – the RDO Code

The Timeshare Regulations provided a regulatory framework. But as the parties to this complaint already know, I am also required to take into account, when appropriate, what I consider to have been good industry practice at the relevant time – which, in this complaint, includes the Resort Development Organisation's Code of Conduct dated 1 January 2010 ("the RDO Code").

My provisional findings

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 currently do not 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, including, for instance, the cash price of the purchase, which must not exceed £30,000. This excludes the Second Credit Agreement.

The Lender does not dispute that the relevant conditions are met in this complaint so far as the First Credit Agreement is concerned. And as I'm satisfied that section 75 applies to that agreement, if I find that the Supplier is liable for having misrepresented something to Mr and Mrs S at the Time of Sale, then the Lender is also liable.[1]

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 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'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 an actionable misrepresentation by the Supplier at the Time of Sale for the other reasons they allege. And I say that for the following reasons.

It is true that the Fractional Club membership did not have a guaranteed end date, in that it is not possible to guarantee when a property will actually be sold. But it did have a prescribed date on which the Allocated Property would be put up for sale. I don't think that Mr and Mrs S would have been misled into thinking that the sale of the property would complete on a specific day, only that the property would be put on the market on that day.

I've seen evidence that the Supplier's holiday resorts were not exclusive to its members. But I've not seen evidence (other than Mr S's witness statement) that Mr and Mrs S were told that they were exclusive and not open to the public. The

[1] Mrs S was not a party to the Second Credit Agreement, and so she only has rights under the CCA in relation to the First Credit Agreement. But I can still take all of her evidence into account.

Supplier says that its resorts are not exclusive to members, although club members do receive benefits which are exclusive to members. As Mr S wrote his witness statement more than five years later, it's possible that he has half-remembered being told about exclusive benefits and now recalls it differently. I'm open to receiving more evidence on this matter, but for the moment I am not persuaded that the evidence I have now is enough to find that the resorts were misrepresented as only being available to be booked by members.

For reasons I will set out later on in this decision, I am satisfied that the Fractional Club membership was an investment, and that describing it as such was not untrue.

What's more, as there's nothing else on file that persuades me that there were any false statements of existing fact made to Mr and Mrs S by the Supplier at the Time of Sale, I do not think there was an actionable misrepresentation by the Supplier for the reasons they allege.

For these reasons, therefore, I do not think the Lender is liable to pay Mr and Mrs S any compensation for the alleged misrepresentations of the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the section 75 claim in question.

Section 75 of the CCA: the Supplier's breach of contract

I've already summarised how section 75 of the CCA works and why it gives Mr and Mrs S a right of recourse against the Lender. So, it isn't necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the First Purchase Agreement, the Lender is also liable.

Mr and Mrs S say that they could not holiday where and when they wanted to – which, on my reading of the complaint, suggests that they consider that the Supplier was not living up to its end of the bargain, and had breached the Purchase Agreement. Like any holiday accommodation, availability was not unlimited – given the higher demand at peak times, like school holidays, for instance. Some of the sales paperwork signed by Mr and Mrs S states that the availability of holidays was/is subject to demand. It also looks like they made use of their fractional points to holiday on eight occasions between 2014 and 2017. I accept that they may not have been able to take certain holidays. But I have not seen enough to persuade me that the Supplier had breached the terms of the Purchase Agreement.

Overall, therefore, from the evidence I have seen to date, I do not think the Lender is liable to pay Mr and Mrs S any compensation for a breach of contract by the Supplier. And with that being the case, I do not think the Lender acted unfairly or unreasonably when it dealt with the section 75 claim in question.

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

I have already explained why I am not persuaded that the contract entered into by Mr and Mrs S was misrepresented (or breached) by the Supplier in a way that makes for a successful claim under section 75 of the CCA and outcome in this complaint. But Mr and Mrs S also 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 Mr and Mrs S and the Lender was unfair. Unlike section 75, section 140A applies to both credit agreements.

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, includes 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.

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.140A(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."[2]

So, the Supplier is deemed to be the 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:

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[2] The Court of Appeal's decision in *Scotland* was recently followed in *Smith*.

1. The Supplier's sales and marketing practices at the Time of Sale – which 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 also 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 and the UTCCR, partly for the same reasons they gave for their section 75 claim for misrepresentation, and also for other reasons. But I am not persuaded that anything done or not done by the Supplier was prohibited under those Regulations. I will explain why.

The PR says that the contractual terms setting out the Supplier's ability to terminate Mr and Mrs S's membership in the event of non-payment of management fees or other fees were unfair contract terms under the UTCCR, which prohibit *"requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation"*. In support of this argument, the PR relies on the case of *Wilson.* In that case, the judge held that it was disproportionate to have a contractual term saying that fractional membership can be ended by the Supplier for non-payment of fees – however small the amount outstanding may be – without refunding any of what he paid for his purchase, because then the Supplier would get not only receive a windfall (the purchase price paid for the timeshare) but can also re-sell the same allocated property to another consumer. The judge described this as *"wholly disproportionate and penal."*

I agree with that, but before I can accept that this means that the relationship between the creditor and the debtor thereby became unfair, as the judge went on to find in *Wilson,* I think I have to take into account how the clause has actually operated in practice in relation to Mr and Mrs S's agreements, not just how it could potentially operate hypothetically. The judge in *Wilson* said as much at paragraph [46] of his judgement:

"The fact that clause D can be regarded in the abstract as an unfair term is not however the end of the enquiry for the purposes of s.140A of the Act. In considering the fairness of the relationship, it is necessary to consider all other relevant matters, and (amongst other things) these necessarily include how the clause has been operated in practice."

In *Wilson* the clause had been used to terminate the defendant's timeshare. But Mr and Mrs S's membership has not been terminated, and they have not stopped paying the management fees. They have explained that the *potential* for the foreclosure clause to be implemented if they ever stop paying their fees (which they would like to do because they are no longer taking the holidays) is causing them stress. Nevertheless, they would still be legally obliged to pay those fees whether the

foreclosure clause was there or not, and as that clause has not been invoked, I do not think that its mere existence, by itself, amounts to grounds to find that an unfair credit relationship exists.[3]

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, 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. But I won't just infer that solely from the fact that they paid off the second loan using the proceeds of the sale of their house, because I have not seen evidence that this was why they sold it. If they were selling their house anyway, and they just used some of the proceeds to settle the loan, that does not prove that the loan was unaffordable at the Time of Sale.

Mr and Mrs S say that they were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale, at a presentation which lasted for seven hours. I acknowledge that they may have felt weary after a sales process that went on for a long time. But they say little about what was said and/or done by the Supplier during their sales presentation that made them feel as if they had no choice but to purchase Fractional Club membership when they simply did not want to. They were also given a 14-day cooling off period and they have not provided a credible explanation for why they did not cancel their membership during that time. Moreover, they did go on to upgrade their Fractional Club membership – which I find difficult to understand if the reason they went ahead with the purchase in question was because they were pressured into it. And with all of that being the case, there is insufficient evidence to demonstrate that Mr and Mrs S made the decision to purchase Fractional Club membership because their ability to exercise that choice was significantly impaired by pressure from the Supplier.

I'm not persuaded, therefore, that Mr and Mrs S's credit relationship with the Lender was rendered unfair to them under section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why they say their credit relationship with the Lender was unfair to them. And that's the suggestion that Fractional Club membership was marketed and sold to them as an investment in breach of the prohibition against selling timeshares in that way.

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's Fractional Club membership met the definition of a "timeshare contract" and was a "regulated contract" for the purposes of the Timeshare Regulations.

[3] Even if I took a different view about that, the remedy would not be to unwind the purchase agreements and the credit agreements. Regulation 8 of the UTCCR says that an unfair term is not binding, but the rest of the contract shall continue to be binding.

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling membership of the Fractional Club 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 PR says that the Supplier did exactly that at the Time of Sale. 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 [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 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 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 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 other, similar complaints 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 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 membership was not sold to Mr and Mrs S as an investment. (I haven't seen an example of that in the evidence served in relation to this complaint, but I have not assumed that that means such paperwork was not shown to Mr and Mrs S, as it appears to have been the standard practice at the time of their purchases, based on what I have seen in other complaints.)

With that said, I acknowledge that the Supplier's training material still left open the possibility that the sales representative may have positioned Fractional Club 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, in Mr S's signed witness statement, he did say the following:

"It was an investment for our retirement and after the contractual period we would have the option to sell."

"[The Supplier's] properties had huge resale value."

"We were very interested in the investment aspect of the Fractional Ownership scheme."

So I accept that it's possible that Fractional Club membership was marketed and sold to Mr and Mrs S as an investment in breach of regulation 14(3), especially 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 membership without breaching the relevant prohibition. However, that by itself does not mean that the credit relationship was unfair. I address this in the next section.

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 of the CCA) led them to enter into the Credit Agreements and the related Purchase Agreements.

In his witness statement Mr S said the following:

"We like to try different destination[s], and one of the reasons we decided to join [the Supplier] [was to] reduce cost and explore different cultures".

"We enjoy family orientated holidays with provision for children of differing ages. [I] have been fortunate to explore many beautiful countries and cultures and wanted for my family during our holiday periods to enjoy and experience the same."

"We believed from what we were told that this would allow us to have great holidays with the family for great value for money, and much cheaper than what we were already spending on holidays each year."

"…*along with being able to access high quality holidays with our family at a lower price."*

From this evidence I think it is reasonable to conclude that Mr and Mrs S were strongly motivated to purchase their membership of the Fractional Club by their holiday requirements, at least as much as – and probably more than – by the opportunity to invest.

On balance, therefore, even if the Supplier did market or sell 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 still 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).

Failing to disclose that commission had been paid to the Supplier

Although the PR did not mention commission in its complaint letter to our service, this seems to have been an oversight, since the PR did mention it in the original claim to the Lender, and the Lender did not address that issue in its final response letter. So I have considered it, and the Lender will have an opportunity to deal with it in its response to this provisional decision.

The sales documentation does not mention whether any commission was paid by the Lender to the Supplier. But the Lender has told us, and I accept, that the commission paid to the Supplier in respect of the First Credit Agreement was £1,799:80, and £528:90 was paid for the Second Credit Agreement.

The PR says that a payment of commission from the Lender to the Supplier at each Time of Sale should lead me to uphold this complaint because, simply put, information in relation to that payment went undisclosed at the Times 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 & others and Business Mortgage Finance 4 plc v Pengelly* [2021] EWCA Civ 471, is not enough.

However, the Supreme Court held that the credit relationship between the lender and Mr Johnson was unfair under section 140A of the CCA because of the commission paid by the lender to the car dealer. The main reasons for coming to that conclusion included, amongst other things, the following factors:

1. The size of the commission (as a percentage of the total charge for credit). In Mr Johnson's case it was 55%. This was *"so high"* and *"a powerful indication that the relationship…was unfair"* (see paragraph 327);
2. The failure to disclose the commission; and
3. The concealment of the commercial tie between the car dealer and the lender.

The Supreme Court also confirmed that the following factors, in what was a non-exhaustive list, will normally be relevant when assessing whether a credit relationship was/is unfair under section 140A of the CCA:

1. The size of the commission as a proportion of the charge for credit;
2. The way in which commission is calculated (a discretionary commission arrangement, for example, may lead to higher interest rates);
3. The characteristics of the consumer;
4. The extent of any disclosure and the manner of that disclosure (which, insofar as section 56 of the CCA is engaged, includes any disclosure by a supplier when acting as a broker); and
5. Compliance with the regulatory rules.

From my reading of the Supreme Court's judgment in *Hopcraft, Johnson and Wrench*, it sets out principles which apply to credit brokers other than car dealer–credit brokers. So, when considering allegations of undisclosed payments of commission like the one in this complaint, *Hopcraft, Johnson and Wrench* is relevant law that I'm required to consider under Rule 3.6.4 of the Financial Conduct Authority's Dispute Resolution Rules ('DISP').

But I don't think *Hopcraft, Johnson and Wrench* assists Mr and Mrs S in arguing that their credit relationship with the Lender was unfair to them for reasons relating to commission, given the facts and circumstances of this complaint.

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

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

But as I've said before, the case law on section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way. And with that being the case, it isn't

necessary to make a formal finding on that because, even if the Lender and the Supplier failed to follow the relevant regulatory guidance at the Times of Sale, it is for the reasons set out below that I don't currently think any such failure is itself a reason to find the credit relationship in question unfair to Mr and Mrs S.

In stark contrast to the facts of Mr Johnson's case, the amounts of commission paid by the Lender to the Supplier for arranging the Credit Agreements that Mr and Mrs S entered into weren't high. Each amount was only 10% of the amount borrowed, and even less than that (8.89% in 2013 and 5.37% in 2014) as a proportion of the charge for credit. So, had they known at the Times 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 payments at those times. After all, Mr and Mrs S 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 loans to fund their purchases at the Times of Sale had the amounts of commission been disclosed.

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

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

Section 140A: Conclusion

Given all of the factors I've looked at here, and having taken everything into account, I'm not persuaded that the credit relationships between Mr and Mrs S and the Lender under the Credit Agreements and related Purchase Agreements were unfair to them. And as things currently stand, I don't think it would be fair or reasonable that I uphold this complaint on that basis.

Commission: alternative grounds of complaint

As things currently stand, while I've found that Mr and Mrs S's credit relationships with the Lender weren'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 free-standing complaints to Mr and Mrs S's complaint about unfair credit relationships. So, for completeness, I've considered those grounds on that basis here.

The first ground relates to whether the Lender is liable for the dishonest assistance of a breach of fiduciary duty by the Supplier because it took a payments of commission from the Lender without telling Mr and Mrs S (i.e., secretly). And the second relates to the Lender's compliance with the OFT's and FCA's regulatory guidance in place at

the Times of Sale (in 2013 and 2014 respectively), insofar as they were relevant to disclosing the commission arrangements between the Lender and the Supplier.

However, for the reasons I set out above, 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 Times 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 because, for the reasons I also set out above, I think they would still have taken out the loans to fund the relevant purchases at the Times of Sale had there been more adequate disclosure of the commission arrangements that applied at those times.

Unauthorised credit-broking

The PR has argued that the Credit Agreements may have been brokered by an entity which was not authorised to do so, with the result that the agreements are unenforceable under section 40 of the CCA and under the Financial Services and Markets Act 2000 ('FSMA').

Section 40(1) of the CCA states (so far as relevant) that *"A regulated agreement is not enforceable against the debtor … by a person acting in the course of a consumer credit business … if that person is not licensed to carry on a consumer credit business … of a description which covers the enforcement of the agreement."* That does not prevent the Lender from enforcing the agreement, even if the agreement was brokered by a third party who should have been licensed but was not. And section 40(1A) is only about lenders and not brokers. So I don't think section 40 assists Mr and Mrs S here.

Section 19 of FSMA states that "*[n]o person may carry on a regulated activity in the United Kingdom"* unless they are *"an authorised person*". This prohibition is called the "general prohibition". Credit-broking became a regulated activity on 1 April 2014.

Section 27 of FSMA states that an agreement that was "*made in consequence of something said or done by another person ("the third party") in the course of…a regulated activity carried on by the third party in contravention of the general prohibition*" is unenforceable against the borrower. Further, consumers such as Mr and Mrs S would be entitled to recover any money paid under the loan agreement and to compensation for any loss suffered as a result of making such payments.

The PR says that the 2014 loan was arranged by a business not authorised by the FCA to broker loans, which was a breach of the general prohibition. That meant that under section 27 of FSMA, Mr and Mrs S were entitled to recover anything paid under the loan, plus further compensation.

Here, one of the key issues for me to determine is whether the relevant credit intermediaries carried out the credit broking of the credit agreements, a regulated activity, within the United Kingdom. On the face of the credit agreements, they did not appear to, as the loans were arranged in Spain, the businesses named on the credit agreements as the credit intermediaries had addresses in Spain, and the suppliers, which were similarly named and linked businesses, also had addresses in Spain.

However, section 418 of FSMA sets out a number of cases where an activity would be deemed as having taken place within the United Kingdom where they would not

otherwise have been regarded as doing so. Each of these cases depends, in one way or another, on the entity carrying on the regulated activity having its registered office, head office or an establishment in the United Kingdom.

The suppliers who sold Mr and Mrs S's timeshares were Continental Resort Services SL[4] (in August 2013) and Paradise Trading SLU (in April 2014). The credit intermediaries were named on the loan agreements as Club La Costa Resorts and Hotels (2013) and Club La Costa Exhibition Centre (2014), but these were simply trading names of Continental Resort Services and Paradise Trading, respectively. Both companies were also part of the CLC group of companies, which had a head office in the UK. So that means they *did* need to be authorised to carry out the regulated activity of credit broking. In 2013, that meant holding a licence issued by the Office of Fair Trading ('OFT'). And from 1 April 2014, that meant being authorised by the Financial Conduct Authority ('FCA').

Neither of the suppliers appears in the FCA's online Financial Services Register, so I checked the Financial Ombudsman Service's own internal records. These showed that Continental Resort Services SL held a consumer credit licence from 3 June 2009 to 31 March 2014 (and thereafter it was authorised by the FCA for an interim period). And Paradise Trading SLU held a licence from 26 February 2010 to 31 March 2014, and was then authorised by the FCA from 1 April 2014 for an interim period until 2015.

I shared this information with the PR, which objected to findings being based on records which had not been disclosed to it and which it described as *"unspecified"*. So, I checked this information against the Consumer Credit Register ('the register'), which is no longer publicly available on the FCA's website but which our service holds a copy of. Unfortunately I am not permitted to share this with the PR, but the information it contains can be verified with the FCA (please see its website at https://www.fca.org.uk/firms/consumer-credit-register). Paradise Trading SLU's OFT licence number was 634483, and it was authorised from 2010 to 2015. And Continental Resort Services SL appears[5] under licence number 628454, showing as authorised from 2009 to 2 June 2014. Both companies were authorised for Credit Brokerage. So based on this information, I am satisfied that the credit intermediaries were authorised to broker credit agreements at the Times of Sale.

So I do not think the Lender is required to repay anything paid under the credit agreements due to the credit intermediaries not being authorised by the OFT or the FCA.

Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs S's section 75 claims, and I am not persuaded that the Lender was party to credit relationships with them under the Credit Agreements that were unfair to them for the purposes of

[4] The First Credit Agreement calls it "Continental Resort Services SL**U**" (which is a different company), with Spanish company registration number B92998285. However a search of that company number shows that it belongs to Continental Resort Services SL, and so I'm satisfied that that was the company that was meant.

[5] It is listed there as "Continen**t**ial Resort Services SL". In case that was a different company, I verified that the address on the First Credit Agreement matched the address on the register. And an online search for the exact spelling yields no results, so I'm satisfied that the extra *i* is just a typographical error.

section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct the Lender to compensate them.

Responses to my provisional decision

The Lender accepted my provisional decision. The PR did not. In summary, it made the following points:

- Although the decisions of ombudsmen do not create precedents, their decisions should follow a broadly consistent approach if they are to be fair and reasonable. But my provisional decision had not identified a difference between this complaint and other complaints which had been upheld. The PR asked me to look at an ombudsman's decision in another complaint in particular, which he had upheld, and which the PR argued was similar to Mr and Mrs S's case.

- I had applied the wrong burden of proof. The burden is on the Lender to show that its relationship with Mr and Mrs S was not unfair. I had reached my conclusions without any rebuttal evidence provided by the Lender.

- It was more likely than not that the timeshares had been sold in breach of regulation 14(3).

- I had placed too much weight on the holidays feature of the timeshares and not enough weight on the investment feature. The investment feature was not a minor benefit, but a core part of why Mr and Mrs S had bought the timeshares.

- I had placed too much weight on the case of *Carney,* and had marginalised *Plevin* and *Kerrigan*. A regulatory breach does not have to be the dominant or determinative factor in a consumer's decision to enter into a loan agreement. There only has to be a failing which may lead to unfairness in a credit relationship. Causation in the strict or common law sense is not required.

- I had not given enough weight to certain passages in Mr S's witness statement. Mr and Mrs S would not have bought the timeshares if there had been no investment element.

- The PR claimed (without quoting or otherwise identifying which part of my decision they were referring to) that I had relied on Mr and Mrs S's post-sale conduct (namely going on holidays) as evidence that their purchases had been mainly motivated by holidays.

- Even if undisclosed commission by itself would not cause unfairness under section 140A, it should be considered cumulatively with other factors, such as a breach of regulation 14(3), high pressure sales tactics, *etc*.

- Failing to disclose a commission payment – regardless of the amount of the payment – is inherently dangerous to consumers, and had been found to be so by the High Court (especially when combined with other factors).

- My refusal to share the internal records I had relied on in relation to the unauthorised credit broking complaint raised questions about transparency and procedural fairness. The complainants had been placed at a disadvantage.

The PR did however submit a freedom of information request to the FCA, which responded with some information (although not everything which the PR had asked for). The PR shared with me what it had received from the FCA, which was a list of five companies or trading

names which the FCA had searched for in its records to see if any of them had been licenced by the OFT or had interim or full authorisation from the FCA. Only one of them had (the one with its head office in the UK). The four others, which were Spanish companies, were reported as *"None found"*. The PR said this was evidence of unauthorised credit broking by the Suppliers.

My findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

However, I have not changed my mind about the outcome of this complaint. I will explain why.

The complaint about unauthorised credit-broking

I will begin with the FCA's response to the PR's freedom of information request.

First, I note that the FCA's covering letter which accompanied the list contains this caveat:

"A value of 'None found' (column F) does not definitively mean the entity did not have a regulation record of this type."

Column F gives, where available, a reference number for each OFT credit licence or FCA permission.

So the list which was provided to the PR is not definitive, and it does not purport to be.

I think that the *"None found"* entries next to each of the four companies are probably there due to reasons other than because those companies were never licenced or authorised. I won't speculate here about alternative reasons for those entries; it is sufficient to acknowledge that the FCA was aware of the possibility. But I remain satisfied that the internal FOS records that I referred to in my provisional decision, and our copy of the Consumer Credit Register (which our service obtained from the FCA), are reliable and accurate records, and I accept them as such. As I've said, they show that Continental Resort Services SL (not SLU) had OFT licence no. 628454 and was authorised for credit broking from 2009 to 2 June 2014, and Paradise Trading SLU (not SL) had OFT licence no. 634483 and was similarly authorised from 2010 to 2015. On the balance of probabilities, I think that those entries are accurate, and that the relevant Suppliers were therefore authorised to broker Mr and Mrs S's loans at the Times of Sale.

I acknowledge the PR's concerns about transparency. But as I've said, our rules (which have to be approved by the FCA before they come into effect) allow us to withhold evidence on occasion. (See rule DISP 3.5.9 (2).)

Consistency of decisions

I agree that, as a public body, the Financial Ombudsman Service should endeavour to be broadly consistent in its approach to similar cases, even though ombudsman's decisions are not binding precedents. So in view of that, I read the final decision written by my colleague in the other case which the PR asked me to consider. But having read that decision, I do not think the evidence in that other complaint was remotely similar to the evidence in Mr and Mrs S's complaint.

My colleague upheld the other complaint because the complainant in that case was very clear in her evidence that she had bought her timeshare because it would make a profitable investment. But as I've said before, in Mr S's witness statement he gave different reasons for his purchase. So the other case is easily distinguished from this one on its facts.

The burden of proof

Section 140B(9) of the CCA says:

"If … the debtor … alleges that the relationship between the creditor and the debtor is unfair to the debtor, it is for the creditor to prove to the contrary."

However, 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 or else the credit relationship must 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[6] 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[7] 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." [8]*

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.

As for Mr and Mrs S's motivations for buying fractional points, it is Mr S's own evidence which leads me to conclude that they were not motivated by the prospect of making a profit when the Allocated Property is sold. I agree that it does not have to be the sole motivating factor, but I do think it needs to have made a difference to the decision to purchase for me to find that it resulted in unfairness. And for the reasons previously given, the evidence does not suggest to me that it did.

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[6] In this case the creditor answering a claim of an unfair credit relationship arising out of an overdraft facility.
[7] In this case the borrower making an allegation that there was an unfair credit relationship.
[8] 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.

Post-sale conduct

I can't see anything in my provisional decision where I said that Mr and Mrs S's conduct after the Times of Sale was evidence against them. This passage in the PR's response to my provisional findings might be template wording that was used in another case, but I cannot see that it is relevant here. But for the avoidance of any doubt, I confirm that I did not regard Mr and Mrs S booking and going on holidays as being proof of their motivations and reasons for buying fractional points at the Times of Sale.

Undisclosed commission

I don't agree that the amount of commission is irrelevant. But in my provisional decision I did not simply say that just because the amount of commission was low meant that there could be no unfairness. I also considered other reasons why undisclosed commission might cause unfairness (in light of the Supreme Court decision, which supersedes the High Court case), and found that on the facts of this case they did not. I remain of that view now, for the same reasons.

I do agree that different issues can be considered cumulatively, not just in isolation, to see if they collectively resulted in unfairness. But considering this case in the round, I do not think that the matters complained of had that effect.

My final decision

My 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 19 February 2026.

Richard Wood
Ombudsman