DRN-6069046

The complaint

Mr J'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 him 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.

The timeshare in question was bought in the joint names of Mr and Mrs J, but as the loan taken for the purchase was in Mr J's sole name only, he is the only eligible complainant here. I will, however, refer to both Mr and Mrs J where it is appropriate to do so.

What happened

Mr and Mrs J were trial members of a timeshare provider (the 'Supplier'). But the product at the centre of this complaint is their full membership of a timeshare that I'll call the 'Fractional Club' – which they bought on 21 April 2019 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,540 fractional points at a cost of £22,916. But after trading in their trial membership, they ended up paying £18,521 (the 'Purchase Agreement') for their Fractional Club membership.

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

Mr J paid for their Fractional Club membership by taking finance of £18,521 from the Lender (the 'Credit Agreement') in his sole name.

On 17 September 2019 Mr and Mrs J traded in this Fractional Club membership for an 'upgraded' version, with a new allocated property. As such the Purchase Agreement being considered here was terminated.

Mr J – using a professional representative (the 'PR') – wrote to the Lender on 15 November 2021 (the 'Letter of Complaint') to raise a number of different concerns. As both sides are familiar with those concerns, it isn't necessary to repeat them in detail here beyond the summary above.

The Lender was unable to provide Mr J with a substantive response to his complaint within the eight weeks required by the regulator, so the complaint was referred to the Financial Ombudsman Service.

The Lender, on 23 September 2022, sent its final response to the complaint, rejecting it on every ground.

Mr J's complaint was assessed by an Investigator at this Service who, having considered the information on file, rejected the complaint on its merits.

Mr J disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me. The PR, on Mr J's behalf, also at this point complained

that the Lender had paid the Supplier a commission for arranging the Credit Agreement, which was undisclosed to Mr J. The PR said this was a breach of the Regulator's Handbook, specifically CONC 4.5.3 and 4.5.3a.

The provisional decision

I set out my initial thoughts on the merits of Mr J's complaint in a provisional decision (the 'PD'). In this I said:

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

And having done that, I do not currently think this complaint should be upheld.

However, before I explain why, I want to make it clear that my role as an Ombudsman is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

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

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

Certain conditions must be met if the protection afforded to consumers is engaged, including, for instance, the cash price of the purchase and the nature of the arrangements between the parties involved in the transaction. The Lender doesn't dispute that the relevant conditions are met. But for reasons I'll come on to below, it isn't necessary to make any formal findings on them here.

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

1. *Told that they had purchased an investment that would "considerably appreciate in value".*
2. *Promised a considerable return on their investment because they were told that they would own a share in a property that would considerably increase in value.*
3. *Told that they could sell their Fractional Club membership to the Supplier or easily to third parties at a profit.*
4. *Made to believe that they would have access to "the holiday apartment" at any time all year round.*

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 any accompanying 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 Time of Sale for one or both of those reasons, I don't think it's probable. They're given little to none of the colour or context necessary to demonstrating that the Supplier made false statements of existing fact and/or opinion. And as there isn't any other evidence on file to support the suggestion that Fractional Club membership was misrepresented for these reasons, I don't think it was.

So, while I recognise that Mr J - and the PR - have concerns about the way in which Fractional Club membership was sold by the Supplier, when looking at the claim 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 the Lender acted unreasonably or unfairly when it dealt with this particular Section 75 claim.

Section 75 of the CCA: the Supplier's Breach of Contract

I have already summarised how Section 75 of the CCA works and why it gives consumers a right of recourse against a lender. So, it is not necessary to repeat that here other than to say that, if I find that the Supplier is liable for having breached the Purchase Agreement, the Lender is also liable.

The PR says on Mr J's behalf that the Supplier breached the Purchase Agreement because it went into liquidation. And if certain parts of the Supplier's business were put into administration, I can understand why the PR is alleging that there was a breach of the Purchase Agreement as a result. However, neither Mr J nor the PR have said, suggested or provided evidence to demonstrate that, because of the liquidation he and Mrs J are no longer:

1. *Members of the Fractional Club;*
2. *able to use their Fractional Club membership to holiday in the same way they could initially; and*
3. *entitled to a share in the net sales proceeds of the Allocated Property when their Fractional Club membership ends.*

So, from the evidence I have seen, I do not think the Lender is liable to pay Mr J 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 in relation to this aspect of the complaint either.

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

I've already explained why I'm not persuaded that Fractional Club membership was actionably misrepresented by the Supplier at the Time of Sale. But there are other aspects of the sales process that, being the subject of dissatisfaction, I must explore with Section 140A in mind if I'm to consider this complaint in full – which is what I've done next.

Having considered the entirety of the credit relationship between Mr J and the Lender along with all of the circumstances of the complaint, I don't think the credit relationship between them was likely to have been rendered unfair for the purposes of Section 140A. When coming to that conclusion, and in carrying out my analysis, I have looked at:

1. *The standard of the Supplier's commercial conduct – which includes its sales and marketing practices at the Time of Sale along with any relevant training material;*
2. *The provision of information by the Supplier at the Time of Sale, including the contractual*

documentation and disclaimers made by the Supplier;

3. *Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale; and*
4. *The inherent probabilities of the sale given its circumstances.*

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

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

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

The PR says, for instance, that the Credit Agreement was arranged by an unauthorised credit broker, the upshot of which is to suggest that the Lender wasn't permitted to enforce the Credit Agreement. However, it looks to me like Mr J knew, amongst other things, how much he was borrowing and repaying each month, who he was borrowing from and that he was borrowing money to pay for Fractional Club membership. And as the lending doesn't look like it was unaffordable for him, even if the Credit Agreement was arranged by a broker that didn't have the necessary permission to do so (which I make no formal finding on), I can't see why that led to Mr J's financial loss – such that I can say that the credit relationship in question was unfair on them as a result. And with that being the case, I'm not persuaded that it would be fair or reasonable to tell the Lender to compensate them, even if the loan wasn't arranged properly.

The PR also says that there was one or more unfair contract terms in the Purchase Agreement. But as I can't see that any such terms were operated unfairly against Mr and Mrs J in practice, nor that any such terms led them to behave in a certain way to their detriment, I'm not persuaded that any of the terms governing Fractional Club membership are likely to have led to an unfairness that warrants a remedy.

Overall, therefore, I don't think that Mr J's credit relationship with the Lender was rendered unfair to him under Section 140A for any of the reasons above. But there is another reason, perhaps the main reason, why the PR says the credit relationship with the Lender was unfair to Mr J. And that's the suggestion that Fractional Club membership was marketed and sold to him and Mrs J as an investment in breach of prohibition against selling timeshares in that way.

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

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

Regulation 14(3) of the Timeshare Regulations prohibited the Supplier from marketing or selling Fractional Club membership as an investment. This is what the provision said at the Time of Sale:

"A trader must not market or sell a proposed timeshare contract or long-term holiday product contract as an investment if the proposed contract would be a regulated contract."

But the PR says that the Supplier did exactly that at the Time of Sale – saying, in summary, that Mr and Mrs J were told by the Supplier that Fractional Club membership was the type of investment that would only increase in value.

The term "investment" is not defined in the Timeshare Regulations. But for the purposes of this provisional decision, and by reference to the decided authorities, an investment is a transaction in which money or other property is laid out in the expectation or hope of financial gain or profit.

A share in the Allocated Property clearly constituted an investment as it offered Mr and Mrs J 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 J 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.

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

On the one hand, it is clear that the Supplier made efforts to avoid specifically describing membership of the Fractional Club as an 'investment' or quantifying to prospective purchasers, such as Mr and Mrs J, 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.

But 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 J as an investment in breach of Regulation 14(3).

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

Was the credit relationship between the Lender and the Consumer rendered unfair?

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

Indeed, it seems to me that, if I am to conclude that a breach of Regulation 14(3) led to a credit relationship between Mr J and the Lender that was unfair to him and warranted relief

as a result, whether the Supplier's breach of Regulation 14(3) led him and Mrs J to enter into the Purchase Agreement, and Mr J into the Credit Agreement is an important consideration.

But on my reading of the evidence before me, the prospect of a financial gain from Fractional Club membership was not an important and motivating factor when they decided to go ahead with their purchase. I'm simply not persuaded that was the case. I'll explain.

As part of its submissions to this Service, the PR sent a statement from Mr J, setting out his recollections of his and Mrs J's relationship with the Supplier. Although it is undated, the PR said it was written on 12 May 2021.

As regards their purchase of the Fractional Club at the Time of Sale Mr J says:

> *"We travelled to Tenerife in April 2019. As promised, we attended another meeting which was scheduled on the 21st. A [Supplier] representative picked us up around 9 am from our accommodation and drove us to another [Supplier] resort where the meeting would be held. We started with a breakfast where a second [Supplier] representative joined us. After breakfast, they both took us to a large room with [sic] many one-to-one meetings were being held. They made us fill another holiday planner and then advised us that the trial membership was not [sic] longer the best option to us. In order to convince us to become [a Supplier] member and for 14 years and fractional property owner, they use a pricing sheet which contained information such as:*
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> - *Number of points which will be allocated to us; which in this case was 1540. They did not explain how they came up with this point-allocation system and how it was attributed to their residences*
> - *The type of residence which we would be fractional owner, which was 2-bedroom unit in our case*
> - *The number of weeks we would be allowed to stay each year: 2 weeks*
> - *The cost of the fraction: £22916*
> - *Annual maintenance fees: £1554*
>
> *Again, we were told that we could use a loan to finance our purchase. We were not keen at all but they insisted how a good investment this was. We spent an entire day the meeting was so long that we ended being the only couple left in the room. We tried to discuss this fractional property owner option away from the [Supplier] representatives but every time we walked out of the room, they would keep interrupting us in order to bring us back to the room and discuss our options a little bit more. At the end of the day, we decided to join the fractional property owner club by applying for a loan in order to purchase the fraction. We believed that we were purchasing a fraction of a property and this would certainly pay off in few years. We traded in our trial membership fees (£4395) so the total cost of the fraction became £22916 - £4395 = £18521.*
>
> *[…]*
>
> *…it is definitely more costly to be a [Supplier] member than using a travel agent. And we now found out that it is unlikely we will ever cash in on our property as we need approval from around 50 people in order to sell the property. At the end of each of the meetings we respectively attended in Tenerife and Costa Del Sol, we were handed in a Factional Rights Certificate which we later found out are not any form of deeds and therefore, these had no value. Our motivation and belief was that we were investing money and we now realised that this was never the case but we were misled to believe so."*

On my reading of this statement, Mr J remembers the sales representative setting out the

number of points they would get; the type of property and number of weeks holiday they could expect annually; how much the membership cost and what they would pay in maintenance fees. There is nothing in the statement which describes how the sales representative positioned the membership as an investment, and there is nothing in it which leads me to think it likely that it was sold to Mr and Mrs J as an investment that could lead to a profit. He says:

> *"We believed that we were purchasing a fraction of a property and this would certainly pay off in few years",*

but this was after taking into account the holidays they could take using the membership, and it seems likely that this is referring to the overall savings on holidays when compared to if they were bought outside of the membership. And my view on this is strengthened by what Mr J later says in his statement they were disappointed by:

> *"…it is definitely more costly to be a [Supplier] member than using a travel agent."*

I do acknowledge that Mr J concludes his statement by saying their motivation and belief was that they were investing money, but I am not persuaded that this was with a view to possibly gain a profit on the sale of the Allocated Property. I think it was more likely the prospect of the holidays which was the driving factor in their decision to purchase the Fractional Club membership.

That doesn't mean they weren't interested in a share in the Allocated Property. After all, that wouldn't be surprising given the nature of the product at the centre of this complaint. But as Mr J himself doesn't persuade me that their purchase was motivated by their share in the Allocated Property and the possibility of a profit, I don't think a breach of Regulation 14(3) by the Supplier (if there was one) was likely to have been material to the decision Mr and Mrs J 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 J's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests they would have pressed ahead with their purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mr J and the Lender was unfair to him even if the Supplier had breached Regulation 14(3).

Mr J's Commission Complaint

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

Conclusion

In conclusion, as things currently stand, I do not think that the Lender acted unfairly or unreasonably when it dealt with the relevant Section 75 claims, and if I put the issue of

commission to one side for the time being, I am not persuaded that the Lender was party to a credit relationship with Mr J under the Credit Agreement that was unfair to him for the purposes of Section 140A of the CCA – nor do I see any other reason why it would be fair or reasonable to direct the Lender to compensate Mr J.

But, as I've already said, once the implications of Johnson, Wrench and Hopcraft become clear, I will finalise my findings on this complaint."

The responses to the provisional decision

The Lender responded to the PD, accepting it. It also provided details of the commission arrangements in place between it and the Supplier in respect of Mr J's Credit Agreement.

The PR also responded – they did not accept the PD and provided some further comments and evidence they wish to be considered.

Following this I set out to both sides how I was not persuaded that Mr J's credit relationship with the Lender was unfair to him for reasons relating to the commission arrangements between it and the Supplier. Neither party responded to this.

As the deadline has now passed, and 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:

<u>The Consumer Credit Sourcebook ('CONC') – Found in the Financial Conduct Authority's (the 'FCA') Handbook of Rules and Guidance</u>

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]

<u>The FCA's Principles</u>

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, in the main, relate to the issue of whether the credit relationship between Mr J and the Lender was unfair. In particular, the PR has provided further comments in relation to whether the membership was sold to Mr J as an investment at the Time of Sale, and has drawn my attention to a contradiction in the contractual documentation relating to the length of the membership term, and consequently the proposed date of sale of the Allocated Property. The PR also repeated its assertion that the non-disclosure of the commission paid by the Lender to the Supplier was a breach of the regulator's rules.

As outlined in my PD, the PR originally raised various other points of complaint, all of which I addressed at that time. But they didn't make any further comments in relation to those in their response to my PD. Indeed, they haven't said they disagree 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 the Lender participate in an unfair credit relationship?

I will firstly address the PR's point regarding the apparent ambiguity in the proposed sale date of the Allocated Property. The PR suggests that a delayed sale date could lead to an unfairness to Mr and Mrs J in the future, as any delay could mean a delay in the realisation of their share in the Allocated Property. But I cannot see how this ambiguity has, or could, lead to any unfairness to Mr J here. After all, this Fractional Club membership (and so it follows the share in the Allocated Property) was traded in only five months after it was purchased, so Mr J is no longer entitled to a share in the net sales proceeds of this property anyway.

In response to the PD, the PR has not provided any new evidence, it has just set out why it thinks I was wrong in my assessment of what Mr J says happened at the Time of Sale and why he and Mrs J made the purchase. It says that the fact that Mr and Mrs J were also interested in holidays doesn't change the fact that the prospect of a profit from their investment influenced their decision. The PR says that my conclusion is based on an incorrect interpretation of the court's decision in *Shawbrook & BPF v FOS*[1]. Here the court asserted that the relevant question in this circumstance is whether the breach of Regulation 14(3) was a material factor in the decision to purchase, not whether it was the only factor or

[1] *R (on the application of Shawbrook Bank Ltd) v Financial Ombudsman Service Ltd and R (on the application of Clydesdale Financial Services Ltd (t/a Barclays Partner Finance)) v Financial Ombudsman Service* [2023] EWHC 1069 (Admin)

principal one. The PR feels that the testimony Mr J has provided demonstrates that this was the case. But, as I explained in my provisional decision, I'm not persuaded from the testimony that Mr J has adequately demonstrated that the promise of profit was a motivating factor to their decision to move ahead with the purchase – principal or otherwise. And having considered what Mr J has said, for the reasons I set out in the PD, I still don't think it was.

The PR also says that the trial membership that Mr and Mrs J had already provided access to the same style of holidays and experiences, meaning that the holiday aspect was not new or exclusive to the Fractional Club purchase. And, they therefore say the key distinction between the two products lies in the investment element of the Fractional Club. But I don't agree with this. The trial membership that Mr and Mrs J had only provided them with a total of five weeks' holiday over three years. But the Fractional Club afforded them the opportunity to take as many holidays as their points would permit over the following 19 years. So, this was, in my view, a significant upgrade in holiday access.

So, ultimately, for the above reasons, along with those I already explained in my PD, I remain unpersuaded that any breach of Regulation 14(3) was material to Mr J's purchasing decision.

So, as I said before, even if the Supplier had marketed or sold the membership as an investment in breach of Regulation 14(3) (which I still make no finding on here), I'm not persuaded Mr J's decision to make the purchase was motivated by the prospect of a financial gain. So, I still don't think the credit relationship between Mr J and the Lender was unfair to him for this reason.

Conclusion

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

My final decision

For all of the reasons set out above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 9 February 2026.

Chris Riggs
Ombudsman