DRN-6139704

The Complaint

Mr and Mrs M'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 claims under Section 75 of the CCA.

Background to the Complaint

Mr and Mrs M first purchased a trial timeshare membership from a timeshare provider (the 'Supplier') on 11 September 2016 ('Purchase Agreement 1').

Following this, Mr and Mrs M purchased membership of a timeshare (the 'Fractional Club') from a timeshare provider (the 'Supplier') – purchasing the following number of fractional points on the dates below:

- 1,130 fractional points on 22 February 2017 for £14,569 ('Purchase Agreement 2') having traded in their trial membership.
- 1,500 fractional points on 15 August 2017 for £13,410 – having traded in the first lot of fractional points. ('Purchase Agreement 3')

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

Each date of purchase will be called the 'Times of Sale' for the purposes of my decision.

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

Mr and Mrs M paid for their trial membership and their fractional points by taking the following amounts of finance of from the Lender:

- £3,995 on 11 September 2016 ('Credit Agreement 1')
- £18,269 on 22 February 2017 ('Credit Agreement 2') which included the consolidation of the outstanding balance from Credit Agreement 1.
- £27,059 on 15 August 2017 ('Credit Agreement 3') which included the consolidation of the outstanding balance from Credit Agreement 2. They also paid £5,000 by other means[1].

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

[1] The PR says this payment of £5,000 was for the purpose of gaining additional points, to allow Mr and Mrs M to take holidays every year. The Lender says this was simply a part-payment towards Purchase Agreement 3. I have not seen any evidence that Mr and Mrs M purchased additional points, outside of those they gained through the above Purchase Agreements.

Mr and Mrs M – using a professional representative (the 'PR') – wrote to the Lender on 25 March 2022 (the 'Letter of Complaint') to raise a number of different concerns about the three purchases. As those concerns haven't changed since they were first raised, and as both sides are familiar with them, it isn't necessary to repeat them in detail here beyond the summary above.

The Lender dealt with Mr and Mrs M's concerns as a complaint and issued its final response letter on 3 August 2022, rejecting it on every ground.

The complaint was then referred to the Financial Ombudsman Service. It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

Mr and Mrs M disagreed with the Investigator's assessment and asked for an Ombudsman's decision – which is why it was passed to me.

I issued my provisional findings (the 'PD') to the parties on 15 September 2025. In my PD, I said:

"I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint. And having done that, I do not 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 Times 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.

Firstly, as far as the trial membership is concerned, the only allegation that this was misrepresented to Mr and Mrs M is the PR's assertion that the paperwork contained a "false statement", which is as follows:

"Trial membership has been designed to provide a <<test drive>> product so that a Trial Member can enjoy a number of weeks in a choice of resorts for the introductory number of years specified enjoying many of the benefits and facilities in the full term Destinations."

The PR says this is a false statement as the Purchase Agreement required Mr and Mrs M to take a "prelude" holiday before using the weeks.

I've read the full document, which was provided by the Supplier, and am not persuaded that the Supplier has misrepresented the trial membership in the way the PR seems to suggest it has done. After all, Mr and Mrs M did gain a product that gave them a specific number of

weeks in a choice of resorts. They chose to upgrade from the trial membership to a full membership before using the weeks, other than the prelude holiday, and received a discount on the price of the full membership by trading in their trial membership. The paperwork makes it clear that the prelude week needed to be taken first, and I'm persuaded that Mr and Mrs M were aware of this as they have marked their initials next to this term.

In addition, there is no testimony from Mr and Mrs M about why they feel the trial membership was misrepresented to them. So, I am not persuaded that the Lender has done anything wrong by declining to pay the claim under Section 75 about the trial membership.

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

1. *told by the Supplier that Fractional Club membership had a guaranteed end date when that was not true.*
2. *told by the Supplier that they were buying an interest in a specific piece of "real property" when that was not true.*
3. *told by the Supplier that Fractional Club membership was an "investment" when that was not true.*

Regarding the two fractional timeshare purchases, the PR's Letter of Complaint only refers to "Statements made in the course of the Sales Presentation". The PR has not given any indication as to which presentation it refers to, and I have seen many of its letters of complaint which use the same, or very similar, wording. So, I have considered the substance of these allegations under the assumption that the PR intended these allegations to cover both the Fractional Club purchases.

The words and/or phrases allegedly used by the Supplier to misrepresent Fractional Club for the reason given in point (1) were set out by the PR in the Letter of Complaint, and they were limited to: " That the Fractional Property Ownership Scheme had a guaranteed end date, specifically after 19 years, after which the clients would have no further legal liability to [the Supplier] under or in respect of the Scheme.".

The PR says that such a representation was untrue because the "Sales Process" begins on the Sale Date as defined in the Fractional Club Rules, and under Rule 9, particularly Rules 9.2.9 and 9.2.12, there is no guarantee that any sale will result at all, leaving prospective members to pay their annual management charge for an indefinite and unspecified period.

However, I cannot see why the phrase above would have been untrue at the Times of Sale even if it was said. It seems to me to reflect the main thrust of the contracts Mr and Mrs M entered into. And while, under Rules 9.1 and 9.2.9 of the relevant Fractional Club Rules, the sale of the Allocated Properties could be postponed for up to two years by the 'Vendor'[2], longer than that if there were problems selling and the 'Owners'[3] agreed, or for an otherwise specified period provided there was unanimous agreement in writing from the Owners, that does not render the representation above untrue. So, I am not persuaded that the representation above constituted a false statement of fact even if it was made.

As for points (2) and (3), neither of these 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

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[2] Defined in the FPOC Rules as "CLC Resort Developments Limited".

[3] Defined in the FPOC Rules as "a purchaser who has entered into a Purchase Agreement and has been issued with a Fractional Rights Certificate (which shall include the Vendor for such period of time until the maximum number of Fractional Rights have been acquired)."

fraction or share of one of the Supplier's properties was not untrue – nor was it untrue to tell prospective members that they would receive some money when the allocated property is sold. After all, a share in an 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 prospective members that interest, it did not change the fact that they acquired such an interest.

So, while I recognise that Mr and Mrs M - 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 Agreements, the Lender is also liable.

Mr and Mrs M say that they could not holiday where and when they wanted to as there was "no availability". That was framed, in the Letter of Complaint, as part of their complaint about the fairness or otherwise of their credit relationships with the Lender under Section 140A of the CCA. However, on my reading of the complaint, this suggests that the Supplier was not living up to its end of the bargain, potentially breaching the Purchase Agreements.

Yet, 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 M states that the availability of holidays was/is subject to demand. 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 Agreements.

Mr and Mrs M say in their testimony that they were not accommodated in their "allocated apartment, as they had expected" in August 2017. I am unsure exactly what they mean by this, as the Allocated Property 1 was located in Tenerife, not in mainland Spain where they had booked the holiday. If I have misunderstood this point, I would ask for Mr and Mrs M to provide me with a more detailed explanation as to what they had expected, but did not receive, in response to this provisional decision.

Mr and Mrs M say they weren't told that maintenance fees would increase but they had increased to £1,560 per year, which the PR says was "almost double the original amount". But the paperwork makes it clear that the maintenance fees were subject to annual increases. And I have not been given any evidence to support this allegation. I am aware that Mr and Mrs M increased their points allocation, which also increased the annual fees associated with their memberships. So, I don't agree that the Supplier breached the contract when it increased the charges each year, if it did that.

Further to this, the PR says Mr and Mrs M were told the Fractional Club was "exclusive" to members, but that non-members could book holidays. The Purchase Agreement 3 provided them with exclusive rights to stay in a particular apartment during a particular week, so I don't think it was wrong for the Supplier to frame the membership in that way. Specifically, Mr and Mrs M say that, while they were staying at Mijas Costa resort, they were told by guests staying in luxurious apartments that they booked through a third-party website. But

they also say that they "found themselves unable to book a holiday in Mijas Costa or the 'Signature' apartment they had upgraded to". So, these conversations, as described by Mr and Mrs M, must have happened during their stay in August 2017, and would have therefore happened during the cooling-off period provided under the agreement. So, I am unsure why they did not cancel the agreement if they were unhappy with what they perceived as a lack of exclusivity.

So, from the evidence I have seen, I do not think the Lender is liable to pay Mr and Mrs M 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 one or more unfair credit relationships?

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

Having considered the entirety of the credit relationships between Mr and Mrs M and the Lender along with all of the circumstances of the complaint, I don't think the credit relationships 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 Times of Sale along with any relevant training material;*
2. *The provision of information by the Supplier at the Times of Sale, including the contractual documentation and disclaimers made by the Supplier;*
3. *Evidence provided by both parties on what was likely to have been said and/or done at the Times of Sale;*
4. *The inherent probabilities of the sale given its circumstances; and, when relevant*
5. *Any existing unfairness from a related credit agreement.*

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

<u>The Supplier's sales & marketing practices at the Times of Sale</u>

Mr and Mrs M's complaint about the Lender being party to unfair credit relationships was and is made for several reasons.

They include, for various reasons, the allegation that the Supplier misled Mr and Mrs M and carried on unfair commercial practices under Regulations 5 and 6 of the CPUT Regulations. However, as Regulations 5 and 6 state, commercial practices only amount to misleading actions or omissions if, in addition to satisfying one or more of the specific matters set out in those provisions, they cause or are likely to cause the average consumer to take a transactional decision they would not have taken otherwise. And as I haven't seen enough evidence to persuade me that, if there were any such actions or omissions at the Times of Sale (which I make no formal finding on), they led Mr and Mrs M to make the purchasing decisions they did, I'm not persuaded that anything done or nor done by the Supplier amounted to an unfair commercial practice for the purposes of those provisions.

The PR also alleges that the Supplier acted unfairly under Regulation 7 Schedule 1 of the CPUT Regulations. But given the limited evidence in this complaint, I am not persuaded that the Supplier did.

In addition, the PR also says that:

1. *the right checks weren't carried out before the Lender lent to Mr and Mrs M.*
2. *Mr and Mrs M were pressured by the Supplier into purchasing the Trial and the Fractional Club memberships at the Times of Sale.*
3. *there was one or more unfair contract terms in the Purchase Agreements.*

However, as things currently stand, none of these strike me as reasons why this complaint should succeed.

I haven't seen anything to persuade me that the right checks weren't carried out before the Lender agreed to lend the money on each occasion, given this complaint's 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 M was actually unaffordable before also concluding that they lost out as a result and then consider whether the credit relationships with the Lender were unfair to them for this reason. But from the information provided, I am not satisfied that any of the lending was unaffordable for Mr and Mrs M.

I acknowledge that Mr and Mrs M may have felt weary after sales processes that they say went on for a long time. But they say little about what was said and/or done by the Supplier during their sales presentations 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 first purchase – 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 M made the decision to purchase the trial, or either of the Fractional Club memberships because their ability to exercise those choices were significantly impaired by pressure from the Supplier.

As for the PR's argument that there were one or more unfair contract terms in the Purchase Agreements, I can't see that any such terms were operated unfairly against Mr and Mrs M in practice, nor that any such terms led them to behave in a certain way to their detriment. And with that being the case, I'm not persuaded that any of the terms governing Fractional Club membership are likely to have led to an unfairness that warrants a remedy.

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

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

The Lender does not dispute, and I am satisfied, that Mr and Mrs M's Fractional Club memberships 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 and Mr and Mrs M now say that the Supplier did exactly that at the Times of Sale – saying, in summary, that they were told by the Supplier that Fractional Club membership was the type of investment that would only increase in value.

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

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

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

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

On the other hand, I acknowledge that the Supplier's sales process left open the possibility that the sales representative may have positioned Fractional Club membership as an investment. So, I accept that it's equally possible that Fractional Club membership was marketed and sold to Mr and Mrs M 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 Times of Sale, I now need to consider what impact that breach had on the fairness of the credit relationships between Mr and Mrs M and the Lender under the Credit Agreements and related Purchase Agreements as the case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. Such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way.

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

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 Mr and Mrs M decided to go ahead with their purchases. I say that because the Letter of Complaint written by the PR does not suggest that they were told they could receive a profit. The PR did not have any testimony to share until after our Investigator rejected the complaint, only saying the following:

"That they were told, by the [Supplier] representatives, that the fractional scheme was an "investment", in so far as they would get money back at the end of the term, after 19 years of luxury holidays."

This statement is not in Mr and Mrs M's own words and does not give me any useful information to help me understand which sale this applied to, or the context in which it was said, and in any case, I'm not persuaded that the promise of "money back" indicates that they were told they might make a profit by purchasing the Fractional Club membership.

Then, following the Investigator's rejection of the complaint, the PR provided what it called a "Supplementary Witness Statement". Here, regarding the February 2017 sale, Mr and Mrs M say:

"We were also told that [the Supplier] had a scheme called "[Supplier] Fractional Property Owners Club", which involved buying shares in a property, for 19 years, after which the property would be sold, and the proceeds split between the owners".

…

"We were put under a lot of pressure to agree to "upgrade" to Fractional Property Ownership. We were told that we could get bigger benefits, by signing up to a bigger deal by buying fractions. We would get a bigger piece of the pie".

I am unsure why Mr and Mrs M say they were told they would get a "bigger deal" and "bigger piece of the pie" when, at that time, they were not full members and were entering the Fractional Club for the first time. Regarding the February 2017 sale, the Letter of Complaint says: "but our clients say that they never really understood the product, nor can they recall the details. They do recall however being assured that the extra cost wouldn't be "too much different' and they get a much better apartment at a nicer resort". So, I think Mr and Mrs M were unsure exactly how the Fractional Club product worked, but I think they were aware they would receive holiday accommodation at the Supplier's resorts as members of the club.

About the August 2017 purchase, the PR's Letter of Complaint says:

"They were told that if they upgraded, they could take holidays whenever the wanted, including school holidays.

Our clients were told that if they could not take a holiday in a particular year, [the Supplier] would let the property out on their behalf and collect Points on their behalf. However, they were not told that they would be charged £200.00 on which [sic] occasion.

After approximately two or three more hours and based on what they had been shown and told, our clients eventually agreed to trade in their allocated property in Tenerife for the better property in Spain."

Having considered the PR's Letter of Complaint and the Supplementary Witness Statement, I think Mr and Mrs M were interested in making the purchases in order to obtain holiday accommodation at the Supplier's resorts. Mr and Mrs M do not appear to have been given the impression that they could potentially receive a profit upon the sale of the Allocated Properties. That doesn't mean they weren't interested in their share in the Allocated Properties. After all, that wouldn't be surprising given the nature of the products at the centre of this complaint. But as Mr and Mrs M themselves don't persuade me that their purchases were motivated by their shares in the Allocated Properties and the possibility of a profit, I don't think a breach of Regulation 14(3) by the Supplier was likely to have been material to the decisions they ultimately made.

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

In summary, I wasn't minded to think that the Lender acted unfairly or unreasonably when it dealt with Mr and Mrs M's section 75 claims.

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

I shared that the Lender had supplied information demonstrating that no commission was paid in relation to the Trial Membership sale on 11 September 2016 or the Fractional Club sale on 22 February 2017. With that being the case, I wasn't persuaded this position could have led to an inequality of knowledge capable of rendering the credit relationship unfair to Mr and Mrs M such that the Lender needed to take any action in redress.

I shared different findings regarding the Fractional Club sale dated 15 August 2017. Applying the principles and factors set out in the Supreme Court judgment[4] handed down on 1 August 2025, I found nothing to suggest 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 M. Nor did I see anything that persuaded me that the commission arrangements

[4] *Johnson v FirstRand Bank Ltd, Wrench v FirstRand Bank Ltd and Hopcraft v Close Brothers Ltd* [2025] UKSC 33 ("*Hopcraft, Johnson and Wrench*")

between them gave the Supplier a choice over the interest rate which led Mr and Mrs M into a credit agreement that cost disproportionately more than it otherwise could have.

Further, the flat rate and amount of commission paid was such that it gave me no reason to think that any failure to disclose it to Mr and Mrs M had a material impact on their decision to enter into the Credit Agreement. At £733.94, it was only 5.0% of the amount borrowed and even less than that (4.63%) as a proportion of the charge for credit. That didn't strike me as disproportionate; nor were the surrounding circumstances otherwise capable of rendering unfair the credit relationship between the Lender and Mr and Mrs M such that the Lender needed to take any action in redress.

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

Responses to my provisional findings

The Lender accepted my PD. The PR didn't accept the proposed outcome. It made further submissions in support of Mr and Mrs M's position. Having received and reviewed these, I'm now proceeding with my final decision.

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

The PR's requests have been addressed by us under separate correspondence. For reasons I will explain in the course of this decision, I've concluded that it's appropriate for me to proceed with my determination.

The legal and regulatory context

The legal and regulatory context that I think is relevant to this complaint has been shared in several hundred published decisions on very similar complaints, as well as in previous correspondence with the parties. So there's no need for me to set this out again in detail here. I simply remind the parties that our rules[5] say that in considering what is fair and reasonable in all the circumstances of the complaint, I will take into account: relevant (i) law and regulations; (ii) regulators' rules, guidance and standards; and (iii) codes of practice; and (where appropriate), what I consider to have been good industry practice at the relevant time.

What I've decided – and why

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

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

[5] Financial Conduct Authority ("FCA") Handbook – DISP 3.6.4R ("R" denotes a rule).

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

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

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

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

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

I remind the PR that in my PD, I accepted the possibility that Fractional Club membership was marketed and/or sold to Mr and Mrs M as an investment, in breach of Regulation 14(3). I went on to explain that relevant case law[6] indicates that in considering the question of relief for any resultant unfairness in the credit relationship, I needed to take into account any material impact of such a breach on Mr and Mrs M's decision whether to enter into the Purchase and Credit Agreements. It doesn't strike me that doing so flies in the face of either the handed down judgment or previous decisions the PR has mentioned.

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

I remind the PR that it confirmed to our service in October 2023 that it did not have any testimony available to share with us. It then shared a "supplementary witness statement" in March 2024, after the investigator had rejected the complaint. It has now provided a second document in response to the PD, which is not titled, signed, or dated. The PR has not provided me with a reasonable explanation as to why this document has only come to light now, at this very late stage in the complaint process and long after it said that it did not hold any testimony. Indeed, it was only provided after the Investigator issued their view, after the judgment in *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*') was handed down, and after my issuing of the PD. And as experience tells me that, the more time that passes between a complaint and the event complained about, the more

[6] *Carney* and *Kerrigan*

risk there is of recollections being vague, inaccurate and/or influenced by discussion with others, I find it difficult to understand why the Financial Ombudsman Service was only given such evidence when it was.

As there isn't any other evidence on file to corroborate this very recent evidence, there seems to me to be a very real risk that the recollections contained within were coloured by the judgment in *Shawbrook & BPF v FOS*. And with that being the case, I'm not persuaded that I can give these written recollections the weight necessary to finding that the credit relationship between Mr and Mrs M and the Lender was unfair for reasons relating to a breach of the relevant prohibition, or indeed for any other reasons.

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

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

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

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

I see no reason to find that this prejudices any arguments the PR or Mr and Mrs M are able to make in support of their position. The PR has demonstrated its ability to present Mr and Mrs M's case and has had sufficient time to consider and make any further arguments.

As I've noted, the PR has disagreed with my provisional conclusions on whether the Lender should pay redress because of an unfair credit relationship arising in connection with commission arrangements between the Lender and the Supplier. The PR says, in summary, that when the overall circumstances of those arrangements are considered in the round, the credit relationship was plainly unfair. In support of this position the PR has expressed, among other things, that:

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

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

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

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

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

> *"…the onus is on the claimant[7] 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[8] 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."*[9]

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, where a payment was made, is inaccurate. So there's no reason for me to reach a different finding over those commission arrangements.

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

Section 140A: Conclusion

Given all of the factors I've looked at in this part of my decision, and having taken all of them into account, I remain unpersuaded that the credit relationship between Mr and Mrs M and the Lender under the Credit Agreement and related Purchase Agreement was unfair to them such that it warrants the Lender offering any redress.

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[7] In this case the creditor answering a claim of an unfair credit relationship arising out of an overdraft facility.
[8] In this case the borrower making an allegation that there was an unfair credit relationship.
[9] 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.

Commission: The Alternative Grounds of Complaint

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

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

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

Conclusion

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

My final decision

For the reasons set out above, my final decision is that I don't uphold this complaint.

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

Andrew Anderson
Ombudsman