DRN-6142008

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.

What happened

In April 2009, prior to the events now being complained about, Mr and Mrs S purchased from a timeshare provider (the 'Supplier'), a type of 'Trial' timeshare membership which lasted a few months.

They followed up shortly after this by upgrading and purchasing a points-based 'Vacation Club' timeshare membership from the same Supplier, in August 2009. This Vacation Club was the Supplier's main non-fractional timeshare[1]: a points-based timeshare that allowed members to acquire points that they could use in various different ways to reserve holidays. Mr and Mrs S have since said they encountered several problems and areas of dissatisfaction with these Trial and Vacation Club memberships such as finding it difficult to book the holidays they wanted, when they wanted.

However, the Trial and Vacation memberships aren't the subject of this complaint, although as I'll explain more about below, their circumstances are somewhat relevant to what happened later. The events complained of now, relate specifically to Mr and Mrs S's purchase of membership in a Fractional timeshare (the 'Fractional Club'), from the same timeshare Supplier.

This Fractional membership sale occurred on 22 July 2013 (the 'Time of Sale'). Here, Mr and Mrs S entered into an agreement with the Supplier to buy 1,750 fractional points at a cost of £7,950 (the 'Purchase Agreement'). But after trading-in their existing Vacation Club timeshare membership, they ended up paying a total of £24,461 for membership of the Fractional Club, comprising a £16,511 trade-in value. They paid the remainder for their Fractional Club membership by taking finance of £7,950 from the Lender, Shawbrook Bank Limited, in their names (the 'Credit Agreement').

The 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 – using a professional representative (the 'PR') to bring their complaint – wrote to the Lender on 3 July 2017 (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.

[1] A non-fractional timeshare as described here is where the consumer(s) did not acquire a beneficial interest in any property when they became timeshare members, as opposed to fractional members, where they typically did.

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.

(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 they were buying an interest in a specific piece of "real property" when that was not true.
2. told them that Fractional Club membership had a guaranteed end date 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 also say that the Supplier breached the Purchase Agreement because there is no guarantee that they will receive their share of the net sale proceeds of the Allocated Property.

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. Fractional Club membership was marketed and sold to them as an investment.
2. The contractual terms setting out (i) the duration of their Fractional Club membership and / or (ii) the obligation to pay annual management charges for the duration of their membership were unfair contract terms under the Unfair Terms in Consumer Contracts Regulations 1999 (the 'UTCCR').
3. They were pressured into purchasing Fractional Club membership by the Supplier.
4. The Supplier's sales presentation at the Time of Sale included misleading actions and / or misleading omissions under the Consumer Protection from Unfair Trading Regulations 2008 (the 'CPUT Regulations') as well as a prohibited practice under Schedule 1 of those Regulations.
5. The Supplier provided misleading information in relation to the Fractional Club's ongoing costs.

The Lender dealt with Mr and Mrs S's concerns as a complaint about the 2013 sale of the Fractional Club membership.

The Lender issued its final response letter on 31 August 2017. Here, the Lender said that there were obvious inconsistencies between what the PR had said in the letter of complaint, and Mr and Mrs S's own recollections as set out in their witness statement. This therefore portrayed a lack of consistency and credibility, and it said their complaint points had become confused between the Vacation Club and Fractional Club membership rules. This included, for example, issues such as Mr and Mrs S evidently being under a misunderstanding that exiting the Vacation Club was unduly onerous (and could probably only be achieved by buying Fractional Club membership). The Lender also said there were further misunderstandings on Mr and Mrs S's part about there being asset backed property rights in both the Vacation and Fractional membership products, when this plainly wasn't the case.

But overall, the Lender summarised its rejection of the complaint by saying that it was clear from their testimony that Mr and Mrs S's motivation for buying Fractional Club membership was not related to it being marketed to them as an asset backed 'investment', as is being alleged. But rather, their purchase was clearly and wholly based on their expectations of improving their future holiday experiences, and accessing future annual management charges which they thought could be lower in the Fractional type of membership. It rejected their complaint on all grounds. Mr and Mrs S later referred their complaint to the Financial Ombudsman Service.

I issued a provisional decision (PD) in August 2025 in which I said I was not intending to uphold Mr and Mrs S's complaint. I'm sorry there's been a further delay relating to legal matters about undisclosed commission. However, I issued a second communication (a 'side letter') to the parties on 22 December 2025 about commission. In this I said I wasn't 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 relationship unfair to Mr and Mrs S.

I've had a response from Mr and Mrs S's PR which basically disagrees with my PD. I have read everything said on their behalf carefully. As I said before, 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. I have already set out in the PD the legal and regulatory context in which I'm making my decision about this case. For further information, I have also considered the following:

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

Below are the most relevant provisions and/or guidance as they were at the relevant time:

- CONC 3.7.3 [R]
- CONC 4.5.3 [R]
- CONC 4.5.2 [G]

The FCA's Principles

The rules on consumer credit sit alongside the wider obligations of firms, such as the Principles for Businesses ('PRIN'). Set out below are those that are most relevant to this complaint:

- Principle 6
- Principle 7
- Principle 8

What I've decided – and why

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

Having done this, I am not upholding this complaint. This is my final decision.

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

As both sides may already know, 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 this protection is engaged – which are set out in the CCA. The Lender does not dispute that the relevant conditions are met in this complaint, and I'm satisfied that they are.

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 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 any other 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.

I've also considered what Mr and Mrs S have said, and what I know about the Supplier's sales process, to see if there is any evidence that supports their allegation that the Supplier implied they could sell their Vacation Club points back to it, or within a secondary market. But from what I know about how the Supplier was likely to have sold the Fractional membership, I haven't seen anything that suggests that Mr and Mrs S would have been told that. Also, I note that Mr and Mrs S have provided testimony of their recollections, and whilst they've said they were given this *"impression"* about selling their points, they haven't described what exactly was said or how they gained such an impression.

I do also think that Mr and Mrs S harboured some significant misunderstandings about the different types of membership they had. For example, I think their wider testimony reflects their misunderstanding of the main differences between the Vacation and Fractional membership set-ups: they referred to the Vacation Club membership as containing an investment element in the form of asset backed property, but this is incorrect.

What's more, as there's nothing else on file that persuades me 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.

Mr and Mrs S say that they could not holiday where and when they wanted to, but in my view, this is a somewhat generic comment which relates to their pre-existing Vacation Club membership (which is not the subject of this complaint). Having looked at the complaint points carefully in relation to the *Fractional membership* from 2013 onwards, I haven't seen persuasive evidence which suggests that the Supplier has not lived up to its end of the bargain or has breached the Purchase Agreement.

Mr and Mrs S's testimony about continuing booking problems *after* 2013 is in my opinion somewhat vague and is not, I'm afraid, borne out in any of the other evidence. From what I can see, this issue is raised once, in their witness statement. And it only refers to them last using their timeshare in 2013 and having been unable to book what they wanted (I presume after buying that membership).

On the other hand, I think the sales paperwork signed by Mr and Mrs S stated that the availability of holidays was subject to demand and availability constraints and like any holiday accommodation, availability is not unlimited given the higher demand at peak times. The Suppliers' electronic records I've seen covering the relevant time show a 'cancellation by customer' only once, in August 2013, and then no further holidaying activity thereafter.

Mr and Mrs S themselves provide no specific post-2013 examples, details or further evidence to support any allegation of there being widespread booking problems with *Fractional* membership after the sale. Also, according to Mr and Mrs S themselves, the absence of holidaying has unfortunately been due to personal medical issues which were probably not foreseen at the Time of Sale. So overall, I don't think that it's likely the Supplier has breached the Purchase Agreement in this regard.

Mr and Mrs S also say that the Supplier breached the Purchase Agreement because there is no guarantee that they will receive their share of the net sale proceeds of the Allocated Property. I understand that they are saying that they fear that, when the time comes for the Allocated Property to be sold, they will not receive their share of the sales proceeds. However, it would seem that any breach of contract (if that occurs) lies in the future and is currently uncertain.

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. 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. However, 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.

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

1. The 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. The commission arrangements between the Lender and the Supplier at the Time of Sale and the disclosure of those arrangements;
4. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;
5. The inherent probabilities of the sale given its circumstances; and when relevant, any existing unfairness from a related credit agreement.

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 & marketing practices at the Time of Sale

Mr and Mrs S's complaint about the Lender being party to an unfair credit relationship was made for several reasons, all of which I set out at the start of this decision. They include the allegation that the Supplier misled Mr and Mrs S and carried on unfair commercial practices which were prohibited under the CPUT Regulations. But given the limited evidence in this complaint, I am not persuaded that anything done or not done by the Supplier was prohibited under the CPUT Regulations.

Elsewhere, I think it's fair to say that Mr and Mrs S *imply* that they were pressured by the Supplier into purchasing Fractional Club membership at the Time of Sale. Whilst I completely acknowledge that it's possible someone could feel weary after a sales process that went on for a long time, this allegation is only briefly mentioned: in effect Mr and Mrs S themselves say very little about what was said and / or done by the Supplier during their sales presentation. But overall, there's simply no coherent allegation here, and certainly no secondary evidence, that this matter caused Mr and Mrs S to take any action they otherwise wouldn't have taken.

Mr and Mrs S also briefly mention previously buying the Trial membership under similar 'pressured' circumstances. But again, this didn't contain much detail either and I find it difficult to understand why, if they felt that previous timeshare sales experiences were unduly pressured, they once again committed in 2013 to attending a similar event and to buying Fractional membership after enduring previous and similar sales' techniques. Here, Mr and Mrs S were, in effect agreeing to purchase their third timeshare product from the same Supplier and from what I've seen they had experienced similar sales events in the past, with presentations and refreshments throughout the day. So, with great respect, I do think they would have been fully aware of what to expect and the types of processes likely to be involved. In any event, 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 Fractional membership during that time, if they felt gruelling and pressurised selling was a feature.

As I'll explain below, I don't think the reason they went ahead with the Fractional Club purchase was because they were pressured into it – I think their reasoning related to a cohort of other issues they felt brought them improved holiday experiences.

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 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 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 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 the PR says that the Supplier did exactly this 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 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 decide, 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.

I am familiar with the processes normally followed in these types of sale at around the relevant time 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 some 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 also disclaimers in the contemporaneous paperwork that state that Fractional Club membership was not sold to Mr and Mrs S as an investment. So, it's *possible* that Fractional Club membership wasn't marketed or sold to them as an investment in breach of Regulation 14(3).

On the other hand, I acknowledge that the Supplier's training material could have 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 S 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. With that being the case, it is not necessary to make a formal finding on this particular issue for the purposes of this decision.

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

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. And in light of what the courts had to say in *Carney* and *Kerrigan,* 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 whether that alleged Supplier's breach of Regulation 14(3) led them to enter into the Purchase Agreement and the Credit Agreement, is an important consideration.

They began their complaint by describing the experience of their earlier Vacation Club membership very much in a negative dimension. They said the holiday availability was very restricted, and they were frequently unable to book the dates they wanted; they also describe specific holiday experiences where the accommodation they did manage to secure, simply didn't meet their expectations in terms of its overall standards.

It was against this apparent disappointing backdrop with their existing Vacation Club membership that Mr and Mrs S attended another sales event hosted by the Supplier and upgraded to a Fractional Club membership. And in my view, there's persuasive testimony from Mr and Mrs S themselves which speaks to their motivations for upgrading to the Fractional Club membership. With everything I've seen, I'm persuaded their purchasing motivations weren't around having the 'investment' features marketed to them as they now allege. This was Mr and Mrs S's third timeshare product, and they were increasing the number of holiday entitlements they had. I think this, in all the circumstances, most likely explains their desire to upgrade to another product from the Supplier. Their purchasing motivations seem to me to be around improving holiday availability and enjoyment and tailoring this to fit their circumstances better. I say this because Mr and Mrs S and their PR said:

- the sales representatives convinced them to purchase a Fractional Club membership *"in order to prevent any further upset"* [by which they meant being unable to holiday where they wanted and when they wanted].

- *"we felt that if we owned fractional property …. we should be guaranteed availability and, furthermore, we could sell at any time in the future".*

- *We decided to purchase…. fractional ownership in order that we could partially reduce our maintenance fees…."*

With all these issues in mind, what the circumstances show is that Mr and Mrs S's motivations for the purchase lay in other distinct areas which comprised mainly of better holidaying experiences and adjusting the costs to suit their needs. Put another way, I'm not persuaded that Mr and Mrs S's decision to purchase Fractional Club membership was motivated by the prospect of a financial gain.

So, 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 think the evidence suggests they would have still pressed ahead with their purchase. And for that reason, I do not think the credit relationship between Mr and Mrs S and the Lender was unfair to them even if the Supplier had breached Regulation 14(3).

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

The PR says that Mr and Mrs S were not given sufficient information at the Time of Sale by the Supplier about the ongoing costs of their membership. The PR also says that the contractual terms governing the ongoing costs of membership and the consequences of not meeting those costs were unfair contract terms.

As I've already indicated, the case law on Section 140A makes it clear that it does not automatically follow that regulatory breaches create unfairness for the purposes of the unfair relationship provisions. The extent to which such mistakes render a credit relationship unfair must also be determined according to their impact on the complainant.

I acknowledge that it is also possible that the Supplier did not give Mr and Mrs S sufficient information, in good time, on the various charges they could have been subject to as Fractional Club members in order to satisfy the requirements of Regulation 12 of the Timeshare Regulations (which was concerned with the provision of 'key information'). But even if that was the case, I cannot see that the ongoing costs of membership were applied unfairly in practice here. And as neither Mr and Mrs S nor the PR have persuaded me that they would not have pressed ahead with their purchase had the finer details of the Fractional Club's ongoing costs been disclosed by the Supplier in compliance with Regulation 12, I cannot see why any failings in that regard are likely to be material to the outcome of this complaint given its facts and circumstances.

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 S in practice, nor that any such terms led them to behave in a certain way to their detriment. So, 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.

Commission

As both sides already know, the Supreme Court handed down an important judgment on 1 August 2025 in a series of cases concerned with the issue of commission: *Johnson v FirstRand Bank Ltd, Wrench v FirstRand Bank Ltd and Hopcraft v Close Brothers Ltd [2025] UKSC 33* ('*Hopcraft, Johnson and Wrench*').

The Supreme Court ruled that, in each of the three cases, the commission payments made to car dealers by lenders were legal, as claims for the tort of bribery, or the dishonest assistance of a breach of fiduciary duty, had to be predicated on the car dealer owing a fiduciary duty to the consumer, which the car dealers did not owe. A "disinterested duty", as described in *Wood v Commercial First Business Ltd & ors and Business Mortgage Finance 4 plc v Pengelly* [2021] EWCA Civ 471, is not enough.

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

1. The size of the commission (as a percentage of the total charge for credit). In Mr Johnson's case it was 55%. This was *"so high"* and *"a powerful indication that the relationship…was unfair"* (see paragraph 327);
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 the credit relationship with the Lender was unfair 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 recognise that it's possible 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 noted in my provisional decision, case law on section 140A makes clear that regulatory breaches do not automatically lead to an unfair credit relationship, and that such breaches and any consequences must be considered in the round rather than in a narrow or technical way.

With that being the case, even if the Lender and the Supplier failed to follow the relevant

regulatory guidance at the Time of Sale, I'm not minded to think any such failure is itself a reason to find the credit relationship in question unfair to Mr and Mrs S. I say this for the following reasons.

In stark contrast to the facts in Mr Johnson's case, the amount of commission paid by the Lender to the Supplier for arranging Mr and Mrs S's Credit Agreement wasn't high. At £795.00 it was only 9.91% of the amount borrowed and even less than that - 5.41 % as a proportion of the charge for credit - which is the calculation the Supreme Court used.

Had Mr and Mrs S known at the Time of Sale that the Supplier was going to be paid a flat rate of commission at this level, I'm not persuaded that they either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. After all, Mr and Mrs S wanted membership and had no obvious means of their own to pay for it. And at such a low level, the impact of commission on the cost of the credit they needed for a timeshare they wanted doesn't strike me as disproportionate. So, I think they would still have taken out the loan to fund their purchase at the Time of Sale had the amount of commission been disclosed.

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

I don't consider it necessary for me to take into account any commission the Supplier might have paid to its sales representatives, or that this should be disclosed or factored into any calculation used to determine unfairness. Even if any such arrangement was in place (and I make no finding in this respect), its disclosure and/or payment would be further removed from any obligations the Supplier might have held, and be even less likely to have an impact on Mr and Mrs S's decision to enter into the Credit Agreement.

Overall, therefore, I'm not 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 relationship unfair to Mr and Mrs S.

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 S (that is, secretly). The second relates to the Lender's compliance with the regulatory guidance in place at the Time of Sale insofar as it was relevant to disclosing the commission arrangements between them.

For the reasons I set out previously, I'm not persuaded that the Supplier – when acting as credit broker – owed Mr and Mrs S a fiduciary duty. So, the remedies that might be available at law in relation to the payment of secret commission aren't, in my view, available to them. And while it's possible that the Lender failed to follow the regulatory guidance in place at the

Time of Sale insofar as it was relevant to disclosing the commission arrangements between it and the Supplier, I don't think any such failure on the Lender's part is itself a reason to uphold this complaint. For the reasons I have also previously set out, I think they would still have taken out the loan to fund their purchase at the Time of Sale had there been more adequate disclosure of the commission arrangements that applied at that time.

The response to the provisional decision (PD)

The PR rejected my PD on behalf of Mr and Mrs S and argues there are inconsistencies compared to other similar ombudsman decisions which have similar facts. The PR also argues my reasoning was flawed and inconsistent with the High Court's judgment in *Shawbrook & BPF v FOS* [2023] EWHC 1069 (Admin), and contrary to multiple recent FOS final decisions involving similar fractional timeshare products. And a further core criticism is that the PD does not appear to have properly considered the Supplier's sales training materials, which shows a *"repeated emphasis the prospect of financial gain".* The PR also objects strongly to my 'side letter' reliance on commission material I have received from the Lender, which it says has not been shared.

I have considered everything the PR has said with care.

Firstly, I do not believe that the judgment referred to makes a blanket finding that all products of the type Mr and Mrs S purchased were mis-sold in the way the PR appears to think. Nor do I believe my outcome runs contrary to the judgment handed down in *Shawbrook and BPF v FOS,* and for the avoidance of any doubt, other decisions issued by other ombudsmen do not have a precedent effect like some court judgments might; each ombudsman must determine each case on its own specific facts. This is what I've done in this case.

I also remind the PR that in my PD I accepted the *possibility* that Fractional Club membership was marketed and/or sold to Mr and Mrs S as an investment, in breach of Regulation 14(3). I went on to explain that relevant case law[2] indicates that in considering the question of relief for any resultant unfairness in the credit relationship, I needed to take into account any material impact of such a breach on Mr and Mrs S's decision whether to enter into the Purchase and Credit Agreements. It doesn't strike me that doing so flies in the face of either the handed down judgment or previous decisions the PR has mentioned.

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

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

The PR has asked for the documents the Lender has provided to us 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.

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[2] *Carney* and *Kerrigan*

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 communications. 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 S are able to make in support of Mr and Mrs S's position. The PR has demonstrated its ability to present their case and has had sufficient time to consider and make any further arguments.

As I've noted, the PR has disagreed with my PD (and 'side letter') 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 provisional decision doesn't properly apply the Supreme Court's judgment in *Hopcraft, Johnson and Wrench,* which concluded a range of factors informed whether a credit relationship between a consumer and a lender was unfair
- A conflict of interest existed on the part of the Supplier, who provided neither independent nor competent explanation of the credit
- Failure to disclose payment of commission – irrespective of the size of any payment - was a regulatory breach that goes to the heart of fairness

I appreciate the time the PR has taken to put together its submissions. 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 S's arguments that their credit relationship with the Lender was unfair to them for reasons relating to commission given the facts and circumstances of this complaint.

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

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

> *"…the onus is on the claimant[3] 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*

[3] In this case the creditor answering a claim of an unfair credit relationship arising out of an overdraft facility.

> *creditor and debtor. This onus on the claimant does not however mean, in my judgement…that where Mr Samra[4] 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."*[5]

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

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

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 S's section 75 claim(s).

I'm also not persuaded that the Lender was party to a credit relationship with Mr and Mrs S that was unfair to them for the purposes of section 140A of the CCA.

Having taken everything into account, I see no other reason why it would be fair or reasonable for me to direct the Lender to compensate them.

My final decision

I do not uphold this complaint against Shawbrook Bank Limited.

I do not direct Shawbrook Bank Limited to do anything more.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S and Mrs S to accept or reject my decision before 10 March 2026.

Michael Campbell
Ombudsman

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[4] In this case the borrower making an allegation that there was an unfair credit relationship.
[5] 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.