DRN-6149327

Financial Ombudsman Service

## The complaint

Mrs B's complaint is, in essence, that Clydesdale Financial Services Limited trading as Barclays Partner Finance ('BPF') acted unfairly and unreasonably by (1) being party to an unfair credit relationship with her under Section 140A of the Consumer Credit Act 1974 (as amended) (the 'CCA') and (2) deciding against paying a claim under Section 75 of the CCA.

## Background to the complaint

Mrs B and her husband Mr B were members of a timeshare provider (the 'Supplier'), having purchased a number of products from it previously. But the product at the centre of this complaint is their membership of a timeshare that I'll call the 'Fractional Club' – which they bought on 12 February 2017 (the 'Time of Sale'). They entered into an agreement with the Supplier to buy 1,800 fractional points at a cost of £26,712 (the 'Purchase Agreement').

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

Mr and Mrs B traded in their existing membership with the Supplier towards the purchase of the Fractional Club membership. To fund the remainder, Mrs B took out a loan of £8,205 from BPF (the 'Credit Agreement').

As only Mrs B was named on the Credit Agreement, only she is able to refer a complaint about it to our Service. For ease I will refer to Mrs B only from here on, even where she and Mr B may have been acting jointly or the matter is otherwise applicable to either or both of them.

Mrs B – using a professional representative ('PR1') – wrote to BPF on 21 March 2023 (the 'Letter of Complaint') to raise a number of different concerns. 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.

As BPF didn't respond to the complaint, Mrs B referred it to the Financial Ombudsman Service with the assistance of a different professional representative ('PR2'). It was assessed by an Investigator who, having considered the information on file, rejected the complaint on its merits.

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

I considered the matter and issued a provisional decision (the 'PD'). In that decision, 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 think this complaint should be upheld.
>
> However, before I explain why, I want to make it clear that my role as an Ombudsman

is not to address every single point that has been made to date. Instead, it is to decide what is fair and reasonable in the circumstances of this complaint. So, if I have not commented on, or referred to, something that either party has said, that does not mean I have not considered it.

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

As both sides may already know, a claim against BPF under Section 75 essentially mirrors the claim Mrs B could make against the Supplier. Certain conditions must be met if this protection is engaged – which are set out in the CCA. BPF does not dispute that the relevant conditions are met in this complaint, and I'm satisfied that they are.

There are, though, certain time limits that apply – and I think these mean Mrs B's claim would've been time-barred.

The Limitation Act 1980 sets out limitation periods, or time limits, for bringing various types of legal claim. For a claim based on contract, it's not generally possible to start court action more than six years after the cause of action arose. If a claim is brought too late, the respondent is likely to have a complete defence to the claim on that basis.

For claims relating to misrepresentation, the time limit would typically be six years from the date the claimant suffers damage as a result of the misrepresentation. For example, entering into a contract – and incurring liabilities – when they would otherwise not have done.

Mrs B's claim under Section 75 is that but for the Supplier's various alleged misrepresentations, she wouldn't have entered into the Purchase Agreement (and, therefore, the Credit Agreement). So it is the date on which she entered into those agreements that her cause of action arose, meaning she had six years from that date within which to bring this claim.

Mrs B entered into the Purchase Agreement and Credit Agreement on 12 February 2017. She raised her claim under Section 75 within the Letter of Complaint dated 21 March 2023 – more than six years later.

That being the case, I don't think BPF acted unfairly or unreasonably in declining the claim. However, I have later considered whether these alleged misrepresentations could have been something that caused an unfair credit relationship.

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

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

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

1. The standard of the Supplier's commercial conduct – which includes its sales and

marketing practices at the Time of Sale along with any relevant training material;
2. The provision of information by the Supplier at the Time of Sale, including the contractual documentation and disclaimers made by the Supplier;
3. Evidence provided by both parties on what was likely to have been said and/or done at the Time of Sale;
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 relationship between Mrs B and BPF.

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

Mrs B's complaint about BPF being party to an unfair credit relationship was made for several reasons.

I have firstly considered whether the misrepresentations she alleges were made by the Supplier in the context of Mr B's Section 75 claim could have caused any unfairness for the purposes of Section 140A.

In the Letter of Complaint, PR1 said that the Fractional Club membership was misrepresented by the Supplier as an investment, through which Mrs B would have a share of a property and obtain a "*considerable return*". As I'll come on to in more detail below, I consider that the acquisition of a share in the Allocated Property did amount to an investment – as it offered the prospect of a financial return. Presenting the timeshare as an investment would not, therefore, have amounted to a misrepresentation – albeit there are other considerations when it comes to the marketing and selling of a timeshare contract as an investment that I explore below.

The amount of money Mrs B receives on her investment will only be known after the membership term ends, when the Allocated Property is sold. So even if I were to accept that any such comments were made by the Supplier in this regard (and I make no firm finding on that), I cannot say they would amount to a misrepresentation as there is no evidence that this was not simply the salesperson's honestly held opinion.

It is also said in the Letter of Complaint that Mrs B was told that she could sell the timeshare back to the resort. No such option was available. This was clearly set out in an Information Statement that Mrs B was given, which she signed, at the Time of Sale. I do not find it likely that the Supplier would've suggested something so starkly contradictory to not only its standard practice, but to the terms and conditions that were provided to Mrs B.

The Letter of Complaint also stated that Mrs B was "*made to believe that [she] would have access to the holiday's apartment at any time all around the year*". I understand this to mean that Mrs B thought she would be able to stay at the Allocated Property whenever she wanted, which was not the case. The Purchase Agreement that Mrs B signed explained that she was depositing her Fractional Rights – the rights of exclusive use of the Allocated Property – in exchange for her Fractional Points, to exchange for the booking of other holiday resorts. I find it unlikely that the Supplier would've made promises of the type suggested in the Letter of Complaint.

So, while I recognise that Mrs B and her representatives have concerns about the way in which Fractional Club membership was sold by the Supplier, I do not think this caused any unfairness in Mrs B's credit relationship with BPF such that it warrants a remedy.

Turning to the points specifically raised in relation to the potential unfairness of the relationship between Mrs B and BPF, PR1 said in the Letter of Complaint that the right checks weren't carried out before BPF lent to Mrs B. I haven't seen anything to persuade me that was the case in this complaint given its circumstances. But even if I were to find that BPF 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 Mrs B was actually unaffordable before also concluding that she lost out as a result and then consider whether the credit relationship with BPF was unfair to her for this reason. But from the information provided, I am not satisfied that the lending was unaffordable for Mrs B.

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

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

<u>The Supplier's alleged breach of Regulation 14(3) of the Timeshare Regulations</u>

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

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

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

But Mrs B's representatives say that the Supplier did exactly that at the Time of Sale – saying, in summary, that Mrs B was told by the Supplier that Fractional Club membership was the type of investment that would only increase in value.

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

A share in the Allocated Property clearly constituted an investment as it offered Mr B the prospect of a financial return – whether or not, like all investments, that was more than what they first put into it. But it is important to note at this stage that the fact that Fractional Club membership included an investment element did not, itself, transgress the prohibition in Regulation 14(3). That provision prohibits the *marketing and selling* of a timeshare contract as an investment. It doesn't prohibit the mere existence of an investment element in a timeshare contract or prohibit the marketing and selling of such a timeshare contract *per se*.

In other words, the Timeshare Regulations did not ban products such as the Fractional Club. They just regulated how such products were marketed and sold.

To conclude, therefore, that Fractional Club membership was marketed or sold to Mrs B 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 her as an investment, i.e. told her or led her to believe that Fractional Club membership offered her 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 Time of Sale as an investment in breach of regulation 14(3) of the Timeshare Regulations.

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

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 Mrs B 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 BPF and Mrs B rendered unfair?

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

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

To help me decide this point, I've carefully considered what Mrs B has said in the course of her complaint about how the membership was sold to her and her motivation for taking it out.

As noted above it was said within the Letter of Complaint that Mrs B was told that he had purchased an investment and could expect a profit. There was no further detail underpinning these statements within the Letter of Complaint, which are rather generic in nature. In fact, such assertions are made in an identical fashion by PR1 in a number of other complaints.

When referring the complaint to us, PR2 included a statement in Mrs B's own words. The statement, particularly insofar as it relates to the membership at issue in this complaint, is brief. Recalling the Time of Sale, Mrs B says:

> "*In (sic) February 12th 2017 [for] an additional £8205 plus interest [we] purchased more points to increase the value of our fractional property. This was at Sunningdale village when we went to Tenerife for a holiday. They invited us our for a lunch and we were in office until 8pm that night, where they tried to sell us more until they told us that we wouldn't have to pay the maintenance that year and show us a website that they have that would help us to save money and the possibility of it helping us to cover our bills. That sounded fantastic.*"

Mrs B's recollections lack any real detail about how the Supplier presented the membership as an investment and how that appealed to her. This is perhaps unsurprising, given the statement was only made in February 2025 – some eight years after the Time of Sale. And, notably, after the complaint was first raised.

I'm aware that the more time that passes between a complaint and the event complained about, the more risk there is of recollections being vague, inaccurate and influenced by discussions with others. I'm also mindful that statement was only made after the judgment in *Shawbrook & BPF v FOS*. So I cannot discount the possibility that Mrs B's comments were influenced by this widely publicised and highly relevant judgment.

In this case, especially in the absence of an earlier account nearer to the time of sale or the time the complaint was first made, I simply can't place significant weight on these recollections. In the circumstances, and on balance, I think there's a high risk that Mrs B was influenced by discussions she had with others or the widespread publicity following the outcome of the judicial review.

Mrs B held an existing membership and increased the number of points in upgrading to the one at issue in this complaint, giving her access to a wider range of options – which, to my mind, represent an obvious and significant attraction. Notes made by the Supplier at the Time of Sale also recorded that Mrs B was purchasing additional points with a view to holidaying at particular resorts.

Weighing all of this up, I am not persuaded that the prospect of a financial gain from Fractional Club membership was not a material factor in Mrs B's decision to go ahead with the purchase. That doesn't mean she wasn't interested in a share in the Allocated Property. But ultimately I am not persuaded that Mrs B's purchase was motivated by a share in the Allocated Property 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 decision she ultimately made.

On balance, therefore, even if the Supplier had marketed or sold the Fractional Club membership as an investment in breach of Regulation 14(3) of the Timeshare Regulations, I am not persuaded that Mrs B's decision to purchase Fractional Club membership at the Time of Sale was motivated by the prospect of a financial gain (i.e., a profit). On the contrary, I think the evidence suggests she would have pressed ahead with the purchase whether or not there had been a breach of Regulation 14(3). And for that reason, I do not think the credit relationship between Mrs B and BPF was unfair to her even if the Supplier breached Regulation 14(3).

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

Mrs B's representatives say that she was not given sufficient information at the Time of Sale by the Supplier about the ongoing costs of Fractional Club membership and 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 Mrs B sufficient information, in good time, on the various charges she could have been subject to as a Fractional Club member 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. And as neither Mrs B nor her representatives have persuaded me that she would not have pressed ahead with her 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 fact and circumstances.

As for the argument that there were one or more unfair contract terms in the Purchase Agreement, I can't see that any such terms were operated unfairly against Mrs B 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.

At the time of my provisional decision, 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 said:

Mrs B's professional representative ('PR') says that a payment of commission from BPF to the Supplier at the Time of Sale should lead me to uphold this complaint because, simply put, information in relation to that payment went undisclosed at the Time of Sale.

As both sides already know, the Supreme Court handed down an important judgment on 1 August 2025 in a series of cases concerned with the issue of commission – the aforementioned *Hopcraft, Johnson and Wrench* judgment.

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
5. Section 56 of the CCA is engaged, includes any disclosure by a supplier when acting as a broker); and
6. 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 Mrs B in arguing that her credit relationship with BPF was unfair to her for reasons relating to commission given the facts and circumstances of this complaint.

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

I acknowledge that it's possible that BPF 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.

The case law on Section 140A makes it clear that regulatory breaches do not automatically create unfairness for the purposes of that provision. And with that being the case, it isn't necessary to make a formal finding on that because, even if BPF and the Supplier failed to follow the relevant regulatory guidance at the Time of Sale, it is for the reasons set out below that I don't currently think any such failure is itself a reason to find the credit relationship in question unfair to Mrs B.

In stark contrast to the facts of Mr Johnson's case, the amount of commission paid by BPF to the Supplier for arranging the Credit Agreement that Mrs B entered into wasn't high. At £205.13 it was only 2.50% of the amount borrowed and even less than that (2.32%) as a proportion of the charge for credit. So, had she known at the Time of Sale that the Supplier was going to be paid a flat rate of commission at that level, I'm not currently persuaded that she either wouldn't have understood that or would have otherwise questioned the size of the payment at that time. After all, Mrs B wanted Fractional Club membership and had no obvious means of her own to pay for it. And at such a low level, the impact of commission on the cost of the credit she needed for a timeshare she wanted doesn't strike me as disproportionate. So, I think she would still have taken out the loan to fund the purchase at the Time of Sale had the amount of commission been disclosed.

What's more, based on what I've seen so far, the Supplier's role as a credit broker wasn't a separate service and distinct from its role as the seller of timeshares. It was simply a means to an end in the Supplier's overall pursuit of a successful timeshare sale. I can't see that the Supplier gave an undertaking – either expressly or impliedly – to put to one side its commercial interests in pursuit of that goal when arranging the Credit Agreement. And as it wasn't acting as an agent of Mrs B but as the supplier of contractual rights he 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 her when arranging the Credit Agreement and thus a fiduciary duty.

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

**Commission: The Alternative Grounds of Complaint**

While I've found that Mrs B's credit relationship with BPF wasn't unfair to her for reasons relating to the commission arrangements between it and the Supplier, two of the grounds on which I came to that conclusion also constitute separate and freestanding complaints to Mrs B's complaint about an unfair credit relationship. So, for completeness, I've considered those grounds on that basis here.

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

However, for the reasons I set out above, I'm not persuaded that the Supplier – when acting as credit broker – owed Mrs B 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 her. And while it's possible that BPF 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 BPF's part is itself a reason to uphold this complaint because, for the reasons I also

set out above, I think Mrs B would still have taken out the loan to fund her purchase at the Time of Sale had there been more adequate disclosure of the commission arrangements that applied at that time.

In conclusion, given the facts and circumstances of this complaint, I did not think there was any basis on which I could direct BPF to take any action in respect of Mrs B's Section 75 claim, and I was not persuaded that BPF was party to a credit relationship with her under the Credit Agreement that was unfair to her for the purposes of Section 140A of the CCA. And having taken everything into account, I could see no other reason why it would be fair or reasonable to direct BPF to compensate her.

BPF responded to the PD and accepted it.

PR2 also responded. It did not accept the PD and provided some further comments it wanted me to take into account.

Having received the relevant responses from both parties, I'm now finalising my decision.

**The legal and regulatory context**

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

The legal and regulatory context that I think is relevant to this complaint is, in many ways. no different to that shared in several hundred published ombudsman decisions on very similar complaints – which can be found on the Financial Ombudsman Service's website. And with that being the case, it is not necessary to set out that context in detail here. But I would add that the following regulatory rules/guidance are also relevant:

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

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

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

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

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

- Principle 6
- Principle 7
- Principle 8

**What I've decided – and why**

I've considered all the available evidence and arguments to decide what's fair and

reasonable in the circumstances of this complaint.

Following the responses from both parties, I've considered the case afresh and having done so, I've reached the same decision as that which I outlined in my provisional findings, for broadly the same reasons.

Again, my role as an Ombudsman isn't to address every single point which has been made to date, but to decide what is fair and reasonable in the circumstances of this complaint. If I haven't commented on, or referred to, something that either party has said, this doesn't mean I haven't considered it.

Rather, I've focused here on addressing what I consider to be the key issues in deciding this complaint and explaining the reasons for reaching my final decision.

PR2's further comments in response to the PD only relate to the issue of whether the credit relationship between Mrs B and BPF was unfair. In particular, PR2 has provided further comments in relation to whether the membership was sold to Mrs B as an investment at the Time of Sale.

As outlined in my PD, PR2 originally raised various other points of complaint, all of which I addressed at that time. But it didn't make any further comments in relation to those in their response to my PD. Indeed, it hasn't said it disagrees with any of my provisional conclusions in relation to those other points. And since I haven't been provided with anything more in relation to those other points by either party, I see no reason to change my conclusions in relation to them as set out in my PD. So, I'll focus here on PR2's points raised in response.

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

PR2 has highlighted under Section 140B (9) of the CCA, the burden of proof falls on BPF to disprove the allegation that its relationship with Mrs B was unfair. I agree that this is correct, placing a burden on lenders during the process of litigation. That does not mean, though, that BPF – or I – should take a claim at face value. There remains an onus on Mrs B to provide some evidence for the claim she is making, despite the overall burden of proof resting with BPF, as was set out in the judgment in *Smith and another v Royal Bank of Scotland plc* [2023] UKSC 34 at paragraph 40. I also remind both parties that it is my role to make findings on what I consider to be fair and reasonable in all the circumstances of any given complaint.

In its response to my PD, PR2 has reasserted its view that the Supplier marketed the Fractional Club membership to Mrs B as an investment and that this was a motivating factor in her decision.

I accepted in my PD that the membership may well have been marketed as an investment to Mrs B in breach of the prohibition in Regulation 14(3) of the Timeshare Regulations. I also explained that while the Supplier's sales processes left open the possibility that the sales representative may have positioned Fractional Club membership as an investment, it wasn't necessary for me to make a finding on this as it is not determinative of the outcome of the complaint. I explained that regulatory breaches do not automatically create unfairness and that such breaches and their consequences (if there are any) must be considered in the round, rather than in a narrow or technical way. PR2's response to my PD hasn't changed my view of this, and so whether the Supplier's breach of Regulation 14(3) led Mrs B to enter into the Purchase Agreement and the Credit Agreement remains an important consideration.

In my PD I explained the reasons why I didn't think any breach of Regulation 14(3) had led Mrs B to proceed with her purchase. In short, I was not persuaded that her decision was

motivated by the prospect of a financial gain (i.e., a profit). In reaching that view, I took into account the testimony given by Mrs B in the course of her complaint. I recognise PR2 has interpreted Mrs B's testimony differently to how I have – and that I have not placed appropriate weight upon what she has said – and I have carefully considered its further comments. Ultimately though, they have not led me to a different conclusion.

PR2 highlights that within her testimony, Mrs B mentioned her desire to "sell our timeshare" at one point – which it says mean she saw it as a saleable commodity and therefore that the investment element was "intrinsic" to her decision to purchase it. I do not agree that wishing to sell a timeshare equates to seeing it as an investment opportunity. One could want to sell a timeshare membership whether or not it included any property rights. And it doesn't mean that Mrs B purchased the membership hoping or expecting to make a profit. More importantly, even were I accept what PR2 says in this regard, the question for me to decide is still whether any such hope or expectation was material to Mrs B's decision – and for the reasons set out in my PD, I still do not think it was.

PR2 objects to the approach I've taken in assessing this aspect of the complaint, believing that I have detracted from the judgment in *Shawbrook & BPF v FOS*[1] and the case law that contributed to it, by requiring Mrs B to have been "primarily or mainly motivated" by the investment element in order to uphold the complaint. But I did not make such a finding. I said that, in my view, Mrs B was highly motivated by the holiday options offered by the Supplier – which was a factor in my overall conclusion in light of all the available evidence that she would, on balance, have pressed ahead with her purchase of the Fractional Club membership even if there had been a breach of Regulation 14(3).

So for the reasons given in my PD and above, I still do not think that any breach of Regulation 14(3), if there was one, was material to Mrs B's decision to purchase the Fractional Club membership.

Given all of the factors I've looked at in this part of my decision, and having taken all of them into account, I'm not persuaded that the credit relationship between Mrs B and BPF under the Credit Agreement and related Purchase Agreement was unfair to her. So, I don't think it is fair or reasonable that I uphold this complaint on that basis.

## Conclusion

In conclusion, given the facts and circumstances of this complaint, I do not think that there is any basis on which I could fairly require BPF to take any action in relation to Mrs B's Section 75 claim, and I am not persuaded that BPF was party to a credit relationship with her under the Credit Agreement that was unfair to her for the purposes of Section 140A of the CCA. And having taken everything into account, I see no other reason why it would be fair or reasonable to direct BPF to compensate her.

## My final decision

For the reasons I've explained, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 12 March 2026.

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

Ben Jennings
**Ombudsman**